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No. 51616-1-II

COURT OF APPEALS, DIV. II
OF THE STATE OF WASHINGTON

North Oakes Manor Condominium Association,
Appellant,

v.

2nd Half LLC, Jeffrey Alan Graham, Stephen Roy Dawson,
and John Stafford Mills and Julie M. Mills,
Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

INTRODUCTION..... 1

ASSIGNMENT OF ERROR & ISSUES..... 2

STATEMENT OF THE CASE. 4

STANDARD OF REVIEW..... 13

ARGUMENT..... 13

 1. The WCA and the WNCA continued to govern the Association, and were not supplanted by trust law or TEDRA, after its members signed and recorded the Termination Agreement vesting title in the Association to the members’ former condominium units and to their shared common areas in order to sell the entire condominium project..... 13

 2. The Termination Agreement did not render the Association and its board of directors merely a custodial trustee with no authority to manage its assets and possible liabilities, including litigating contested issues, except as directed by an 80-percent vote of the former unit owners..... 20

 3. Even if the Termination Agreement’s provision for 80-percent approval of a plan of payment and distribution was valid, the court did not correctly interpret it..... 22

 4. The trial court ignored principles of equity, contrary to the WCA’s directive, by disallowing the Association’s action against 2nd Half and its associates unless 2nd Half authorizes the action.. 26

 5. The court acted arbitrarily on December 1, 2017, by barring the Association from controlling its own funds..... 32

 6. RCW 64.34.364(10) expressly required the trial court, upon the Association’s motion, to appoint a receiver for 2nd Half’s

units..	33
REQUEST FOR ATTORNEY FEES AND COSTS.....	34
CONCLUSION.	36
APPENDIX CONTENTS.	37

TABLE OF AUTHORITIES

Cases

<i>Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.</i> , 149 Wn.App. 429,437-38, 203 P.3d 1077, <i>review denied</i> , 166 Wn.2d 1034 (2009).....	28
<i>City of Lakewood v. Pierce County</i> , 144 Wn.2d 118, 126, 30 P3.d 446 (2001).....	16
<i>Deegan v. Windermere Real Estate/Center-Isle, Inc.</i> , 197 Wn.App. 875, 884, 391 P.3d 582 (2017).....	13
<i>Gammel v. Diethelm</i> , 59 Wn.2d 504, 508, 368 P.2d 718 (1962).....	29
<i>Hallauer v. Certain</i> , 19 Wn.App. 372, 379-80, 575 P.2d 732 (1978)....	30
<i>Hisle v. Todd Pacific Shipyards Corp.</i> , 151 Wash.2d 853, 860, 93 P.3d 108 (2004).	13
<i>In re the Estate of Rathbone</i> , Wash. Supreme. Ct. No. 94356-7 (March 15, 2018).	19
<i>Nelson v. Nelson</i> , 57 Wn.2d 321, 356 P.2d 730 (1960).....	31
<i>Rogerson Hiller Corp. v. Port of Port Angeles</i> , 96 Wn.App. 918, 927, 982 P.2d 131 (1999).	35
<i>Skyline Contractors, Inc. v. Spokane Hous. Auth.</i> , 172 Wn.App. 193, 202 , 289 P.3d 690 (2012)..	30

State v. Harris, 95 Wn.App. 741, 747, 977 P.2d 621 (1999)... 35

Water Works Properties, LLC v. Cox, 33332-9-III, 33825-8-III
(Unpublished, COA, Div. III, October 25, 2016). 29

Statutes

Chapter 277, Washington Laws of 2018, sec. 219... 20

RCW 11.96A.020. 14

RCW 24.03.095. 18

RCW 24.03.220–.230. 8

RCW 64.34.030. 20

RCW 64.34.070. 26, 27

RCW 64.34.090. 26, 27

RCW 64.34.100. 26, 27

RCW 64.34.268. 2

RCW 64.34.268. *passim*

RCW 64.34.300. 17

RCW 64.34.308. 18, 20

RCW 64.34.352. 15, 19

RCW 64.34.364. 33, 34

RCW 64.34.376. 16

RCW 64.34.455. 34

RCW 7.60.025. 33

INTRODUCTION

This appeal is by North Oakes Manor Condominium Association, a Washington nonprofit corporation (hereafter “the Association” and sometimes in the records referred to as “NOMCA” or “NOM Association”). It is governed by RCW Chapter 64.34, the Washington Condominium Act (**WCA**), and a Declaration of Condominium recorded pursuant to WCA, and by RCW Chapter 24.03, the Washington Nonprofit Corporation Act (**WNCA**) and its articles of incorporation and bylaws adopted pursuant to WNCA. In 2017, the Association had five members owning its eight condominium units, one of which, **2nd Half LLC**, had not paid assessments on its two units since 2014 and was over \$50,000 delinquent. In early 2017, the Association commenced an action to foreclose its assessment liens against 2nd Half’s units and to seek a judgment against 2nd Half for its delinquent assessments. After the trial court denied the Association’s motion to appoint a receiver for 2nd Half’s units, the parties determined that the Association’s claims against 2nd Half, plus claims against 2nd Half’s manager, Mr. **Graham**, against its attorney, Mr. **Mills**, and against its lender and alleged joint venturer, Mr. **Dawson**, could more likely be settled (but adjudicated if necessary) if the condominium first terminated and the Association sold its real estate in

then hot market for such investment properties. Pursuant to RCW 64.34.268, titled “Termination of Condominium,” all five owners executed a Termination Agreement pursuant to which the Association sold the former condominium real property in late September 2017. Shortly after that sale, the Association brought claims against 2nd Half, Graham, Mills, and Dawson, but the trial court ruled that due to language in RCW 64.34.268 and the Termination Agreement, the Association as a trustee lacked the authority to pursue that action.

This appeal chiefly requires interpretation of the WCA and the WNCA, whether RCW 64.34.268 and the Termination Agreement caused the application to the Association of WCA and the WNCA to be supplanted by RCW Title 11 (trust law and the Trust and Estates Dispute Resolution Act, **TEDRA**), and the interpretation of the Termination Agreement.

ASSIGNMENT OF ERROR & ISSUES

Assignment of Error #1: The trial court erred by ruling on February 27, 2018, that under RCW 64.34.268 and the Termination Agreement the condominium property’s sale proceeds and all the other assets of the Association were placed in a trust.

Issue #1: What body of law governed the Association after its members signed and recorded the Termination Agreement vesting title in the Association to the members' former condominium units and to their shared common areas in order to sell the entire condominium project?

Assignment of Error #2: In response to 2nd Half's CR 12(b)(6) motion, the trial court erred on January 5, 2018, by initially staying the proceeding, and on February 17, 2018, by dismissing the Association's complaint for the reason that it was not authorized by a vote of former unit owners to whom 80 percent of the votes in the Association were allocated.

