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COURT OF APPEALS  
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STATE OF WASHINGTON  
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**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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**RAY PEDERSEN,**  
**Appellant,**

**vs.**

**ALLENMORE RIDGE CONDOMINIUM  
ASSOCIATION,**

**Respondents.**

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

Allenmore Ridge Condominiums is a five building complex in Tacoma. In 2006, the Allenmore Ridge Condominium Association (ARCA) sought owner approval for a ten-month, 4.2 million dollar construction project.

Work was needed to remedy serious conditions mostly resulting from long-term water damage to buildings. The work substantially upgraded the existing structure.

ARCA told owners that the 4.2 million dollar contract was a fixed price contract for all necessary work. ARCA proceeded to set up an owner vote to approve a special assessment for the project.

ARCA told owners the vote must pass with 75% owner approval. Such a vote would grant ARCA the necessary authority to assess owners for their share of the 4.2 million dollars because the Declaration requires 75% owner approval of certain projects with costs in excess of \$25,000.

The vote did not pass with 75% owner approval by the vote deadline. Nevertheless ARCA approved the project and work commenced.

Mr. Pedersen pointed out to ARCA that it should not approve the project because the proposed contract did not appear to be all-inclusive, but was, in fact, a time and materials contract. He also pointed out that the

declarations required a 75% owner approval of the project and that the association had not obtained proper owner approval for a special assessment. He expressed other concerns, including a claim that the expenses were not properly allocated among owners because the costs of limited common area repairs must be allocated to the benefitted units only.<sup>1</sup>

Mr. Pedersen did acknowledge that his unit benefitted from the project and he paid \$60,522 of the \$84,840 initial assessment against his unit under protest. He paid this sum as the portion he calculated could be properly assessed to his unit should a vote have properly occurred.

The project ran over a million dollars over budget and took 3 years to complete instead of ten months. Multiple lawsuits resulted. After ARCA was sued by the contractor to collect cost overruns, ARCA sued Mr. Pedersen by third-party complaint to collect the unpaid portion of the assessment. Mr. Pedersen responded with multiple defenses, counterclaims and requests for declaratory relief.

The trial court dismissed Mr. Pedersen's claims and defenses with prejudice on summary judgment. The court ruled Mr. Pedersen lacked standing because he had not paid the assessment. The court also ruled that

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<sup>1</sup> Amended and Restated Declaration and Covenants, Conditions, Restrictions and Reservations for Allenmore Ridge Condominium (hereafter Declarations), CP 95-150, specifically Section 11.4.3 at CP 315.

no owner approval was required for the assessment and that ARCA had not breached any duties.

There is no Washington decision requiring an owner to pay an assessment prior to asserting claims and defenses against the association. Two cases, however, address assessment collection actions. One case was a declaratory action commenced by the owner which included multiple claims for declaratory relief and damages. The association counterclaimed for unpaid assessments. *Rodruck v. Sand Point Maintenance Commission*, 48 Wash. 2d 565, 295 P.2d 714 (1956). In that case, the court evaluated all owner claims on the merits and ruled against the owners and granted judgment to the association for unpaid assessments.

In a second case (*Panther Lake Homeowner's Association v. Juergensen*, 76 Wn.App. 586, 887 P.2d 465 (1995)), the court dealt with an action to collect a lawful assessment for a road improvement project. The owner replied that the road work was poorly done by the contractor and that the owner should not be responsible for the assessment related to that work. The court ruled that the owner was responsible for the assessment regardless of whether the work was done properly or not.

Courts in other states have two approaches to address owner counterclaims, defenses and requests for declaratory relief. Most states simply resolve all owner defenses and counterclaims in assessment

collection cases in one action, especially when the owner challenges the validity of the assessment itself. This rule is applied more frequently and Mr Pedersen believes this rule should be adopted by Washington.

Massachusetts has struggled with a second rule requiring prepayment as a precursor to asserting counterclaims or defenses. Massachusetts recognizes this harsh rule is contrary to reasonable owner expectations and creates a compelling inequity to owners. Thus the rule was only applied prospectively to cases after the initial ruling requiring prepayment. Further, Massachusetts created an exception for situations where the owner shows the board should have known its actions were not authorized.

If Washington adopts the harsh Massachusetts rule, Mr. Pedersen argues it should only be applied prospectively as it was in Massachusetts. Further there is no reason to prevent an owner from pursuing declaratory or other relief once the assessment is paid in full. He also fits the exception to the prepayment rule because he has shown the board should have known it needed to properly conduct the owner vote to approve the assessment. So, under this rule, dismissal of Mr. Pedersen's claims with prejudice was inappropriate.

Thus in all cases, even the harsh Massachusetts rule with its compelling inequity, the court was not justified in dismissing Mr.

Pedersen's claims with prejudice on the basis that the assessment was not paid in full.

The court also ruled that the Declarations did not require ARCA to obtain owner approval of the project and its cost overruns. This ruling is incorrect. The need for owner approval springs in part from the requirements of the Section 10.2.1(i) of the Declarations which requires 75 percent owner approval of capital improvements costing more than \$25,000. The court had previously ruled (and evidence was before the court on this motion) that there was a material issue of fact as to whether the assessment involved capital improvements in excess of \$25,000. Thus the only way to support summary judgment on this issue was if Washington law or the association Declarations contained some provision superseding the Declarations provisions 10.2.1(i) and (l) requiring 75% owner approval.

ARCA asserted that RCW 64.34.328 and sections 10.2.1(g) and 14.1 of the association Declarations authorized the board to go ahead with the project regardless of owner approval.

Reliance on RCW 64.34.328 is misplaced. RCW 64.34.328 indicates by its own terms that the association's authority to maintain common areas is subject to the association declarations. Thus its authorization to the association to manage common areas does not

overcome provisions of the Section 10.2.1(i) of the ARCA Declarations requiring owner approval of capital improvements. So RCW 64.34.328 does not allow the association to dispense with owner approval for the assessment.

Similarly the ARCA Declarations do not support a ruling circumventing owner approval. Neither the provisions of 10.2.1(g) nor Section 14.1 of the declaration provide any indication those provisions are free from the restrictions of 10.1.2(i) and (l) which prohibit the board from incurring more than \$25,000 in capital improvements or other purchases without approval of 75% of owners. Further Section 14.1 provides no indication that limitations on the authority of the ARCA board in Section 10.2.1(i) and (l) do not apply to the board when it performs duties under Section 14.1.

Thus, the ruling that the association could circumvent owner approval was in error.

The court also ruled that ARCA was not negligent nor had it breached its duties relative to the 4.2 million dollar project and its cost overruns. This relief was far beyond the relief requested in the summary judgment and the ruling on this point should be reversed for that reason. In any case, this finding was also not supported by the record since ARCA itself had vociferously argued that prior directors had breached

their fiduciary duties with respect to the contract.<sup>2</sup> Thus the trial court erred in ruling that the association was not negligent and had not breached its duties.

## II. ASSIGNMENTS OF ERROR

### Assignments of Error

The court erred when:

A. it ruled that Ray Pedersen did not have standing to oppose ARCA's Motion for Summary Judgment for Unpaid Assessments because he had not made complete payment of the initial assessment of the restoration and repair project

B. it ruled that ARCA was not negligent, nor did it breach its duty, in the management of the restoration and repair project, including not requiring 75% approval vote from the homeowners for the "Restoration Project" or "additional costs to complete the Restoration Project;"

C. it ruled that the ARCA declarations did not require ARCA or its officers or directors to obtain approval for from the owners for the "Restoration Project" or "additional costs to complete the Restoration Project;" and

D. it dismissed all claims for relief of Ray Pedersen with prejudice

E. it ruled that the association governing instruments do not require a vote for owner approval for the "Restoration Project" or "additional costs to complete the Restoration Project;"

F. it ruled that Mr. Pedersen's claims should be dismissed with prejudice

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<sup>2</sup> ARCA argued: "...it is clear that Mr. Lowry's [ARCA president who started the 4.2 million dollar contract] conduct raises genuine issues of material fact as to whether ARCA was in breach of "ordinary and reasonable care" under RCW 64.34.308." CP 602, lines 12-13.

G. it entered judgment against Mr. Pedersen

**Issues Pertaining to Assignments of Error**

A. Did the trial court err when it ruled that Mr. Pedersen lacked standing to challenge the ARCA assessment because he had not paid the assessment in full?

B. Did the trial court err in ruling that the association declaration and state law do not require the authority of a membership vote for the assessments for the \$4.2 million dollar project and its cost overruns?

C. Did the trial court err in ruling that ARCA and its directors were not negligent and did not breach their duties because those rulings are beyond the scope of the summary judgment motion and ARCA previously admitted an issue of material fact as to these issues?

**III. STATEMENT OF THE CASE**

Ray Pedersen has owned his unit in Tacoma's Allenmore Ridge Condominiums for 27 years. CP 393. The complex has an association to manage its affairs called the Allenmore Ridge Condominium Association (ARCA). CP 423, line 21-22.

Mr. Pedersen has served on the board on several occasions and participated in the management of some improvements to the complex in that capacity. CP 393, 561. He is a retired professional engineer with decades of experience in the management of complex design, engineering and construction projects. CP 393, 560. He also oversaw improvement and repair projects at Allenmore Ridge and another condominium

association where he was President/Treasurer. CP 561.

In 2006, ARCA sought owner approval for a substantial tear down and upgrade of the five complex buildings. CP 394. Ray Pedersen participated in this process as an involved owner. CP 562, para. 12.

ARCA obtained a bid for 4.2 million dollars to essentially rebuild substantial portions of all five buildings in the complex. CP 384-86. Work was needed as a result of long-term water and rot problems. CP 354-55, para. 5.

The project was presented to owners by the association as a fixed price contract. CP 73, para. 20, CP 208, CP 563, paras. 15 and 16. This was a false representation. CP 602, line 17. In fact, the contract was a time and materials contract. CP 26, para. 16, CP 563, para. 16.

Before the initial project was approved by owners, Ray Pedersen wrote to the board in September 2006 indicating that the project was a capital improvement subject to a 75 percent owner approval vote. CP 562, 571-73. An owner vote for the project was ultimately held by ARCA in December 2006. CP 244, para. 3, CP 247, para. 3, CP 291, para. 6, CP 395-97, paras. 13-21, CP 401-122, CP 564, para. 17. The board approved the owner vote in a meeting that took place on December 5, 2006. *Id.* The deadline set by the board for return of the forms was December 31, 2006. *Id.* By January 4, 2007, only 63% of owners approved the project.

Id. The vote did not pass with a 75% majority.

The vote and the vote process were tainted by additional problems. The form did not contain a resolution as required by the bylaws. Id. It did not state any date by which it had to be returned. Id. The form was not actually a ballot but a "Consent of Owner" form and contained no option to vote "no." Id.

On January 5, 2007, Mr. Pedersen attended an owner's informational meeting. CP 564, para. 18. After the meeting, he again wrote to the board on January 5, 2007. CP 564, para. 19, CP 581-83. He stated that the plan under discussion was flawed because

The proposed program is not yet defined explicitly; final drawings and contract are not final. Therefore the association has only estimated Time and Materials cost bids. The bids are unsatisfactory.

Id. Mr. Pedersen reiterated the need for an owner meeting and 75% vote approving the project. Id. He stated in addition that certain costs were associated with certain limited common areas and could not be assessed to all owners. Id. The board did not respond to this letter. CP 564, para. 19.

On April 11, 2007, when it became obvious the project was going ahead despite his concerns, Mr. Pedersen requested to review the contract documents including a scope of work and drawings. The board denied his request. CP 564, para. 20, CP 585.

In May 2007, Ray Pedersen estimated what portion of the contract bid costs could properly have been determined to be assessed against his unit had the board honored its fiduciary duties in the contract negotiation process and obtained proper owner approval of the contract. He determined that sum was \$60,522 of the total of \$84,840 and paid it without limiting his claims or defense relative to the assessment. CP 422, line 16, CP 516-17, CP 587-88.

The project was a disaster. CP 78-80, paras. 37-39, CP 83-85, para. 52, CP 172, para. 5. CP 174-202, CP 208-213, CP 394, para. 10. It was supposed to take 10 months. Id. CP 109, para. 10. It ended up taking three years because the engineering firm, the contractor and the board had failed to adequately inspect the buildings before starting work. CP 73, para. 19, CP 211-13.

The contract was not a fixed price contract as the board had told owners. CP 90, para. 3. It was a time and materials contract as Ray Pedersen had warned the board on January 4, 2007. CP 90, para. 3.

The contract cost exceeded the \$4.2 million dollars by a figure which is not exactly clear but appears to exceed \$1 million dollars. CP 92, para. 6, CP 211-13, CP 78, CP 222,-23, para. 6, CP 227, para. 6. The association was sued by the contractor. CP 92-93, para. 8. CP 128-137. A number of owners sued the association because the association had to

issue a second assessment to cover the contract cost overruns. CP 1-14. CP 636, line 14-18. The second assessment was rejected by owners in two separate votes. CP 91-92, para. 5, CP 100, CP 222-23, para. 6.

The association brought an action by way of third-party complaint against Mr. Pedersen to collect the balance of the assessment. CP 697-712. Mr. Pedersen responded with counterclaims and defenses against the association related to the validity of the assessment and arising from other wrongful acts of the association. CP 718-731. He sought declaratory relief declaring the relative rights and responsibilities of the parties relative to the governing instruments of the association and relative to the special assessment. CP 730-31.

ARCA moved for summary judgment asserting that Mr. Pedersen lacked standing to assert defenses or counterclaims of any type because he had not paid the assessment in full. CP 420-434. Mr. Pedersen responded that the assessment was unlawful and that his claims and defenses were not precluded by Washington law. CP 594-612.

The trial court ruled that Mr. Pedersen's counterclaims and defenses whether related to the assessment or not must be dismissed with prejudice due to nonpayment of the assessment. CP 647-52. The court ruled further that the association Declarations and Washington law did not require 75% approval of assessment. *Id.* The court also ruled that ARCA

directors were not negligent or in breach of any duty. *Id.* This appeal resulted.

#### IV. ARGUMENT

**A. This court should reverse the trial court's ruling that Mr. Pedersen did not have standing to challenge ARCA's assessments because of nonpayment.**

**1. Challenges to the validity of association assessments are traditionally resolved on the merits in the principal assessment collection action.**

The proposition offered by ARCA is that Washington law precludes an owner from challenging a special assessment unless the owner first pays the assessment. According to ARCA and the trial court, if the owner does not pay the assessment in full prior to the commencement of a collection action, the owner's defenses and counterclaims of any type must be dismissed with prejudice. No Washington case has previously ruled that an owner must pay an assessment as a condition to challenging it.

In this case, Mr. Pedersen challenges the validity of a special assessment for in excess of 4 million dollars (\$84,840 to his unit alone). He alleges – among other things – that the assessment was not validly approved by owners, a violation of Declaration requirements. His answer seeks a declaratory judgment as to whether the assessment was lawful

under the governing instruments of the association and state law.<sup>3</sup>

The trial court's ruling was based in part upon the conclusion that Mr. Pedersen did not have standing to challenge the assessment because he had not paid the assessment. CP 649, lines 13-15.

The first issue for resolution is whether an owner waives all rights relative his relationship with the association by failing to pay a special assessment (whether validly assessed or not) in full.

Washington provides us with two cases addressing the issue of an owner's challenge to the propriety of assessments. The first of these is *Rodruck v. Sand Point Maintenance Commission*, 48 Wash. 2d 565, 295 P.2d 714 (1956)

In *Rodruck*, several owners sought declaratory judgment as to the validity of numerous actions of the association. *Rodruck v. Sand Point Maintenance Commission*, 48 Wash. 2d 569.<sup>4</sup> The association counterclaimed for unpaid assessments. *Id.* The owners in *Rodruck* had not paid association assessments. *Id.* Nevertheless, the *Rodruck* trial court

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<sup>3</sup> He also asserts claims for other relief against the association, including (among others) trespass to his property, improper allocation of the assessment among owners, violation of fiduciary duties and acting outside the board's authority. CP 718-31.

<sup>4</sup> The owners in *Rodruck* sought declaratory relief related to the association's ability to levy assessments. Owners sought an order declaring the corporate reorganization void, an order declaring the corporation to have no power to levy assessments for certain improvements, title quieted as against the filed covenants and restrictions, an order declaring a right to withdraw from membership in the commission and other requests. *Rodruck*, at 569.

fully evaluated the owner claims against the association on the merits. *Id.* at 569-70. Similarly, the appellate court ruled on all owner claims on the merits. *Id.* at 570-80. Only when the owner claims were ruled upon on the merits and dismissed, did the court find it proper to grant judgment to the association for unpaid assessments. *Id.* at 580-81.

The next Washington case to rule on the subject of an owner's counterclaim in an assessment case was *Panther Lake Homeowner's Association v. Juergensen*, 76 Wn. App. 586, 887 P.2d 465 (1995). In *Panther Lake* an association imposed a special assessment to pave a road. *Panther Lake* at 587-88. Some owners complained that the road work was poorly done by the contractor and refused to pay the assessment. *Id.* at 588. The court ruled against the owners on the basis that "defects in the Association's capital improvements do not provide members with a defense to assessments imposed to pay for such improvements." *Id.* at 590-91 (emphasis added).

*Panther Lake* is itself a ruling against the owner on the merits of the owner's claim. The owner claimed the contractor had not properly performed the work paid for by the association with the assessed funds. The court ruled that such a claim belonged only to the association, not to the owner and therefore the owner's claim was without merit. *Panther Lake, supra*, at 591.

It is quite a leap to say that *Panther Lake* commands an owner to pay any assessment (whether valid or invalid) or lose all rights incident to ownership, such as the right to challenge the validity of the assessment. Nevertheless, both ARCA and the trial court reasoned that *Panther Lake* logically inferred a prepayment requirement which requires dismissal with prejudice of an owner's counterclaims against an association when an owner has not paid a special assessment. Mr. Pedersen argues that the prepayment rule is flawed and admittedly inequitable.

Mr. Pedersen argues the proper approach for handling owner challenges to the validity of an assessment is on the merits in the principal assessment collection action itself. He argues further that owner counterclaims and defenses unrelated to an assessment should also be resolved in the principal collection action, but that judgment for admittedly valid assessments need not be delayed.