Issue #2: Did the Termination Agreement render the Association and its board of directors merely a custodial trustee with no authority to manage its assets and possible liabilities, including litigating contested issues, except as directed by an 80-percent vote of the former unit owners?

Issue #3: If Termination Agreement's provision for 80-percent approval of a plan of liquidation was valid, did the court correctly interpret it?

Issue #4: Did the trial court ignore principles of equity, contrary to the WCA's directive, by dismissing the Association's action against 2nd Half and its associates unless 2nd Half authorizes the action?

Assignment of Error #3: The trial court erred on December 1, 2017,

by barring the Association from controlling its own funds.

Issue #5: Did the trial court act arbitrarily on December 1, 2017, by barring the Association from controlling its own funds?

Assignment of Error #4: The trial court erred on March 17, 2017, by denying the Association’s motion to appoint a receiver for 2nd Half’s units to collect and apply its tenants’ rents to 2nd Half’s delinquent assessments.

Issue #6: Did RCW 64.34.364(10) expressly require the trial court, upon the Association’s motion, to appoint a receiver for 2nd Half’s units?

STATEMENT OF THE CASE

The Association, a Washington state chartered nonprofit corporation, (CP 181–88) was formed pursuant to RCW Ch. 24.03 (“Washington Nonprofit Corporation Act” or **WNCA**) in 2004 to manage, pursuant to RCW Ch. 64.34 (“Washington Condominium Act” or **WCA**), the condominium project named North Oakes Manor (**NOM**) that consisted of two buildings, each with four apartment units. The owners of the eight units—each unit entitling its owner to one vote as a member of the Association—elected a board of directors to govern the Association that, since late 2014, has consisted of Heather Rankos, George Rankos, and Barbara Webster. At all times relevant here, none of the units was owner-

occupied—all were rentals. CP 302:11.

Jeffrey Graham manages 2nd Half LLC that in February 2014 acquired two condominium units with funds provided by Stephen Dawson, at prices profoundly depressed due to foundation problems, the total combined price being merely \$86,199. CP 168:4-8. 2nd Half and its attorney, John Mills, since then have filed many lawsuits and appeals against the Association, its directors and members. Pierce County Superior Court case nos. 14-2-06599-5, 15-2-05443-6, 15-2-13053-1 and 18-2-06673-1, and Court of Appeals case nos. 47651-7-II (closed), 48351-3-II (closed), 49128-1-II (pending), 49185-1-II (closed), and 49815-4-II (closed).

After a trial court ruling, upheld by the Court of Appeals in case 47651-7-II, that Graham and his father had been removed from the Association's board of directors at least by January 2015, 2nd Half stopped paying to the Association its monthly \$200, later \$250, dues assessments per unit and refused to pay a special \$12,500 assessment per unit for foundation repairs levied in 2016, though its two units were generating rental income for 2nd Half and its co-venturer, Dawson. CP 58-63, 107-08 ¶¶32-33.

This case began in February 2017 with the Association filing a

complaint to collect 2nd Half's unpaid assessments that approached \$50,000, and to establish the priority of the Association's liens over Dawson's deeds of trust on 2nd Half's two units. CP 1, 24–33. The Association moved the trial court to appoint a receiver for 2nd Half's two units, but the court denied its motion. CP 13–15, 464. Through the spring of 2017, counsel for the Association, for 2nd Half, and for Dawson discussed settlement of the Association's claims, those being the assessment claim of about \$50,000 against 2nd Half, a claim against Graham for misappropriating about \$14,000 while acting in 2014 as the Association's president, a claim against attorney Mills for wrongfully taking about \$7,300 of the Association's funds, and a claim that Dawson as a joint venturer shared liability with 2nd Half and Graham. CP 106–08, ¶¶27–34. Counsel and their clients agreed that those claims might be more readily settled if there was “a big pile of money on the table to be divided” from selling the entire condo project in the hot rental property market, since parties might be willing to compromise in order to more quickly receive their rightful share of that “big pile of money.” CP 169:19–170:12; 377–78. So all the parties, including Graham and 2nd Half, then cooperated in preparing and listing the project for sale. Favorable purchase offers were received in late July 2017. CP 119 ¶3.

RCW 64.34.268 (copy in appendix) requires for a condominium termination that owners holding at least eighty percent (80%) of the votes in its association must execute a termination agreement agreeing to the termination and “the minimum terms of the sale” of the project. The owners of seven¹ of the Association’s units (87.5%) signed such a termination agreement that then was recorded on July 26, 2017. CP 118-25. Under that statute’s subsection (4), upon the recording of such a termination agreement, title to the real property “vests in the Association as trustee for the holders of all interests in the units. ... Until the sale has been concluded and the proceeds thereof distributed, the Association continues in existence with all powers it had before termination.” And under subsection (6), “Following termination of the condominium, the proceeds of any sale of real property, together with the assets of the Association, are held by the Association as trustee for unit owners and holders of liens on the units and creditors of the Association as their interests may appear. No such proceeds or assets may be disbursed to the owners until all of the creditors of the Association have been paid or provided for.” [Emphasis added in the above extracts.]

The WNCA states the procedure for a nonprofit corporation’s voluntary dissolution, requiring that a plan of distribution of its assets be

¹ The owner of the eighth unit later also executed the Termination Agreement.

approved by a vote of two-thirds (66.7%) of its participating members.

RCW 24.03.220–.230. Graham’s 2nd Half LLC, holding 25% of the Association’s votes, sought to ensure that bona fide settlement discussions of the Association’s claims would occur before its assets were distributed, since it was apparent that the Association’s claims against 2nd Half, Graham, Mills, and Dawson might be assigned at their claimed values to 2nd Half as part of its distributive share of the Association’s assets. CP 138:21–139:10. To address Graham’s concern, the Association’s final termination agreement was drafted to require eighty percent (80%) approval of a plan of distributions. It stated that after the escrow closing agent paid all encumbrances of record and closing costs from the purchase money, “The remaining proceeds of the sale and all other assets of NOM Association will be held by it as trustee for its creditors and the unit owners. Pursuant to a payment and disbursement plan that is agreed to by the unit owners to which at least eighty percent of the votes in NOM Association are allocated, NOM Association shall pay its creditors and disburse its remaining assets to the unit owners as their interests may appear, after which it shall dissolve.” CP 119 ¶3, last two sentences.