At the heart of this issue is the extent to which subordination of an owner's interest to the group in condominium ownership commands unquestioning enforcement of association actions. This subordination concept was expressed first in *Rivers Edge Condo. Association v. Rere, Inc.*, 390 Pa. Super. 196, 568 A.2d 261, 263-264 (1990) and echoed in *Panther Lake*. This subordination theory explains that with condominium assessments it is critical for the association to have the right to collect

valid assessments to maintain its government-like functions related to common area management. Thus owners cannot withhold payment of valid assessments as a self-help remedy when they are unhappy with the association's performance. Such action is an improper effort to opt out of association benefits the owners do not want or claim they did not receive. Such complaints must be addressed in the form of voting on condominium management as allowed by the governing instruments for the association or in a declaratory action against the association.

*Panther Lake* reads:

We agree with the reasoning in *Rivers Edge* and hold that defects in the Association's capital improvements do not provide members with a defense to assessments imposed to pay for such improvements. As in *Rivers Edge*, any dispute over defects in the construction of Association property was between the Association and the developers or contractors. Whether legal action would be taken in the event of a dispute was for the board or voting Association membership to decide. Lot Owners' remedies are limited to making their wishes known to the Association, casting their votes, **and seeking declaratory relief if the Association acts beyond its authority**. Lot Owners are not permitted to compound the Association's problems by unilaterally withholding assessments for capital improvements.

*Panther Lake* at 590-91 (emphasis added).

An owner's right to seek declaratory relief and damages when an association violates state law or the governing instruments of the association is clearly acknowledged in *Panther Lake* and *Rodruck*. The issue is how this right is affected by the subordination theory.

One approach is to simply handle all owner claims in the principal assessment collection action because the subordination theory does not apply when an owner challenges the validity of the assessment itself.

This approach is followed in Arizona and South Carolina<sup>5</sup> where the court does not apply the subordination concept at all when there is a challenge to the validity of the assessment.

In *The Villas at Hidden Lakes Condominiums Association v. Geupel Construction Company, Inc.*, 174 Ariz. 72, 847 P.2d 117 (1992), the association claimed that an owner owed delinquent monthly assessments and late charges. *The Villas*, 847 P.2d at 120. The owner responded with a counterclaim that the assessment was invalid because he had properly withdrawn the units from the project temporarily and that late charges were not authorized. *Id.* The trial court ruled in favor of the association and the court of appeals reversed.

The court of appeals addressed the owner's counterclaims on the merits. *Id.* at 121-122. It ruled that the owner was not subject to the assessments because the units were properly withdrawn from the project. *Id.* at 123. For periods when late charges were applied to properly charged assessments, the court ruled that the late charges were unreasonable, arbitrary and an abuse of discretion. *Id.* at 124-26.

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<sup>5</sup> And in Pennsylvania as argued on pages 23-25 below.

The court also addressed multiple other issues as defenses to the amount due. These included the owner's entitlement to offsets and credits, validity of the assessment lien, and whether there was a valid tender of amounts due *Id.* at 128. All these issues were evaluated on the merits or remanded for evaluation on the merits. *Id.*

This case did not even mention the subordination concept of *Panther Lake* and *Rivers Edge* in its opinion.

South Carolina also evaluates owner challenges to assessments on the merits in the assessment collection context. In *Dockside Association, Inc. v. Detyens*, 352 S.E.2d 714, 291 S.C. 214 (1987), the association levied an emergency special assessment against the owners. The special assessment was to pay for repairs to the common elements and to establish a reserve fund. *Dockside*, 352 S.E.2d at 715. The assessment was approved by 57 percent of owners, sufficient for an emergency assessment but insufficient for a nonemergent improvement to the common elements. *Id.* Two owners refused to pay the special assessment claiming there was no emergency and a 60 percent vote was required. *Id.*

The trial court ruled in favor of the owners and found there was no emergency and that the assessment did not have a high enough owner approval rate. *Id.* at 716.

On appeal the court reversed the trial court on the basis that the

trial court had not given proper deference to the board's decision that there was an emergency. *Id.* The trial court had improperly placed the burden of proving an emergency on the association instead of requiring the owners to show lack of emergency. *Id.* Thus the case was remanded to determine if the owners could prove there was no emergency. *Id.*

Like *The Villas*, the *Dockside* court again evaluated the owners' counterclaims to the association collection action on the merits. Also like *The Villas*, *Dockside* contains no mention of preclusion of owner claims or defenses based on the *Rivers Edge* subordination theory.

The subordination theory, like any concept, has boundaries. One must recognize that associations and the boards that govern them wield disproportionate power over the affairs of the individual homeowner. *See Arabian, Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 *Pepperdine L. Rev.* 1, 24 (1995) (hereafter *Arabian*). Legal challenges to the association's authority are few and far between as a result of the disproportionate power of the association over the individual owner. *See Arabian* at 23-24. The association has the power to levy fines, impose a lien (as in this case), and pay for legal costs from the condominium's general budget. The homeowner must finance his own suit and bear his own legal expenses then face the prospect of foreclosure if he does not succeed. The resultant imbalance leaves an owner vulnerable to abuses of power by the

association such as imposition of unlawful assessments.

This imbalance is unjustifiably increased when the owner is forced to pay an invalid assessment prior to seeking a declaratory action as to the assessment's validity. The Arizona and South Carolina approach properly contains the disproportionate power of the association over the owner described by Justice Arabian by preventing the association from using that power with impunity by obtaining unquestioning enforcement of invalid assessments.

The approach of Arizona and South Carolina has the additional advantage of preventing duplicative litigation. If the direct challenge to the assessment is not permitted in the principal assessment action, then it will create duplicative litigation on the same issue as the association files a collection action and obtains its judgment on the assessment as a matter of right. Then the owner's declaratory action proceeds in separate action, resulting in the possible invalidation of the prior judgment and the regurgitation of the funds collected by the association for the assessment.

Thus, the court opinions in *Dockside* and *The Villas* simply acknowledge that the *Rivers Edge* subordination theory does not apply when an owner challenges the validity of the assessment the association is suing to collect. These courts decided the validity of the assessment in the principal collection action to avoid duplicative litigation and balance out

the disproportionate power of the association over the individual owner.

The approach taken by South Carolina and Arizona can be construed consistently with Washington decisional law. In cases like *Panther Lake* and *Rivers Edge*, the challenge was not to the validity of the assessment itself. The owners in those cases did not assert the assessment itself was invalid. Instead the owners claimed they had not received the benefit of the work paid for by the assessment. In this respect they were seeking to opt out of a valid assessment claiming they did not want or receive the benefit of the assessment. On the merits, such claims fail as inappropriate attempts to opt out of validly assessed expenses.

In Washington we know that *Rodruck* establishes an owner's right to challenge the validity of an association's power to levy assessments (among other things). *Rodruck* at 569. *Panther Lake* establishes that an owner may not withhold payment of a *lawful* assessment for improvements on the basis that the owner did not obtain the full benefit of the improvements paid for by the assessment. *Panther Lake* at 590-91. However, neither case states that an owner is precluded from challenging the validity of the assessment in a collection action by the association. Indeed, in *Rodruck* the owner had not paid the assessment that was complained of. *Rodruck* at 569. The association counterclaimed against the owner for payment of the assessment and was awarded judgment for

the assessment, but only after the court resolved all owner challenges to the validity of the assessment on their merits. *Rodruck* at 581.

*Rodruck*, like *The Villas* and *Dockside* did not even mention the subordination concept when evaluating the lawfulness of the assessments on the merits.

Since *Panther Lake* acknowledges an owner's right to challenge the validity of an assessment by a declaratory action, *Panther Lake* does not compel dismissal of the owner's counterclaim for declaratory relief when the owner challenges the validity of the assessment itself. In *Panther Lake*, like *Rodruck*, *Dockside* and *The Villas*, the court ruled upon the validity of the owner's claim on the merits in the principal collection action.

Thus it is entirely consistent, under Washington decisional law, for the court to evaluate an owner's challenge to the validity of an assessment in the principal action to collect the assessment.

The logic of this approach becomes more obvious as we observe the evolution of the subordination theory in Pennsylvania. Pennsylvania issued the *Rivers Edge* decision relying on the subordination theory in 1990. Seven years later, in *Kelso Woods Association, Inc. v. Swanson*, 692 A.2d 1132 (1997) the Pennsylvania court ruled that a **direct challenge** to the validity of an assessment must be resolved **before** entry of judgment

for the assessment.

In *Kelso Woods* the association increased annual dues and adjusted the assessment formula. *Id.* at 1133. One owner did not pay the assessments and the association sued to collect them. *Id.* The owner counterclaimed for a declaratory judgment challenging the new assessments. *Id.* The trial court granted in part and denied in part the owner's request for declaratory relief. *Id.* The trial court entered judgment for the unpaid assessments and ruled that the assessment, though inequitable, was within the board's authority. *Id.*

On appeal, the appeals court agreed with the owner's assertions and affirmed a state court's obligation to review association acts to determine if they are in accordance with state law and the association instruments. The court ruled:

We hold that the trial court, when presented with allegations concerning the legality and propriety of a nonprofit association's imposition of assessments, may review that decision to ensure that it is in accordance with not only Pennsylvania law, as in *Quaker City*, but also the by-laws of the association.

...

In conclusion, we hold that the trial court erred as a matter of law in refusing to review the Association's new assessment formula. We, accordingly, vacate the judgment entered against Mr. Swanson and remand the case to the trial court for further proceedings consistent with this opinion.

*Id.* at 1135.

Thus in *Kelso Woods*, the court actually vacated the judgment for

the unpaid assessment and remanded the case for evaluation of the owner's request for declaratory relief. *Id.* Like in *Dockside* and *The Villas* this case addressed direct challenges to the validity of the assessment without even discussing the application of the subordination theory of *Rivers Edge*. Since *Kelso Woods* is from the same state as *Rivers Edge* and is seven years after *Rivers Edge*, we must conclude, as with *Dockside* and *The Villas*, that the court determined no mention of the *Rivers Edge* subordination concept would be appropriate since the challenge was directly to the validity of the assessment which is clearly within an owner's rights.

Thus in Pennsylvania, which established the subordination theory cited in *Panther Lake*, we see that a trial court must first rule on the owner's challenge to the validity of the assessment before entering judgment for the assessment.

**2. Claims unrelated to the assessment should be resolved in the principal collection action although judgment for admittedly valid assessments may not be delayed.**

Indeed it is evident that the subordination theory does not compel dismissal of the owner's counterclaims against the association that are unrelated to the assessment. North Dakota for instance acknowledges that application of the subordination theory of *Rivers Edge* does not even compel dismissal of owner counterclaims and defenses unrelated to the

association assessment. *Agassiz West Condominium Association v. Solum*, 527 N.W.2d 244 (N.D. 1995). While acknowledging the subordination theory, *Agassiz* resolved owner counterclaims unrelated to the validity of the assessment in the collection action.

In *Agassiz*, the association sued an owner to collect assessments and a pro rata share of insurance in small claims court. *Agassiz*, 527 N.W.2d at 245. The owner removed the case to county court and asserted counterclaims that the association failed to make necessary repairs to the common areas of the building in which her unit was located and seeking damages. *Id.* At trial, the owner did not dispute she owed assessments and the trial proceeded on her counterclaim. *Id.* The trial court found the association had failed to maintain and repair the common areas and awarded the owner damages on her counterclaim. *Id.* The association appealed. *Id.* at 246.

The appeals court first acknowledged the subordination theory reasoning that owners must subordinate certain rights and privileges to the group's interest.

The condominium form of ownership is thus based upon the principle of shared ownership and shared responsibility. Because of the manner in which ownership in a condominium is structured, each unit owner, in choosing to purchase a unit, must give up certain rights and privileges which normally accompany fee ownership of property and agree to subordinate those rights and privileges to the group's interest. A condominium project functions

as a quasi-government, and under N.D.C.C. Sec. 47-04.1-07(1), its unit owners are responsible for its administration. Section 47-04.1-07(1), N.D.C.C., authorizes the unit owners, or the administrative body established by the unit owners, to provide for bylaws for "the maintenance of common elements, limited common elements where applicable, assessment of expenses, payment of losses, division of profits, disposition of hazard insurance proceeds, and similar matters." When there has been a failure to comply with the condominium's bylaws, N.D.C.C. Sec. 47-04.1-08 authorizes "an action to recover sums due for damages, injunctive relief or such other relief as a court of proper jurisdiction may provide by the administrative body or in a proper case, by an aggrieved unit owner."

*Id.* at 246 (citations omitted).

The court went on to conclude that the owner was not entitled to withhold payment of the monthly condominium assessment and affirmed the trial court's award of judgment for the association. *Id.* at 247.

The court then turned to the issue of the owner's counterclaims and resolved those claims in the owner's favor.

... Although a unit owner may not withhold common charges in a dispute over repairs to common areas, other courts have recognized individual unit owners can sue a condominium association for failure to comply with its bylaws.

Courts have also allowed unit owners to sue a condominium association for personal injuries sustained because of negligence relating to upkeep and maintenance of common areas.

We hold N.D.C.C. Sec. 47-04.1-08 allows a unit owner to sue the condominium association for failure to comply with the condominium's bylaws.

*Id.* at 248-49 (citations omitted).

The *Agassiz* court reviewed the owner's entitlement to damages on her counterclaim and remanded the case for recalculation of damages to the owner consistent with the opinion. *Id.* at 249. So the owner claim unrelated to the valid assessment was remanded for resolution by the trial court despite entry of judgment for the association for unpaid assessments.

In *Forest Villas Condominium Association, Inc. v. Camerio*, 205 Ga.App. 617, 422 S.E.2d 884 (1992), a Georgia case, the association sued owners for unpaid monthly assessments. The owners responded with defenses and counterclaims which asserted that the association failed (among other things) to honor its obligations to perform maintenance and make repairs. *Forest Villas*, 422 S.E.2d at 885. Their challenges were not to the validity of the assessment. The owners sought an accounting and other relief.

The association moved for summary judgment which was denied. The appeals court overruled the trial court on the basis that an owner could not withhold payment of "lawful" assessments. *Id.* at 886. However, the court acknowledged that if the owner challenged the lawfulness of the assessment itself, then a challenge could be appropriate.

The court reasoned:

[The owners] do not assert, nor is there any evidence, that the condominium instruments were anything other than lawful, see OCGA § 44-3-76, or that the subject assessments were made other

than in compliance with the condominium instruments and law. See OCGA §§ 44-3-71(5) and 44-3-76. Whether such would be a defense permitted under OCGA § 44-3-80(d) in a suit for unpaid fees is not before us. Plaintiff Association was entitled to summary judgment on defendants' liability for unpaid assessments.

*Id* (Citation omitted).

In addition, the *Forest Villa* court in its conclusion ruled that the owner's counterclaim against the association could go forward. *Id.* at 886-87. The owner's multiple claims were unrelated to the validity of the assessments for which the association was entitled to summary judgment. Instead the owners claimed the association failed to honor its obligations to perform maintenance and make repairs among other things. These claims had been dismissed by the trial court as beyond the court's authority. The appeals court, however, reinstated the claims and remanded them to the trial court for evaluation on the merits. *Id.* at 887.

Thus in these two cases, counterclaims unrelated to the validity of the assessment were litigated in the principal collection action.

This approach can also be followed consistent with the ruling of *Panther Lake*. In the *Agassiz* and *Forest Villa* cases, an association commenced an action to collect an assessment. The owner responded with a counterclaim unrelated to the assessment. The trial court ruled the association was entitled to judgment for unpaid assessments. But owner claims were not dismissed. They were addressed on the merits, even

though judgment for the association was not delayed.

Thus in these two cases, under the subordination theory, the association is entitled to immediate entry of judgment for admittedly valid assessments because the counterclaims and defenses on owner claims unrelated to the assessment cannot inhibit the association's right to collect the valid assessment. This is consistent with the result in *Forest Villa, Agassiz* and *Panther Lake*. However, once judgment is entered for the association on the unpaid *valid* assessments, the owner's counterclaims should not be dismissed. They must continue in the same action.

This approach promotes judicial economy by providing for only one action to resolve all claims between the parties. It promotes the subordination theory objective of allowing the association to obtain immediate relief for unpaid assessments when there is no challenge to the assessment validity.

It seems that the proper application of the *Panther Lake* and *Rivers Edge* subordination theory is as a substantive rule that precludes an owner from challenging admittedly lawful assessments on the grounds that the owner does not receive the benefit of the assessment. When there is an owner counterclaim challenging the validity of the assessment, however, the matter must be resolved on the merits before a judgment is entered on the assessment. When there is a counterclaim unrelated to the unpaid

assessment, the association is entitled to immediate entry of judgment for the admittedly valid assessment, but the counterclaims may continue in the same suit.

**3. The Massachusetts Prepayment Requirement Suffers from Multiple Flaws.**

None of the above cases from Pennsylvania, Arizona, South Carolina, Georgia or North Dakota have a prepayment requirement. The prepayment requirement stems from Massachusetts. The difficulty of following the harsh prepayment approach proposed by ARCA is evident from a review of Massachusetts law.

In *Baker v Monga*, 590 N.E.2d 1162, 32 Mass.App.Ct. 450 (1992), the association commenced an action to collect unpaid common expenses. *Baker*, 590 N.E.2d at 1163. The owner filed counterclaims for breach of contract, breach of fiduciary duty, unfair trade practices and abuse of process. *Id.*

The court noted the subordination theory advanced by *Rivers Edge* and found no evidence to support the owner's counterclaims.

Absent an adjudication by a court of competent jurisdiction that the condominium association's adoption of its budget or imposition of its assessment was accomplished in bad faith or in excess of its authority, condominium charges by the unit owners' organization are not subject to set-off or some other form of self-help remedy. See, e.g., *Rivers Edge Condominium Assn. v. Rere, Inc.*, 390 Pa.Super. 196, 199, 568 A.2d 261 (1990).

*Baker* at 1164-65 (emphasis added, footnote omitted, citations omitted).

The next Massachusetts case addressing the issue is *Trustees of The Prince Condominiums Trust v. Prosser*, 412 Mass. 723, 724-726, 592 N.E.2d 1301 (1992). This was a dues collection action where the owner failed to pay lawfully assessed common expenses and counterclaimed that he had been denied use of garage facilities. *Trustees of The Prince Condominiums* 592 N.E.2d at 1301-02. The court relied on the subordination theory and cited *Rivers Edge* and similar cases and ruled against the owner. *Id.* at 1302.<sup>6</sup>

After *Prince Condominiums*, the Massachusetts court decided *Blood v Edgar's Inc.* 36 Mass. App. Ct. 402, 632 N.E.2d 419 (1994). This is where the prepayment rule is first announced.