Unstated but implicit in the dissolution distributions procedure in both the WNPA and in the Termination Agreement’s disbursement plan

procedure was the recognition that if the 66.7% or 80%, respectively, approval threshold could not be attained, then parties could petition a court to adjudicate the issues to permit equitable liquidating distributions of the corporation's assets. CP 139:8–10, 304:22–305:5. The sale proceeds and others assets (the claims) would not be frozen in perpetuity absent the requisite approval of a distributions plan.

The day before the scheduled closing of the \$1.35 million sale of the Association's real estate, Dawson's counsel, Gary Johnston, informed the closing agent that Dawson would not release his deeds of trust, both securing a single note in the face amount of \$122,000 (CP 25, 30), on 2nd Half's units unless the escrow agent disbursed to him at closing a payoff sum of \$244,870. CP 171:18–172:2. Johnston refused to provide any documentation supporting that shocking payoff figure. *Id.* It appeared to the Association that Dawson had colluded with Graham to inflate his payoff figure. *Id.* The effect of that inflated payoff figure, coupled with the closing agent's necessary payment of 2nd Half's delinquent property taxes and its four judgment liens, was that Graham's 2nd Half effectively received at the closing a significantly greater share of the Association's assets than it would be entitled. CP 172–73, 175. Since Graham's 2nd Half LLC effectively had received at closing much more than it would be

entitled as its share of the Association's assets, Graham would have no incentive after that closing to negotiate in good faith a settlement of the Association's claims against him, 2nd Half, Mills, and Dawson. The Association determined that Graham-Dawson's collusive actions had repudiated or rendered ineffective the proposed procedure that was premised upon the factual assumption that each of the former owners would negotiate in good faith about settling the claims in order to more quickly receive, without further litigation, the share of the Association's assets to which they are entitled. CP 173. Accordingly, promptly following the September 25, 2017, closing the Association paid its creditors and disbursed its available funds to the owners of the six units not owned by 2nd Half after holding back \$30,000 of the Association's funds to pay litigation costs anticipated in its lawsuit on its claims against 2nd Half, Graham, Mills, and Dawson. CP 172, 335.

On October 18, 2017, the Association filed an amended complaint in its lawsuit against 2nd Half, adding its claims against Graham, Mills, and Dawson. CP 98–110. It later it very slightly amended that complaint by adding a single clarifying relief-requested paragraph. CP 425 ¶39.

On November 1, 2017, 2nd Half filed a motion for an accounting by the Association, to which the Association responded with an accounting

such that the court on November 9 denied that motion. CP 113-179, 274.

On November 20, 2017, 2nd Half filed a motion to compel the Association to deliver to the court clerk's registry the funds, about \$30,000, that it had retained for litigation costs, then held in its counsel's IOLTA account. CP 265–306. The Association responded. CP 307–36. The court on December 1, 2017, denied the motion but ordered the Association's counsel to make no disbursement from those funds without prior court approval. CP 466.

On November 29, 2017, 2nd Half filed a motion to dismiss the Association's complaint pursuant to CR 12(b)(6), asserting that the Association lacked authority to pursue the lawsuit against 2nd Half and its associates because the Termination Agreement allegedly rendered the Association merely a directed custodial trustee that could take no actions unless directed to do so by a vote of 80% of the former condo owners, and no such vote had authorized the amended complaint against 2nd Half, Graham, Mills, and Dawson. CP 337–56. Dawson joined in that motion. CP 356–58.

On January 5, 2018, the court partially granted 2nd Half's CR 12(b)(6) motion by ordering a stay on the proceeding pending a decision by the former condo owners "about whether to authorize the action." CP

467.

On February 8, the Association filed a motion to lift the stay order, supported by papers showing that all the former condo owners as members of the Association, with the sole exception of 2nd Half, and the Association's governing board of directors vigorously supported pursuing the claims against 2nd Half, Graham, Mills, and Dawson. CP 426–46. The Association's motion requested that if the court declined to lift the stay that it dismiss the case to allow the Association to appeal. CP 435.

On February 27, the court dismiss the Association's lawsuit for the stated reason, as 2nd Half argued in its CR 12(b)(6) motion, that the lawsuit had not been authorized "by a vote of the owners to whom 80% of the votes in [the] Association are allocated." CP 469–70.

On March 16, the Association file a Notice of Appeal of the trial court's orders that had denied its motion to appoint a receiver for 2nd Half's units, that had frozen its funds in its counsel's IOLTA account, that based on CR 12(b)(6) had initially stayed and later dismissed it's lawsuit. CP 362–70.

This brief does not address the propriety of the Association's actions of paying its creditors and making a partial distributions of its liquid assets promptly following the closing of its sale of the condominium property

because the trial court did not address that issue.

STANDARD OF REVIEW

A dismissal under CR 12(b)(6) is proper only where no alleged or hypothetical facts consistent with the complaint would entitle the plaintiff to relief. The court shall regard the plaintiff's allegations in the complaint as true. *Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn.App. 875, 884, 391 P.3d 582 (2017). If on a CR 12(b)(6) motion, matters outside the complaint are considered by the court, the motion shall be treated as one for summary judgment. CR 12(b)(last sentence.) Summary judgment is appropriate only if the records before the court show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c) The appellate court's standard of review of a summary judgment is de novo. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wash.2d 853, 860, 93 P.3d 108 (2004).

ARGUMENT

- 1. The WCA and the WNCA continued to govern the Association, and were not supplanted by trust law or TEDRA, after its members signed and recorded the Termination Agreement vesting title in the Association to the members' former condominium units and to their shared common areas in order to sell the entire condominium project.**

In 2nd Half's CR 12(b)(6) motion, it asserted, "After termination, RCW 64.34.268 of the Condominium Act requires that all assets and sale proceeds be placed into trust and thereby converts the owners relationship with the Association into a trustee/trustor relationship governed by Washington's Trust Act." CP 406. 2nd Half had previously asserted that the trial court possessed plenary power to oversee the alleged "trust" based on RCW 11.96A.020, a provision of the Trust and Estate Dispute Resolution Act (TEDRA). CP 286:4-6. It appears the trial court was persuaded.

The procedure for terminating a condominium is governed by RCW 64.34.268, a section of the WCA that our state adopted in 1989 and 1990, essentially adopting for condominiums the Uniform Common Interest Ownership Act of 1982 (UCIOA-1982). That termination statute provides that if eighty percent of the ownership interests in a condominium project sign an agreement to sell the project upon specified terms, that recorded agreement terminates the condominium and constitutes a deed that immediately vests clear title in the condominium association to all the units and common areas with the power to sell the entire property free of any mortgages, liens, or other encumbrances. The statute states in its subsection (4) that "title to that real property, upon termination, vests in

the Association *as trustee for the holders of all interests in the units,*” and states in its subsection (6) that “Following termination of the condominium, the proceeds of any sale of real property, together with the assets of the Association, are held by the Association *as trustee for unit owners and holders of liens on the units and creditors of the Association as their interests may appear.*” [Emphasis added.] The official comments² to this section of the WCA (in this brief’s appendix) included a Comment 12 stating:

A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower’s undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to subsection (6).