In *Blood*, an owner refused to pay an assessment for common expenses, arguing that a part of each assessment was illegal. The court held that "a unit owner in a condominium may not challenge a common expense assessment by refusing to pay it." *Blood*, 632 N.E.2d at 421.

The court added that

... a unit owner is not without remedy or recourse to challenge the propriety of common expense assessments. We suggest that aggrieved unit owners should timely pay--under protest--the common expense assessment. Thereafter, a judicial determination of the legality of the assessment, and suitable

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<sup>6</sup> Even though the court ruled that the subordination theory applied, it still ruled on the merits of the owner's claim as to use of the garage facilities. *Id.* at 1303.

reimbursement, may be sought.

*Id.* at 421-22 (citations omitted).

So in *Blood* the court made it clear that owners must follow a given procedure: pay under protest, then file a declaratory judgment action. None of the cases previously discussed have such a pre-payment requirement.

The *Blood* court acknowledged that its decision would be unfair if applied retroactively. *Id.* at 422. So the *Blood* court did not apply this provision to the case at bar and resolved the owner's counterclaims on the merits. *Id.*

Although "[d]ecisional law is generally applied retroactively to past events," **we conclude that our decision establishing that a condominium unit owner may not challenge a common expense assessment by refusing to pay it ought to apply prospectively only. ... The compelling inequity of condominium unit owners being held liable for illegal or unauthorized common expense assessments solely because they have brought an action as a counterclaim to a collection action instead of as an independent action outweighs the benefits of retroactive application. In such a case, it is preferable to carry out the reasonable expectations of the parties.**

*Id.* at 422 (footnote, citations omitted, emphasis added).

The *Blood* court acknowledged there was a "compelling inequity" of forestalling relief to an owner who challenges a common expense via counterclaim rather than by independent action. It therefore evaluated and

decided the owner's claims on the merits.<sup>7</sup>

The limited worth of the Massachusetts pre-payment requirement is evident from the court's subsequent struggle to applying the rule.

The court dealt with the strictures of the prepayment rule in *Trustees of Hunters Village Condominium Trust v. Gerke*, 2007 Mass.App.Div. 23 (2007). In *Hunters Village* a unit owner converted association funds to her own use. *Hunters Village*, 2007 Mass.App.Div. at 23. The association assessed the stolen money against the owner as common expense and sued for judgment and foreclosure. *Id.* The owner challenged the assessment as an invalid common expense. *Id.* The trial court ruled for the owner that the assessment was invalid. *Id.* The appeals court distinguished this case from *Blood*, *supra*, and allowed the owner to challenge the validity of the assessment.

... The dispositive question is, therefore, whether the *Blood* rule that a unit owner must, in the absence of a prior judicial determination of illegality, pay the expense assessment is applicable here.

We conclude that in the specific circumstances of this case, *Blood* does not preclude Gerke's defense to the Trustees' claims. In *Blood*, there existed a relationship between the unit owner and the trustees' imposition of the common expense assessment. While the assessment was illegal, there was a direct relationship between it and unit ownership, and a valid basis for the trustees' belief that the assessed expense was proper. In contrast, there is no connection

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<sup>7</sup> Ironically, the *Blood* court went on to examine the owner's claim and found for the owner. *Id.* at 424. The case was remanded to the trial court to determine the deductions the owner was entitled to. *Id.*

between the assessment in this case, Gerke's status as a unit owner and the Trustees. The parties' relationship in this case, from which the Trustees' claims arose, was that of trustees and an employee.

*Hunters Village* at 25-26.

This creates an awkward rule where an owner can bring a challenge to the validity of the assessment as a counterclaim when the association does not have a reasonable belief the assessed expense was proper. Such an exception demonstrates the limited value of the *Blood* rule of absolute preclusion of any direct or indirect challenge to the assessment.

As yet unclear under the Massachusetts line of cases is what happens when the owner pays and then challenges an assessment. There is no indication that mere late payment itself an absolute waiver of the owner's to the right to challenge the assessment. This would be even more of a compelling inequity and contrary to an owner's reasonable expectations.

Further, if Washington adopts the harsh Massachusetts prepayment rule, the rule should only be applied prospectively, as the court decided in *Blood*. Like Massachusetts, Washington requires a court to determine whether a new rule will be applied prospectively or retroactively. The court frequently applies a new rule prospectively in contract cases where the rule runs contrary to the reasonable expectations of parties. *See, e.g.,*

*State ex rel. Washington State Finance Committee v. Martin*, 62 Wn.2d 645, 663, 384 P.2d 833 (overruling decision allowing issuance and sale of limited obligation bonds prospectively only so as not to "jeopardize the massive contractual and governmental enterprises done under its protective shield"); *Cascade Sec. Bank v. Butler*, 88 Wash.2d 777, 784-85, 567 P.2d 631 (applying decision declaring judgments to be liens upon the interests of a real estate contract purchaser prospectively only to prevent harm to reliance interests); *Haines v. Anaconda Aluminum*, 87 Wash.2d 28, 34, 549 P.2d 13 (new rule of law applied retroactively where appellant failed to prove reliance on prior rule when entering lease agreement).

So the Massachusetts approach suffers from several flaws. First, as acknowledged by *Blood*, the prepayment rule creates a compelling inequity to owners who bring challenges to the assessment validity as counterclaims. *Blood* also acknowledges that the prepayment rule is contrary to the "reasonable expectations of the parties." Third, there is an exception for association acts that the association does not have a "valid basis for ... belief that the assessed expense was proper." This opens the door for further uncertainty as to additional exceptions. The rule also provides no check to the disproportionate power the association wields over an owner by forcing the owner to pay even invalid assessments prior to challenging them. And there is no bar to a second litigation when the

owner pays and commences a new action for declaratory relief.

Massachusetts, like the trial court and ARCA, has advanced the subordination theory beyond its tenable bounds.

Even under the harsh and tenuous strictures of the Massachusetts prepayment rule, however, there is no justification for the trial court's decision to dismiss the Pedersen claims with prejudice. He has now paid the assessment opening the door for him to now challenge the validity of the assessment.<sup>8</sup> Further, the rule should not be applied retroactively and even if it is Mr. Pedersen's claim establish that ARCA knew its actions were in violation of the Declaration.

**4. The proper rule is to resolve all owner counterclaims in the principal assessment collection action with the association entitled to judgment for admittedly valid assessments.**

The conclusion to be drawn from this analysis is that courts have adopted two different approaches to resolving owner counterclaims and defenses in assessment collections actions. In Pennsylvania, South Carolina and Arizona, owners may proceed with counterclaims as to the validity of the assessment in the principal collection action itself on the basis that the subordination theory simply does not apply when there is a

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<sup>8</sup> Mr. Pedersen has satisfied the judgment for assessments and a supplemental designation of clerk's papers has been added to include the satisfaction of judgment filed April 5, 2011.

direct challenge to the validity of the assessment. North Dakota and Georgia refine this rule to allow owner counterclaims unrelated to the assessment in the principal collection action regardless of the subordination theory. However, per the North Dakota and Georgia approach, judgment for the association on its assessment claim need not be delayed when the validity of the assessment is conceded.

Only Massachusetts requires payment of an assessment as a precursor to challenging the validity of the assessment. But this rule suffers from numerous flaws and is admittedly inequitable.

For these reasons, Mr. Pedersen argues the court's decision to adopt the harsh and inequitable Massachusetts rule was in error. This court follow the decisions of Pennsylvania, South Carolina, Arizona North Dakota and Georgia which allow owners to litigate counterclaims and defenses, particularly those related to the validity of the assessments, in the principal collection action.

**B. This court should reverse the trial court ruling that the association Declarations and state law do not require the authority of a membership vote for the assessment for the \$4.2 million dollar project and its cost overruns.**

The issue on this point is whether the assessment for the 4.2 million dollar contract and its cost overruns was lawfully approved by owners. Mr. Pedersen asserts that Section 10.2.1(i) of the Declarations

requires such a vote because the project includes several capital improvements with a cost exceeding \$25,000.<sup>9</sup>

ARCA admits that the court already decided that there was an issue of material fact as to whether the contract included capital improvements in excess of \$25,000.<sup>10</sup>

In this case ARCA actually solicited an owner vote to approve the

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<sup>9</sup> CP 385-86, 575-79. Declarations, Section 10.2.1(i) (CP 312, Appendix 1).

The Board's power herein above enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements, including but not limited to real or personal property, (other than for purposes of restoring, repairing or replacing portions of the common areas) having a total cost in excess of Five Thousand Dollars (\$5,000.00), without first obtaining the affirmative vote of the owners holding a majority of the voting power present or represented at a meeting called for such purpose, or if no such meeting is held, then the written consent of voting owners having a majority of the voting power; provided that any expenditure or contract for each capital addition or improvement in excess of Twenty-five Thousand Dollars (\$25,000.00) must be approved by owners having no less than seventy-five percent (75%) of the voting power.

Declarations Section 10.2.1(l) contains a similar requirement for purchase of personal property exceeding \$25,000, an additional basis for requiring the 75% owner approval vote.

The Board shall not, however, in any case acquire by lease or purchase real property valued in excess of Five Thousand Dollars (\$5,000.00) except upon a majority vote of the condominium unit owners, or valued in excess of Twenty-Five Thousand Dollars (\$25,000.00) except upon a seventy-five percent (75%) affirmative vote of the condominium owners....” CP 312, Appendix 1.