So when a condominium association is selling former condominium property free and clear of all encumbrances, the Association owes duties to secured lenders and other lien holders whose liens on the sold property shifted to become liens on the sale proceeds.

One other provision of the WCA, RCW 64.34.352, refers to a condominium association as a *trustee* when it receives fire/casualty insurance claim proceeds in which holders of mortgages, deeds of trust, or

² Senate Journal, 51st Legislature (1990) (Appendix A, “Comments to Washington Condominium Act”), at 2090, cmt. n. These “official comments” were cited as authoritative in footnote 14 of *Casey v. Sudden Valley Community Ass’n*, 182 Wn.App. 315 (2014), *rev. denied* 182 Wn.2d 107 (2015). Also, in footnotes 6 and 18 of *Summerhill Village Homeowners Ass’n v. Roughley*, 289 P.3d 645 (2012).

other encumbrances on damaged units have an interest, recognizing that the Association owes duties to those interested parties.

Usage of the term *trustee* in two sections of the WCA, RCW 64.34.268 and .352, did not actually created express trusts. RCW 64.34.376, titled “Association as Trustee,” expressly limits the application of doctrines from the statutory and common law of trusts when a condominium association is holding insurance proceeds or termination sale proceeds for unit owners, lien or mortgage holders, and creditors. It is apparent from RCW 64.34.376 that the references to an association as a *trustee* in RCW 64.34.268 and .352 serve merely to extend the fiduciary duties owed by a condominium association’s board always to its own members to sometimes include other parties (*i.e.*, creditors, mortgage and lien holders) when an association is holding funds as to which those other parties have a lawful interest. Because of the duties owed to those other parties, it is an implied or constructive trust, but not one governed by RCW Title 11 (TEDRA). “A constructive trust is an equitable remedy which arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it.” *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001).

The Termination Agreement that the Association's unit owners signed included the *as trustee* phrase and associated language from RCW 64.34.268, but because counsel for all parties recognized that a title company would be unwilling, notwithstanding the statute, to insure a buyer's title unless encumbrances of record were extinguished at closing, the agreement directed the escrow agent to satisfy them at the closing. The paragraph nonetheless recognized that under the statute the Association held essentially constructive trustee obligations to its unsecured creditors and former unit owners.

These two mere references to *as trustee* in RCW 64.34.268 that are repeated in the Termination Agreement did not create an express trust subject to TEDRA because the very specific procedures of the WCA govern all the actions of the Association, the duties of its board, and the rights of its creditors and former unit owners. For example, RCW 64.34.268(6) requires that following a condominium termination, creditors must be paid or provided for before any assets may be distributed to former unit owners.

RCW 64.34.300 requires that a condominium association be organized as a profit or, as here, a nonprofit corporation. It provides that should any provision of the WNCA conflict with the WCA, the latter act

shall control. It also states, “Following termination of the condominium, the membership of the Association shall consist of all of the unit owners at the time of termination entitled to distributions of proceeds under RCW 64.34.268 or their heirs, successors, or assigns.” RCW 64.34.268(4) expressly states, “Until the sale has been concluded and the proceeds thereof distributed, the Association continues in existence with all powers it had before termination.”

Both the WCA and the WNCA provide that a condominium association’s board of director shall manage its affairs. RCW 64.34.308; RCW 24.03.095. And the Association’s governing documents each state, “The affairs of the Association shall be managed by a Board of Directors.” Articles of Incorporation, Art. VII (CP 184); Bylaws Art. V, sec. 1 (CP 193); Declaration of Condominium, ¶ 8.3 (CP 226). Nothing in the WCA or the WNCA permits a group of non-director members/owners, even 80% of them, to limit the authority and responsibility of a board of directors to manage the corporation’s assets and liabilities.

If the termination of a condominium caused an association to be governing by TEDRA while holding title and other assets before a sale, or holding proceeds and other assets after a sale, the conflicts between the provisions of the WCA, the WNCA, and TEDRA would be irreconcilable.

(e.g., what standard of care are directors held to?, what indemnification rights do directors have?).

If the appearance in RCW 64.34.268 if the phrase *as trustee* causes the Association of a terminating condominium to become subject to TEDRA, then the same result should apply whenever a condominium association receives fire/casualty insurance proceeds for the benefit of persons with interests in damaged units, because RCW 64.34.352 also uses the phrase *as trustee* to refer to an association's duty to such persons.

Our unanimous state supreme court very recently held that "TEDRA does not independently give trial court's authority when there is another statute through which a beneficiary must invoke authority." *In re the Estate of Rathbone*, Wash. Supreme. Ct. No. 94356-7 (March 15, 2018)(Slip Op., 15). The WCA and the WNCA give unit owners and other persons interested in assets held by a condominium association ample authority to protect their lawful interests.

The resolution of this issue of what body of law applies to the association of a terminated condominium, due to the termination statute's use of the phrase *as trustee*, is critically important because the Washington state's 2018 legislature adopted the comprehensive Washington Uniform Common Interest Ownership Act that employs that phrase in exactly the

same manner with respect to the termination of any common interest community (*i.e.*, condominium, cooperative, plat community, or miscellaneous community). Chapter 277, Washington Laws of 2018, sec. 219 (effective July 1, 2018).

- 2. The Termination Agreement did not render the Association and its board of directors merely a custodial trustee with no authority to manage its assets and possible liabilities, including litigating contested issues, except as directed by an 80-percent vote of the former unit owners.**

The Termination Agreement used the phrase *as trustee* and associated language in the same manner as in RCW 64.34.268, and added a non-statutory provision that liquidating distributions of the Association’s assets would be made pursuant to a plan of payment and distribution approved by owners to whom 80 percent of its votes are allocated. But nothing in the WCA or the WNCA permits a condominium association’s board of directors to be controlled and directed by a vote of its members because both acts provide that management shall be by the board of directors. RCW 64.34.308; 24.03.095. RCW 64.34.030 states, “Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived.” Accordingly, the Termination Agreement’s non-statutory 80-percent vote

provision—that is inconsistent with the WCA and the WNCA— should be recognized as void or invalid.

In 2nd Half’s CR 12(b)(6) motion, it creatively asserted that the Association ceased to exist as a condominium association once it made a partial distribution of some of its assets, and then was transformed into a custodial trustee that was controlled by an 80-percent vote of the former condominium owners. 2nd Half quoted one part of RCW 64.34.268(4), emphasizing the word *until*— “***Until*** the sale has been concluded and the proceeds thereof distributed, the Association continues in existence with all powers it had before termination,” (CP 339:14) then 2nd Half asserted this *non sequitur*: “Once the escrow agent closed the sale and distributed the proceeds into trust, the Association ceased to exist—except as a trustee of assets held for the benefit of creditors and former unit owners.” CP 340:4.

2nd Half’s creative arguments ignored the first two sentences of RCW 64.34.268(6) that read, “Following termination of the condominium, the proceeds of any sale of real property, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units and creditors of the association as their interests may appear. No such proceeds or assets may be disbursed to the

owners until all of the creditors of the association have been paid or provided for.” The other assets that the Association was holding—its meritorious claims against the defendants—were worth nearly \$100,000 considering statutory interest and reimbursable collection costs, in addition to the \$30,000 that it retained to fund the required litigation against those defendants. CP 172:18. And pursuant to the above-quoted statute, the Association sought judicial confirmation of its position that 2nd Half’s counsel, defendant Mills, was not a creditor entitled to payment from it. The Association’s complaint, at ¶¶ 30 and 37, sought that confirmation. CP 107, 109. Mills’ disputed creditor status is also mentioned at CP 168:26 and CP 390 (last sentence alleges Mills is due \$40,000). As matters now stand, a judicial adjudication remains necessary to establish if Mills is a creditor of the Association.

3. Even if the Termination Agreement’s provision for 80-percent approval of a plan of payment and distribution was valid, the court did not correctly interpret it.

As noted above, the 80-percent vote provision of the Termination Agreement should be recognized as invalid because its is inconsistent with the WCA and the WPCA. But if it is not invalid, it should be correctly interpreted. In 2nd Half’s reply to the Association’s response to its CR

12(b)(6) motion, 2nd Half began repeatedly referring to the Termination Agreement as a “Termination Agreement contract.” It asserted “2nd Half contends that the Termination Agreement contract ... is a legal contract, valid and enforceable, and should be enforced by the court as written.” CP 404. In its CR 12(b)(6) motion, 2nd Half wrote, “The Termination Agreement, which created the trust, specifically limits the authority of the Trustee’s power over the assets, and expressly reserves to the owners the exclusive right to authorize a “payment and disbursement plan” respecting all assets of the trust,” but immediately followed that with this *non sequitur*: “That includes a decision on whether to litigate or settle the claims which are supposed to be held in trust.”

But no language in the Termination Agreement contract prevented the Association from continuing to manage its assets prior to making liquidating distributions pursuant to an agreed or court-ordered plan. If the Association had held investment securities, no language in the Termination Agreement contract would have prevented it from selling those investments to obtain cash with which to make liquidating distributions pursuant to an agreed or court-ordered plan. If the Association had possessed a claim against a third party, such as a contractor or insurance company, no language in the Termination

Agreement contract prevented the Association from negotiating a settlement or obtaining and collecting a judgment to obtain cash with which to make liquidating distributions pursuant to an agreed or court-ordered plan. Nonetheless, the trial court interpreted the Termination Agreement contract as divesting the Association of its statutory authority as a Washington corporation governed by the WNCA and the WCA to manage its assets, barring it from prosecuting its claims against the defendants to judgments with which it could make liquidating distributions, by set-offs or by cash, pursuant to either an owners-agreed liquidating distributions plan or a court-ordered liquidating distributions plan.

The parties certainly understood that if the owners failed to agree by an 80 percent vote on a plan of liquidating distributions, then a judicial adjudication of their disputed claims would be necessary. In its complaint, the Association expressly alleged (an allegation that must now be regarded as fact) that such an understanding existed among the parties' counsel: "Counsel agreed that the claims and rights of the Association and its members more likely could be settled by agreement, or adjudicated if necessary, from the proceeds of such a sale." (Emphasis added.) CP 108 ¶ 34. And the Association's counsel emailed to the trial judge's judicial

assistant on June 5, 2017, with copies to all parties' counsel that, "we may [need] a judicial proceeding to resolve issues concerning the division of funds, so the plaintiff (North Oakes Manor Condominium Association) wishes to keep this case open until such issues are resolved." CP 170:10–12.

Mr. Graham, manager of 2nd Half, wrote on November 20, 2017, in a declaration, "What I know is that there are two choices for 2nd Half— either 1) negotiate a resolution of all the issues relating to who owes what and who's entitled to how much, or 2) we all have to get expensive appraisals, and we all go to court and 2nd Half has to incur the expenses of defending lawsuits." (Emphasis added.) CP 304:22–305:2. And he wrote in another declaration, referring to slow-paced litigation, "It [w]as a Termination Agreement that forced everyone to the bargaining table because, short of a deal, all the money would be tied up, potentially for long periods of time." CP 139:9. Indeed, nobody with common sense would imagine that the sale proceeds and all the other Association assets would be frozen in perpetuity absent an 80 percent owners' vote in settlement of the claims and without an avenue to judicially adjudicate those claims so as to allow liquidating distributions of the Association's assets. Even though it was quite apparent from the Association's Motion

to Lift the Stay Order and its attachments (CP 426–46) that the former owners of the eight condo units never will reach an 80 percent vote (because 2nd Half votes 25 percent, having owned two units) in settlement of the claims against 2nd Half and its associated defendants, the trial court determined that the Association had no authority to seek an adjudication of those claims in order that their value can be considered in the context of an agreed or court-ordered plan of liquidating distributions. That was a mis-interpretation of the language of the Termination Agreement.

4. The trial court ignored principles of equity, contrary to the WCA’s directive, by disallowing the Association’s action against 2nd Half and its associates unless 2nd Half authorizes the action.

As note above, the Association is governed by the WCA. One of its provisions, RCW 64.34.070, states:

The principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, condemnation, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter. [Emphasis added.]

RCW 64.34.090 states, “Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.”

RCW 64.34.100(1) states, “The remedies provided by this chapter shall be

liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed.” [Emphasis added.]

Perhaps the most fundamental equitable principle is that courts should not reward parties for acting in *bad faith*. Defendant 2nd Half argues that the Association may not prosecute the meritorious claims against it and the other defendants unless the former owners of 80 percent of its units direct it to do so, and because 2nd Half held 25 percent it holds a veto over any such actions. Such an argument is inconsistent with the good faith requirement of RCW 64.34.090, the liberal remedies directive of RCW 64.34.100(1), and the principles of equity that supplement the Act under RCW 64.34.070.

The inequitable conduct of Dawson and his counsel, Gary Johnston, should be considered. Just a few weeks before the closing, Johnston had represented to the Association’s counsel that 2nd Half’s debt secured by Dawson’s deeds of trust was roughly \$160,000, but on the eve of closing he demanded, refusing to provide supporting documentation, a payoff sum of \$244,870, apparently having colluded with Graham at the last minute to increase it from the previous day’s claim of \$234,870. CP 171:18–171:2.