<sup>10</sup> In ARCA Defendants’ Reply in Support of its Renewed Motion for Partial Summary Judgment on Alleged Voting Requirements, filed October 4, 2010, ACRA states:

On June 25, 2010, the Court denied the ARCA Defendants’ [Motion for Partial Summary Judgment on Alleged Voting Requirement]. The sole basis for the Court’s denial was because it found a question of material fact as to whether the “rain screen” building envelope system was a “restoration or repair” or “capital addition or improvement” CP, 811, lines 12-22. See also CP 353-54, paras 4 & 5.

initial 4.2 million dollar contract. CP 395, 404. ARCA told owners 75% approval was required to proceed. CP 244, para. 3, CP 247, para. 3, CP 291, para. 6, CP 395, 404. ARCA chose not to use an owner meeting to seek approval. Instead it chose the vote by mail process. *Id.* The bylaws provide for a simple process for this kind of vote.

In the case of a vote by mail relating to any other matter, the Secretary shall give written notice to the owners which notice shall include a proposed written resolution setting forth a description of the proposed action, and shall state that such persons are entitled to vote by mail for or against such proposal and stating a date not less than 20 days after the date such notice shall have been given on or before which all votes must be received and stating that they must be sent to the specified address of the principle office of the association. Votes received after that date shall not be effective. Any such proposal shall be adopted by the majority of votes cast on such matter, unless a greater or lesser voting requirement is established by the Declaration or Bylaws for the matter in question.

CP 395, 406.

The vote did not comply with this process. This form did not contain the required resolution. CP 396, 402. The form did not provide an opportunity to vote against the proposed action. *Id.* The form did not have a deadline of no less than 20 days. *Id.* In fact there was no deadline at all. *Id.* There was no indication of how, when or where to return the form. *Id.*

The Declarations require a passage rate of 75%. The Board Meeting Notice indicated that 75% approval was required. CP 404. The

Board decided by motion on December 5, 2006 that the form had to be returned by December 31, 2006. CP 396, 408-10. The Owner Consent Tally provided to owners by the board showed the vote count totals as of January 4, 2007 was 63%. CP 396, 412. The vote did not pass according to the governing Bylaws or according to the board's resolution requiring all votes to be returned by December 31, 2006.<sup>11</sup>

Therefore, no valid owner approval was obtained for the assessment for the \$4.2 million dollar contract or its extensions and the assessment is unlawful.

In addition to the trial court's ruling that Mr. Pedersen lacked standing to challenge the assessment, the trial court also ruled that declarations did not require the association to obtain an approval vote of owners. One wonders how the association can make this argument when they in fact conducted the owner vote and it failed.<sup>12</sup>

Nevertheless the governing provisions of the declarations here are unambiguous in the requirement of 75% owner approval when capital

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<sup>11</sup> The Board continued collecting votes through the end of January and eventually received more than 75% approval. CP 396

<sup>12</sup> Mr. Pedersen also argued the board was estopped from asserting a vote was required. When a board of directors makes an affirmative statement, reasonably relied on by owners, then the board is precluded from asserting the opposite of that affirmative statement. *Norelli v. Mutual Savings Fund Harmonia*, 121 N.J.L. 60, 63-64, 1 A.2d 440 (N.J. 1938); *Baum v. Coronado Condominium Association, Inc.*, 376 So.2d 914, 916 (Fla. 1979) (trial court found association estopped – reversed on other grounds).

improvements in excess of \$25,000 are performed. ARCA admits the court decided there was a material issue of fact as to whether the contract included capital improvements in excess of \$25,000.<sup>13</sup>

So ARCA must show some provision of law or the declarations which exempts the association from the voting requirement. ARCA relies first on RCW 64.34.328.<sup>14</sup> This reliance is misplaced because RCW 64.34.328 specifically indicates that its provisions are subject to the association declarations, meaning the Declarations supersede and limit the authority granted in RCW 64.34.328.<sup>15</sup>

ARCA also apparently relies on repair or replacement authority of section 14.1 of the Declarations.<sup>16</sup> However, there is no indication in

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<sup>13</sup> See note 10 above.

<sup>14</sup> RCW 64.34.328. Upkeep of condominium.

(1) *Except to the extent provided by the declaration*, subsection (2) of this section, or RCW 64.34.352(7), the association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the owner's unit and limited common elements reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, shall be liable for the repair thereof.

Emphasis added

<sup>15</sup> RCW 64.34.328 also does not apply to Old Act (RCW 64.32) condominiums. RCW 64.34.010(1). Both statutes are in Appendix 3.

<sup>16</sup> ARTICLE 14. Damage or Destruction: Reconstruction

14.1 Repair or Replacement of Damaged Premises

Any portion of the condominium for which insurance is required under the terms of the Declaration (Article 13), which is damaged or destroyed, shall be repaired

section 14.1 that the board is liberated from the scope of its authority defined in Section 10.2. Language in a contract will be given its ordinary meaning unless a sufficient reason exists to apply another meaning. *Rew v. Beneficial Standard Life Ins. Co.*, 41 Wash.2d 577, 250 P.2d 956 (1952); *Jack v. Standard Marine Ins. Co.*, 1949, 33 Wash.2d 265, 205 P.2d 351, 8 A.L.R.2d 1426. Language will be given the meaning which best gives effect to the intention of the parties. The Declarations limit ARCA's authority to change the basic structures significantly without owner approval. Had the declarant wished to exempt the board from the limits on its authority in section 10.2.1(i) it would have indicated in section 14 that the board was not subject to the section 10.2.

Further, Article 14 goes on to list a comprehensive procedure for invoking its application, none of which was employed by ARCA in this case. For instance, the vote ballot (CP 402), Notice of Members Meeting (CP 404), and Board minutes authorizing the vote (CP 408) contain no mention of Section 14.1 or its procedures.

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or replaced promptly by the Association unless:

- (a) the condominium is terminated (Article 22);
- (b) repair or replacement would be illegal under any applicable local or state statute, regulation or ordinance;
- (c) at least eighty percent (80%) of the Association's voted allocated to the owners, including the vote of every owner of a unit or an assigned limited common elements which will not be rebuilt, vote not to rebuild.

The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense, which shall be assessed to the surviving units of the condominium.

CP 487 (full text in Appendix 2).

Section 10.2.1 is titled Authority of the Board. It says the board “shall acquire and shall pay for ... all goods and services requisite to the proper functioning of the condominium.” It says the board has authority “to acquire all materials, supplies, labor, services, maintenance, repairs, structural alterations ... necessary for proper operation of the common areas.... “

But section 10.2.1(i) indicates that

*The Board's power herein above enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements, including but not limited to real or personal property, (other than for purposes of restoring, repairing or replacing portions of the common areas) having a total cost in excess of Five Thousand Dollars (\$5,000.00), without first obtaining the affirmative vote of the owners holding a majority of the voting power ...; provided that any expenditure or contract for any expenditure or contract for each capital addition or improvement in excess of Twenty-five Thousand Dollars (\$25,000.00) must be approved by owners having no less than seventy-five percent (75%) of the voting power.*

So Section 10.2.1(i) indicates that for **any** action with respect to ARCA's management or repair of the common areas, Section 10.2.1(i) applies. Clearly Section 10.2.1(i) limits the authority of ARCA in Section 10.2.1(g). Similarly Section 10.1.2(i) limits the authority of ARCA in Section 14.1, since Section 14.1 relates to repair and restoration of common areas.

Thus any capital improvements over \$25,000 in connection with

the authority of section 14.1 remain subject to the requirement of 75% owner approval of Section 10.2.1(i).

Further, even projects for repair or restoration (as opposed to capital improvements) exceeding \$25,000 must be approved by 75 percent of owners under Section 10.2.1(i). Since the first reference to capital additions or improvements in excess of \$5,000 in 10.2.1(i) is qualified as excluding restoration projects and the second reference to capital additions or improvements exceeding \$25,000 in 10.2.1(i) is not qualified by the exclusion of restoration projects,<sup>17</sup> the intent of the declaration is clear in that any project, whether for capital additions or improvements or for restoration, repairing or replacing portions of the common areas, in excess of \$25,000 requires approval of more than 75% of owners.<sup>18</sup>

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<sup>17</sup> The Board's power herein above enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements, including but not limited to real or personal property, **(other than for purposes of restoring, repairing or replacing portions of the common areas)** having a total cost in excess of Five Thousand Dollars (\$5,000.00), without first obtaining the affirmative vote of the owners holding a majority of the voting power ...; provided that **any expenditure or contract for any expenditure or contract for each capital addition or improvement in excess of Twenty-five Thousand Dollars (\$25,000.00)** must be approved by owners having no less than seventy-five percent (75%) of the voting power. Declarations, Section 10.2.1(i) (CP 312) (Appendix 1).

<sup>18</sup> This interpretation is reinforced by section 10.2.1(l) which provides that

The Board shall not, however, in any case acquire by lease or purchase real property valued in excess of Five Thousand Dollars (\$5,000.00) except upon a majority vote of the condominium unit owners, or valued in excess of Twenty-Five Thousand Dollars (\$25,000.00) except upon a seventy-five percent (75%) affirmative vote of the condominium owners....”

Thus Mr. Pedersen argues that the contract involved in the initial assessment required 75% owner approval regardless of whether it is a capital improvement project or a repair project.