Based upon Johnston’s representations, the Association believed that 2nd Half would be entitled to some significant portion of the net

distributable proceeds following the escrow agent's payment of the encumbrances of record, such that Graham would be motivated to negotiate in good faith a settlement of the Association's claims. But Graham-Dawson's collusively inflated payoff figure caused the escrow agent to disburse for the benefit of 2nd Half more funds than 2nd Half equitably would be entitled, so Graham/2nd Half then would have no incentive to negotiate in good faith concerning the Association's claims.

A contract is not enforceable if entered into with parties mutually mistaken as to material facts, or if one party's mistake is caused by the other party inequitable actions relating to it. In *Associated Petroleum Products, Inc. v. Northwest Cascade, Inc.*, 149 Wn.App. 429,437-38, 203 P.3d 1077, *review denied*, 166 Wn.2d 1034 (2009), the court stated:

Unilateral mistake entitles a party to reform a contract only if the other party engaged in fraud or inequitable conduct. *Gammel v. Diethelm*, 59 Wash.2d 504, 507, 368 P.2d 718 (1962) (quoting *Kaufmann v. Woodard*, 24 Wash.2d 264, 270, 163 P.2d 606 (1945)). But a unilateral failure to know or discover facts does not bar the mistaken party from avoiding or reforming the contract unless his fault amounts to a failure to act in good faith or in accordance with reasonable standards of fair dealing. *Wash. Mut. Sav. Bank v. Hedreen*, 125 Wash.2d 521, 530, 886 P.2d 1121 (1994) (quoting 1 Restatement (Second) of Contracts § 157, at 416 (1979)). A party has engaged in fraud or inequitable conduct if it conceals a material fact that it has a duty to disclose to the other party. *Wash. Mut. Sav. Bank*, 125 Wash.2d at 526, 886 P.2d 1121 (citing *Kelley v. Von Herberg*, 184 Wash. 165, 174, 50 P.2d 23 (1935)).

Similarly, in *Gammel v. Diethelm*, 59 Wn.2d 504, 508, 368 P.2d 718

(1962), the court stated:

This is not a case of mutual mistake, but is a case of mistake on the part of the purchasers and inequitable conduct on the part of the seller.

In *Kaufmann v. Woodard* (1945), 24 Wash.2d 264, p. 270, 163 P.2d 606, p. 609, we said:

‘In order to entitle a party to a contract to a reformation thereof based upon mistake of fact there must have been either a mutual mistake of the parties, or a mistake on the part of the one entrusted with reducing the contract to writing (sometimes classed as a mutual mistake), or a mistake on the part of one party and fraud or inequitable conduct on the part of the other party. *John Hancock Mut. Life Ins. Co. v. Agnew*, 1 Wash.2d 165, 95 P.2d 386; *Chapman v. Milliken*, 136 Wash. 74, 239 P. 4; *Thompson v. Stack*, 21 Wash.2d 193, 150 P.2d 387; *Hazard v. Warner*, 122 Wash. 687, 211 P. 732, 31 A.L.R. 381; *Kelley v. Von Herberg*, 184 Wash. 165, 50 P.2d 23; 45 Am.Jur., *Reformation of Instruments*, § 62, p. 621. * * *’

We there said, concerning the facts of that particular case:

‘* * * We do not find any mutual mistake in the transaction between respondent and appellants, but we do find a mistake on the part of respondent and inequitable conduct on the part of appellants.’

In a recent unpublished opinion, the court cited the above *Gammel v.*

Diethelm case in support of this statement: “Unilateral mistake allows a mistaken party to void a contract if the effect of the mistake would render enforcement unconscionable.” *Water Works Properties, LLC v. Cox*, 33332-9-III, 33825-8-III (Unpublished, COA, Div. III, October 25, 2016).

Similarly, in *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172

Wn.App. 193, 202 , 289 P.3d 690 (2012), the court stated:

As with all contracts, the existence of mutual obligations is premised on the understanding that the parties have assented to the same agreement. A mutual misunderstanding may vitiate objective expressions of mutual assent. Restatement (Second) of Contracts § 20 (1981); *Shuck v. Everett Sports Cars, Inc.*, 12 Wn.App. 28, 527 P.2d 1321 (1974). A party's contract obligations may be voidable if the party was unilaterally mistaken as to a basic assumption regarding existing facts, and the other party knew or had reason to know of the mistake or, through fault, caused the mistake. *Associated Petroleum Prods., Inc. v. Nw. Cascade, Inc.*, 149 Wn.App. 429, 437, 203 P.3d 1077 (2009).

This case law as applied to the facts supports the non-enforcement of the 80-percent vote provision that was inserted into the Termination Agreement in the eleventh hour.

Our state's case law make it clear that courts will not specifically enforce an agreement that has been tainted by inequitable conduct or that produce an inequitable result. In *Hallauer v. Certain*, 19 Wn.App. 372, 379-80, 575 P.2d 732 (1978), the court stated the doctrine:

Specific performance is not a matter of right in equity; rather, it rests in the sound discretion of the trial court. It must be exercised in accordance with general principles of equity jurisprudence, and the party seeking such relief must have acted in good faith, come into equity with clean hands and do what is just and equitable to the defendant. *Cascade Timber Co. v. Northern Pacific Ry.*, 28 Wash.2d 684, 184 P.2d 90 (1947). It will be denied where there is an adequate remedy at law, where performance is impossible and where, under the facts and circumstances, it would be inequitable to compel the defendant to perform. [footnotes to cited cases

omitted]

Similarly, in *Nelson v. Nelson*, 57 Wn.2d 321, 356 P.2d 730 (1960), our

Supreme Court wrote the following:

In *Gilman v. Brunton*, 1916, 94 Wash. 1, 161 P. 835, the trial court had, as here, dismissed an action for specific performance. We affirmed, saying, inter alia (94 Wash. at page 8, 161 P. at page 838):

‘Nor can it be said that respondents are estopped by their examination of the lands to deny appellant’s right to specific performance. This is not a case of rescission of an executed contract, in which courts are slow to grant relief where the proof of fraud is not clear and convincing and the complaining party has already consummated the contract after an inspection of the land. It is a case where resort is had to a court of conscience to enforce performance of an executory contract which would impose an inequitable burden upon one of the parties. If the contract is shown to be unconscionable, inequitable, and unfair, it is the duty of the court to deny enforcement, although the evidence might not be sufficient to justify rescission in the case of an executed contract. Taking the evidence most favorable to the appellant, it discloses that he is seeking to compel respondents to pay for property more than \$3,000 in excess of its fair value. Even if there may not have been actionable fraud on the part of appellant, still a court of conscience will not lend its aid to the enforcement of a contract which is manifestly unfair. If the appellant deems himself injured, there remains to him his remedy in an action at law for damages for breach of contract. The law on this subject is well expressed by one of the standard text books as follows:

“So, a court of equity will not lend its aid to enforce a contract which is in any way unfair, inequitable or unconscionable. And gross inadequacy of consideration may be sufficient to justify the court in refusing a decree for specific performance even though there is no such fraud or the like as would require a cancellation. The contract may be perfectly legal, and yet it will not be

specifically enforced if it is unreasonable or unconscionable, or if its enforcement will work a hardship or injustice to one of the parties.”