For this reason, the court was in error to rule that the association was not subject to the requirement of obtaining 75% owner approval of the 4.2 million dollar contract and its cost overruns. Owner approval was required and without owner approval, the assessment is unlawful. It is somewhat absurd to think that an association would not require owner approval of a 4.2 million dollar project with individual assessments as high as \$84,840.<sup>19</sup>

All Mr. Pedersen's claims relative to the validity of the assessment should be reinstated.

**C. This court should reverse the trial court ruling that ARCA and its directors were not negligent and did not breach their duties because those rulings are beyond the scope of the summary judgment motion.**

ARCA framed the issue for resolution in its Motion for Summary Judgment as follows:

Whether ARCA is entitled to a Summary Judgment against the

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CP 312 (Appendix 1).

<sup>19</sup> This is one of several other claims that Mr. Pedersen asserted relative to the validity of the assessment. He also challenged the allocation of the project cost proportionally among all owners when limited common area repairs must be paid for by the benefitting owner(s). These other claims were not evaluated in any way on the merits. Instead it was dismissed with prejudice without any consideration at all.

defending Unit Owners for the unpaid balance owing on a special assessment, plus late interest and related collection fees and costs, when the special assessment did not require authority of a membership vote and ninety percent of the association members ratified the assessment and restoration project by paying the special assessment?<sup>20</sup>

The motion contains no mention of the board's or ARCA's lack of negligence. Yet the court went on to rule that

ARCA was not negligent, nor did it breach its duty, in the management of the restoration and repair project.<sup>21</sup>

This ruling, and any rulings related to whether ARCA or its board members properly exercised their duty is beyond the scope of the motion for summary judgment.

The purpose of the civil rules is to give notice to the other party of the relief sought. "CR 7(b)(1) requires that a motion 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 402, 622 P.2d 1270 (1981). When a trial court goes beyond the scope of relief requested it deprives the parties and others of notice that such relief would be granted.

The only issues presented by the motion were whether the vote required "authority of a membership vote" and whether there was an unpaid balance on the special assessment. CP 426, lines 2-7. ARCA

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<sup>20</sup> CP 426, Section IV.

<sup>21</sup> CP 649, para. 3.3.

argued lack of standing due to nonpayment in its motion as well, but no argument was made as to ARCA's lack of negligence or lack of breach of duty. CP 420-434. A reply brief from ARCA addressed these issues (CP 635-646), but Mr. Pedersen's counsel objected to the lack of ability to respond to those arguments. RP 11, line 7 to RP 12, line 25, RP 39, line 21 to RP 40, line 5.

The court's ruling clearly exceeded the scope of the motion for summary judgment by making rulings as to the board's lack of negligence and lack of breach of duty in its order granting the motion for summary judgment and that order should be vacated.<sup>22</sup>

#### **D. Attorneys' Fees**

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<sup>22</sup> Even if the issue was properly before the court in the motion for summary judgment, Mr. Pedersen's Response outlined numerous reasons why ARCA had violated its duties, including allegations by ARCA of no less than 11 violations of duty by ARCA directors in ARCA's counterclaim against another set of owners (CP 39-40, CP 600-01), declarations from two prior directors outlining wrong doing (CP 601-02) and argument from ARCA itself as follows:

The conduct of ... Thomas Lowry, raises questions of material fact as to whether ARCA's actions were in violation of the Declaration and RCW 64.34.308. ... Despite having knowledge that the ARCA-Porter contract could exceed \$4.2 million, Mr. Lowry never disclosed to the Unit Owners at the November 16, 2006 meeting that if Porter found "Significantly Different Conditions," that the contract could go over budget and ARCA would have to pay any overages. ... Under this pretense, Mr. Lowry was able to secure sufficient votes from the Unit Owners to approve the ARCA-Porter contract. As such, the Unit Owners did not know that the contract they voted for could exceed its value and that they would have to pay for any overages.

Based on the foregoing, it is clear that Mr. Lowry's conduct raises genuine issues of material fact as to whether ARCA was in breach of "ordinary and reasonable care" under RCW 64.34.308.

CP 602, CP 790, line 1-CP 791, line 5.

Ray Pedersen requests an award of fees pursuant to RAP 18.1<sup>23</sup>

## V. CONCLUSION

As a matter of law, the court erred in ruling that Mr. Pedersen lacked standing to assert claims related to the validity of the special assessment because he had not paid the assessment. Also as a matter of law, the court erred when it ruled that the ARCA Declarations do not require ARCA to obtain an approval vote by owners for the 4.2 million dollar construction project and any cost overruns for that project. Further the court erred in ruling that ARCA and its board members were not negligent and did not violate their duties.

Mr. Pedersen requests the court vacate the trial court order on summary judgment and remand this case with instructions for Mr. Pedersen's claims for determination on the merits.

Finally, Mr Pedersen requests vacation of the judgments entered against him by the trial court and for an award of attorneys' fees and costs as the prevailing party on appeal.

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<sup>23</sup> The ARCA Declarations provide that in the event of legal action "to interpret or enforce the Declaration, the Articles, the Bylaws or Rules and regulations of the Association, the prevailing party shall be entitled to judgment against the other party for its reasonable expenses, court costs, and the attorneys' fees in the amount awarded by the court. Declarations Section 10.2.3, CP 475

Respectfully submitted by the undersigned on September 9, 2011.

**HAY & SWANN PLLC**

A handwritten signature in black ink, appearing to read "Andrew Hay", written over a horizontal line.

Andrew Hay, WSBA# 19164  
Attorney for Appellant

## **APPENDIX 1**

### **ARCA Declarations Section 10.2.1(i)**

The Board's powers herein above enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements, including but not limited to real or personal property, (other than for purposes of restoring, repairing or replacing portions of the common areas) having a total cost in excess of Five Thousand Dollars (\$5,000.00) without first obtaining the affirmative vote of the owners holding a majority of the voting power present or represented at a meeting called for such purpose, or if no such meeting is held, then the written consent of voting owners having a majority of the voting power; provided that any expenditures of contract for each capital addition or improvements in excess of Twenty-Five Thousand Dollars (\$25,000.00) must be approved by owners having no less than seventy-five percent (75%) of the voting power.

### **ARCA Declarations Section 10.2.1(l)**

The Board may, from the common funds of the Association, acquire and hold in the name of the Association, for the benefit of the owners, tangible and intangible personal property and real property and interests therein, and may dispose of the same by sale or otherwise; and the beneficial interest in such property shall be owned by the owners in the same proportion as their respective interests in the common area, and such property shall thereafter be held, sold, leased, rented, mortgaged or otherwise dealt with for the benefit of the common fund of the Association as the Board may direct. The Board shall not, however, in any case acquire by lease or purchase real property valued in excess of Five Thousand Dollars (\$5,000.00) except upon a majority vote of the condominium unit owners, or valued in excess of Twenty-Five Thousand Dollars (\$25,000.00) except upon a seventy-five percent (75%) affirmative vote of the condominium owners, in the manner specified in Subsection 10.2(i).

## APPENDIX 2

### ARTICLE 14. DAMAGE OR DESTRUCTION: RECONSTRUCTION

#### 14.1 Repair or Replacement of Damaged Premises

Any portion of the condominium for which insurance is required under the terms of the Declaration (Article 13), which is damaged or destroyed, shall be repaired or replaced promptly by the Association unless:

- (a) the condominium is terminated (Article 22);
- (b) repair or replacement would be illegal under any applicable local or state statute, regulation or ordinance;
- (c) at least eighty percent (80%) of the Association's votes allocated to the owners, including the vote of every owner of a unit or an assigned limited common element which will not be rebuilt, vote not to rebuild.

The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense, which shall be assessed to the surviving units of the condominium.

#### 14.2 Initial Board of Directors' Determinations

In the event of damage or destruction to any part of the property, the Board of Directors shall, as soon as practical and in light of all of the conditions then existing, make the following determinations with respect thereto employing such advice as the Board of Directors deem advisable.

##### 14.2.1 Extent of Damages

The nature and extent of the damage or destruction, together with an inventory of the improvements and property directly affected thereby.

##### 14.2.2 Estimates

A reasonably reliable estimate of the cost to repair and restore the damage and destruction, which estimate shall, if reasonably practicable, be based upon two or more firm bids obtained from responsible contractors.

#### 14.2.3 Insurance Proceeds

The anticipated insurance proceeds, if any, to be available from insurance covering the loss based on the amount paid or initially offered by the insurer.

#### 14.2.4 Cost in Excess of Insurance

The amount, if any, that the estimated cost of repair and restoration exceeds the anticipated insurance proceeds therefore and the amount of assessment to each unit if such excess is paid as a maintenance expense and specially assessed against all the units in proportion to the percentage of interest in the common elements.

#### 14.2.5 Recommendation

The Board of Directors recommendation whether or not such damage or destruction should be repaired or restored.

#### 14.3 Notice of Damage or Destruction

The Board of Directors shall promptly, after making the determination required under Section 14.2, provide each owner and each mortgagee who has theretofore requested special notice, with a written notice summarizing the initial Board of Directors' determinations made under this Article. If the Board of Directors fails to do so within one hundred and twenty (120) days from the date the event causing the damage or destruction, then any owner or mortgagee may make the determinations required under this Article and give the notice required hereunder.