Being satisfied that the contract in the present case, like that in Gilman v. Brunton, supra, was ‘unconscionable, inequitable and unfair,’ and works an ‘injustice to one of the parties,’ we affirm the trial court’s dismissal of the action to compel its specific performance.

[Emphasis added.]

It is plainly inequitable to interpret or enforce the Termination Agreement as giving 2nd Half a veto power over the Association’s ability to pursue its meritorious claims against 2nd Half and its associates.

5. The court acted arbitrarily on December 1, 2017, by barring the Association from controlling its own funds.

In response to 2nd Half’s motion to compel an accounting (CP 113) the Association provided a full accounting (CP 167–79). That accounting showed that the Association had retained \$30,000 to fund the litigation necessary to collect its claims against the defendants. As noted above, the WCA and the WNCA, as well as the Association’s governing documents vests management of its funds and other assets in its board of directors. It was simply an unexplained, unnecessary, arbitrary abuse of power for the trial court, on December 1, 2017, to order the Association’s counsel to make no disbursements of the Association’s funds from his IOLTA

account without prior approval of the trial court. Those funds have been frozen in that IOLTA account since December 1, 2017, while necessary litigation and appeal expenses have had to be paid from personal funds. That freeze order should be vacated.

6. RCW 64.34.364(10) expressly required the trial court, upon the Association’s motion, to appoint a receiver for 2nd Half’s units.

Initially, in February 2017, the Association sought to foreclose its liens on 2nd Half’s units and seek a personal judgment against 2nd Half for its delinquent assessments of roughly \$50,000. 2nd Half had not paid its assessments since 2014. CP 1–12. On February 23, 2017, the Association filed a motion to exercise its statutory entitlement to have the court appoint a receiver for 2nd Half’s units. CP 13–15. RCW 64.34.364(10) expressly entitled the Association to the appointment of a receiver, stating “From the time of commencement of an action by the Association to foreclose a lien for nonpayment of delinquent assessments against a unit that is not occupied by the owner thereof, the Association shall be entitled to the appointment of a receiver to collect from the lessee thereof the rent for the unit as and when due.” (Emphasis added.) That statutory entitlement is repeated in the Association’s Declaration of Condominium. CP 241 ¶12.10. The applicable receivership statute, RCW 7.60.025(1),

does not allow a court to exercise discretion concerning whether or not to appoint a receiver when the petitioning party has a statutory entitlement to the appointment of receiver: “except in any case in which a receiver’s appointment is expressly required by statute ... a receiver shall be appointed only if the court additionally determines [to be reasonably necessary].” The trial court erred on March 17, 2017, by denying the Association’s motion for appointment of a receiver. CP 464–65. Had the court properly appointed a receiver for 2nd Half’s units, as the Association was entitled, most of the disputes in this contentious case could have been resolved without further litigation.

REQUEST FOR ATTORNEY FEES AND COSTS

The Association requests an award of reasonable attorney fees and costs relating to this appeal and the underlying trial court proceeding. There are multiple bases for such an award.

RCW 64.34.364(14) entitles the Association “to recover any costs and reasonable attorneys’ fees incurred in connection with the collection of delinquent assessments.”

RCW 64.34.455 expressly allows a court to award attorney fees and costs to a prevailing party that was adversely affected by another party’s

noncompliance with any provision of the WCA or an association's declaration or bylaws.

The Association's Declaration of Condominium expressly states, "if any dispute should arise regarding the terms of this Declaration, the Articles of Incorporation, the Bylaws, or any Rules or Regulations of the Association, the prevailing party shall recover reasonable attorney's fees and costs, including those for appeals." CP 252 ¶ 19.1.

The Association's Bylaws expressly states, "Should any dispute arise regarding the terms of these Bylaws, the Declaration, the Articles of Incorporation, or the Rules and Regulations of the Association, the prevailing party shall recover reasonable attorney fees and costs, including those for appeals."

And lastly, the case law of this state recognizes that bad faith conduct by a party allows a court to award against that party attorney fees to the affected prevailing party. *See, e.g., Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn.App. 918, 927, 982 P.2d 131 (1999), *State v. Harris*, 95 Wn.App. 741, 747, 977 P.2d 621 (1999)([W]e hold that a trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith.) The conduct of Dawson on the eve of the closing of the \$1.35 million sale of demanding, without documentation, a payoff

about \$245,000 before he'd release his deeds of trust, that he recently had represented as securing only \$160,000, demonstrated bad fath.

CONCLUSION

The trial court erred by failing to recognize and apply applicable provisions of WCA and of WNCA, failing to correctly interpret the Termination Agreement, failed to apply equitable principles and liberal remedies as WCA requited, and failing to appoint a receiver for 2nd Half's units as to which the Association was entitles. The orders appealed from should be vacated.

Respectfully submitted this 5thh day of June, 2018.

/s/ Douglas A. Schafer
Douglas A. Schafer, Attorney for Appellant
North Oakes Manor Condominium Association
(WSBA No. 8652)

Proof of Service

I certify that I served a copy of this Answer on the following parties by email or first class USPS mail, as indicated:

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/s/ Douglas A. Schafer

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North Oakes Manor Condominium Association
(WSBA No. 8652)

APPENDIX CONTENTS

A1 - A2 RCW 64.34.268

A3 - A6 Official Comments to RCW 64.34.268

RCW 64.34.268

Termination of condominium.

(1) Except in the case of a taking of all the units by condemnation under RCW 64.34.060, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies: PROVIDED, That the declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

(2) An agreement to terminate must be evidenced by the execution of a termination agreement or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date and shall contain a description of the manner in which the creditors of the association will be paid or provided for. A termination agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated and is effective only upon recording. A termination agreement may be amended by complying with all of the requirements of this section.