#### 14.4 Special Meeting of Association

If the Board of Directors, pursuant to Section 14.2, shall recommend that the damage or destruction shall be repaired or restored, then it may, but shall not be required to call a special owners meeting to consider such repair and restoration work which notice shall be given simultaneously with the notice required to be given by the Board of Directors under this Article. If the Board of Directors shall elect not to call such a meeting, then the requisite number of owners required to call a special meeting under the provisions of the By-laws, within fifteen (15) days of receipt of the notice given by the Board of Directors under this Article (Section 14.3), may call a

special owners meeting to consider such repair and restoration work. Any meeting held pursuant to this Article shall be called by written notice and shall be convened not less than ten (10) nor more than twenty (20) days after the date of the notice of meeting. If the Board of Directors, pursuant to Section 14.2, shall recommend not to rebuild or restore any unit or assigned limited common element assigned to that unit, the Board of Directors shall be required to call a special owners meeting to approve such recommendation which notice shall be given simultaneously with the notice required to be given by the Board of Directors under this Article.

#### 14.5 Limitation on Restoration Work

In the event a special meeting of the owners is called to consider the repair and/or restoration of the damaged or destroyed premises, as provided in Section 14.4 above, no repair or restoration work, other than emergency work, shall be commenced until after the conclusion of the special meeting of owners.

#### 14.6 Repair or Replacement of Not all of the Damaged Premises

If all of the damaged or destroyed portions of the condominium are not repaired or replaced:

(i) the insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the condominium and the insurance proceeds attributable to the damaged units and the appended limited common elements that are to be repaired and restored shall be used for such repairs and restoration;

(ii) the insurance proceeds attributable to the units and limited common elements which are not rebuilt shall be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lienholders, as their interests may appear;

(iii) the remainder of the proceeds shall be distributed to all the unit owners or lienholders, as their interests may appear, in proportion to the common element interests of all the units.

If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under

R.C.W. 64.34.060(1), and the Association promptly shall prepare, execute and record an amendment to the Declaration reflecting the reallocation.

Notwithstanding the provisions of this section, R.C.W. 64.34.268 governs the distribution of insurance proceeds if the condominium is terminated.

#### 14.7 Definitions

##### 14.7.1 Restoration

As used in this Article, the words "repair," "reconstruct," "rebuild" or "restore" shall mean restoring the improvements to substantially the same condition in which they existed prior to the damage or destruction, with each unit and the common elements having substantially the same vertical and horizontal boundaries as before. Modifications to conform to the then applicable governmental rules and regulations or available means of construction may be made.

##### 14.7.2 Emergency Work

As used in this Article, the term "emergency work" shall mean that work which the Board of Directors deems reasonably necessary to avoid further damage, destruction or substantial diminution in value to the improvements and to reasonably protect the owners from liability from the condition of the site.

#### 14.8 Restoration by the Board of Directors

##### 14.8.1 Board of Directors Shall Restore

Unless prior to the commencement of repair and restoration (other than emergency work referred to in this Article) none of the events specified under Section 14.1 have occurred, the Board of Directors shall promptly repair and restore the damage or destruction. The Board of Directors shall use the available insurance proceeds therefore, and shall pay for the actual costs of repair and restoration in excess of insurance proceeds as a common expense, which shall be specially assessed against all units in proportion to their percentage of interest in the common elements.

##### 14.8.2 Authority to Contract

The Board of Directors shall have the authority to employ architects and attorneys, advertise for bids, let contracts to contractors and others, and

to take such other action as is reasonably necessary to effectuate the repair and restoration. Contracts for such repair and restoration shall be awarded when the Board of Directors, by means of insurance proceeds and sufficient assessments, has made provision for the cost thereof. The Board of Directors may further authorize the insurance carrier to proceed with repair and restoration upon satisfaction of the Board of Directors that such work will be appropriately carried out.

#### 14.9 Vote Required Not to Rebuild

In the event that a special meeting is called as set forth under Section 14.4 above, the damage and destruction shall be repaired and restored unless at least eighty percent (80%) of all unit owners vote not to repair and restore together with a unanimous decision of all the unit owners with units or assigned limited common elements which will not be repaired or rebuilt; provided, however, that the failure to obtain such affirmative vote shall be deemed a decision to rebuild and restore the damage and destruction; provided, further, that the failure of the Board of Directors or the owners to convene a special meeting pursuant to Section 14.4 shall be deemed a decision to undertake such repair and restoration work.

#### 14.10 Decision Not to Restore: Disposition

In the event of a decision as referred to above not to repair and restore the damage and destruction, or if such repair would be illegal and provided the Condominium has not been terminated pursuant to Article 22, the Board of Directors may nevertheless expend such of the insurance proceeds and common funds as the Board of Directors deems reasonably necessary for emergency work (which emergency work may include but is not necessarily limited to removal of the damaged or destroyed building and clearing, filling and grading the real property). The remaining funds, if any, and property shall thereafter be held and distributed as follows:

##### 14.10.1 Repair of Common Elements

The insurance proceeds attributable to the damaged common elements (except for limited common elements) shall be used to restore the damaged area to a condition compatible with the remainder of the condominium.

##### 14.10.2 Distribution to Owners of Damaged Units

The insurance proceeds attributable to units and limited common elements which are not rebuilt shall be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated, or to lienholders of such units, as their interests may appear.

14.10.3 Remaining Proceeds

The remainder of the proceeds shall be distributed to all the unit owners or as their interests may appear, in proportion to such owner's allocated interest in the common elements.

## APPENDIX 3

### RCW 64.34.010 Applicability.

(1) This chapter applies to all condominiums created within this state after July 1, 1990. RCW 64.34.040 (separate titles and taxation), RCW 64.34.050 (applicability of local ordinances, regulations, and building codes), RCW 64.34.060 (condemnation), RCW 64.34.208 (construction and validity of declaration and bylaws), RCW 64.34.268 (1) through (7) and (10) (termination of condominium), RCW 64.34.212 (description of units), \*RCW 64.34.304(1)(a) through (f) and (k) through (r) (powers of unit owners' association), RCW 64.34.308(1) (board of directors and officers), RCW 64.34.340 (voting—proxies), RCW 64.34.344 (tort and contract liability), RCW 64.34.354 (notification on sale of unit), RCW 64.34.360(3) (common expenses—assessments), RCW 64.34.364 (lien for assessments), RCW 64.34.372 (association records), RCW 64.34.425 (resales of units), RCW 64.34.455 (effect of violation on rights of action; attorney's fees), RCW 64.34.380 through 34.34.390 (reserve studies and accounts), and RCW 64.34.020 (definitions) to the extent necessary in construing any of those sections, apply to all condominiums created in this state before July 1, 1990; but those sections apply only with respect to events and circumstances occurring after July 1, 1990, and do not invalidate or supersede existing, inconsistent provisions of the declaration, bylaws, or survey maps or plans of those condominiums.

(2) The provisions of chapter 64.32 RCW do not apply to condominiums created after July 1, 1990, and do not invalidate any amendment to the declaration, bylaws, and survey maps and plans of any condominium created before July 1, 1990, if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by chapter 64.32 RCW. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter which are not otherwise provided for in the declaration or chapter 64.32 RCW, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(3) This chapter does not apply to condominiums or units located outside this state.

(4) RCW 64.34.400 (applicability—waiver), RCW 64.34.405 (liability for public offering statement requirements), RCW 64.34.410 (public offering statement—general provisions), RCW 64.34.415 (public offering statement—conversion condominiums), RCW 64.34.420 (purchaser's right to cancel), RCW 64.34.430 (escrow of deposits), RCW 64.34.440 (conversion condominiums—notice—tenants[-relocation assistance]), and RCW 64.34.455 (effect of violations on rights of action—attorney's fees) apply with respect to all sales of units pursuant to purchase agreements entered into after July 1, 1990, in condominiums created before July 1, 1990, in which as of July 1, 1990, the declarant or an affiliate of the declarant owns or had the right to create at least ten units constituting at least twenty percent of the units in the condominium.

**RCW 64.34.328. Upkeep of condominium.**

(1) Except to the extent provided by the declaration, subsection (2) of this section, or RCW 64.34.352(7), the association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the owner's unit and limited common elements reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, shall be liable for the repair thereof.

(2) In addition to the liability that a declarant as a unit owner has under this chapter, the declarant alone is liable for all expenses in connection with real property subject to development rights except that the declaration may provide that the expenses associated with the operation, maintenance, repair, and replacement of a common element that the owners have a right to use shall be paid by the association as a common expense. No other unit owner and no other portion of the condominium is subject to a claim for payment of those expenses. Unless the declaration provides otherwise, any income or proceeds from real property subject to development rights inures to the declarant.

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

RAY PEDERSEN,

Appellant,

vs.

ALLENMORE RIDGE CONDOMINIUM  
ASSOCIATION, et al.,

Respondents.

Case No.: 41571-2-II

CERTIFICATE OF SERVICE

On the 9th day of September, 2011 I emailed and mailed copies of the following documents: Ray Pedersen's Second Supplemental Designation of Clerk's Papers and Appellants Opening Brief and this Declaration to all parties listed below. I emailed the documents to the email addresses listed and placed copies of the same in sealed envelopes, with proper first class postage affixed, addressed to the following persons, entities and/or corporations in a receptacle maintained by the United States Post Office in Tacoma, Washington.

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DATED this 9th day of September, 2011.

**HAY & SWANN PLLC**



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Gary Shalgen, Paralegal

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