(3) A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real property in the condominium is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(4) The association, on behalf of the unit owners, may contract for the sale of real property in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (1) and (2) of this section. If any real property in the condominium is to be sold following termination, title to that real property, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (7) of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real property, each unit owner and the owner's successors in interest have an exclusive right to occupancy of the portion of the real property that formerly constituted the owner's unit. During the period of that occupancy, each unit owner and the owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

(5) If the real property constituting the condominium is not to be sold following termination, title to all the real property in the condominium vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (7) of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the owner's successors in interest have an exclusive right to occupancy of the portion of the real property that formerly constituted the owner's unit.

(6) Following termination of the condominium, the proceeds of any sale of real property, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units and creditors of the association as their interests may appear. No such proceeds or assets may be disbursed to the owners until all of the creditors of the association have been paid or provided for. Following termination, creditors of the association holding liens on the units, which were recorded or perfected under RCW 4.64.020 before termination, may enforce those liens in the same manner as any lienholder.

(7) The respective interests of unit owners referred to in subsections (4), (5), and (6) of this section are as follows:

(a) Except as provided in (b) of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved, within thirty days after distribution, by unit owners of units to which twenty-five percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

(b) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

(8) Except as provided in subsection (9) of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real property, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real property does not of itself withdraw that real property from the condominium, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real property from the condominium.

(9) If a lien or encumbrance against a portion of the real property that is withdrawable from the condominium has priority over the declaration, and the lien or encumbrance has not been partially released as to a unit, the purchaser at the foreclosure or such purchaser's successors may, upon foreclosure, record an instrument exercising the right to withdraw the real property subject to that lien or encumbrance from the condominium. The board of directors shall reallocate interests as if the foreclosed portion were condemned.

(10) The right of partition under chapter 7.52 RCW shall be suspended if an agreement to sell the property is provided for in the termination agreement pursuant to subsection (3) of this section. The suspension of the right to partition shall continue unless and until no binding obligation to sell exists three months after the recording of the termination agreement, the binding sale agreement is terminated, or one year after the termination agreement is recorded, whichever first occurs. [1992 c 220 § 12; 1989 c 43 § 2-118.]

COMMENTS TO THE WASHINGTON CONDOMINIUM ACT

RCW 64.34.010. APPLICABILITY.

1. The question of the extent to which a state statute should apply to particular condominiums involves the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective.

Two conflicting policies are proposed when considering the applicability of this Act to "old" and "new" condominiums located in Washington. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the uncertainties existing under RCW 64.32, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the Act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing condominiums.

2. In carrying out this philosophy with respect to "new" condominiums, the Act applies to all condominiums "created" within the state after the Act's effective date. This is the effect of the first sentence of subsection (1). The first sentence of subsection (2) makes clear that the provisions of old statutes expressly applicable to condominiums do not apply to condominiums created after the effective date of this Act.

"Creation" of a condominium pursuant to this Act occurs upon recordation of a declaration and survey map and plans pursuant to RCW 64.34.200. "Creation" of a condominium under RCW 64.32 occurs upon the recordation of the declaration, survey map and plans and an as-built verification for constructed units pursuant to RCW 64.32.020, .090 and .100. The focus of the applicability language of subsections (1) and (2) is on whether a condominium project was created before or after the effective date of this Act, and not on whether all of the units (and/or related common and limited common areas and facilities) contemplated to be part of the project have been completed or are a part of the condominium by that date. Thus, with respect to a "phased" condominium project, if prior to the effective date of this Act a declaration (together with the survey map and plans and as-built certificate for units then constructed) has been recorded, and if that declaration specifically provides for the subsequent addition of further units (and/or related common and limited common areas and facilities), then the condominium project was "created" prior to the effective date of this Act, and the subsequent addition of further units (and/or common and limited common areas and facilities) to that project is governed by RCW 64.32 and the provisions of the declaration, and not by this Act.

1. This section recognizes that the declaration, as the perpetual governing instrument for the condominium, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (1), is that the declaration, including the survey map and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely non-residential condominium, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (1) lists those other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board of directors.

2. RCW 64.34.030 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent requirement in RCW 64.34.264(4) of 90% consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (5) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

4. Subsection (6) prohibits elimination or modifying a special declarant right without the consent of the declarant and any mortgagee of record having a security interest in the right.

RCW 64.34.268. TERMINATION OF CONDOMINIUM.

1. While few condominiums have yet been terminated under present state law, a number of problems are certain to arise upon termination which have not been adequately addressed by RCW 64.32. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real property; the circumstances under which sale of units may be imposed on dissenting owners; the powers held by the Board of Directors on behalf of the association to negotiate a sales agreement; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire condominium with respect to the validity of the project; and other matters.

2. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (1) states a general rule that 80% consent of the unit owners would be required for termination of a project. The declaration may require a larger percentage of the unit owners and, in a non-residential project, it may also require a smaller percentage. Pursuant to RCW 64.34.272 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, will require the consent of a percentage of the lenders before the project may be terminated.

3. As a result of subsection (3), unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result

might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made.

4. Subsection (2) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real property is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. Importantly, the agreement becomes effective only when it is recorded.

5. Subsection (3) deal with the question of when all the real property in the condominium, or the common elements, may be sold without unanimous consent of the unit owners.

6. Subsection (4) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on unit owner approval. This section also makes clear that, upon termination, title to the real property shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this section makes clear that, until the association delivers title to the condominium property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real property will not be impaired.

7. Subsection (5) contemplates the possibility that a condominium might be terminated but the real property not sold. While this is not likely to be the usual case, it is important to provide for the possibility.

8. A complex series of creditors' rights questions may arise upon termination. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted, and unsecured creditors of the association. Subsection (6) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those competing claims.

9. Subsection (7)(a) departs significantly from RCW 64.32. Under that act the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination.

10. Subsection (7)(b) is an exception to the "fair market value" rule. It provides that, if appraisal of any unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

11. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (1) of this section.

12. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to subsection (6).

13. With respect to the association's role as trustee under subsection (6), see RCW 64.34.376.

14. If an initial appraisal made pursuant to subsection (7) were rejected by vote of the unit owners, the association would be obligated to secure a new appraisal.

15. "Foreclosure" in subsection (8) includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on real property which may be converted or withdrawn from the project. See RCW 64.34.020(19).

16. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

17. Subsection (9) recognizes the possibility that a pre-existing lien might not have been released prior to the time the condominium declaration was recorded. In the absence of a provision such as subsection (9), recordation of the declaration would constitute a changing of the priority of those liens; and it is contrary to all expectations that a prior lienholder may be involuntarily subjected to the condominium documents. For that reason, this section permits the nonconsenting prior lienholder upon foreclosure to exclude the withdrawable real property subject to its lien from the condominium.

RCW 64.34.272. RIGHTS OF SECURED LENDERS.

1. In a number of instances, particularly sale or encumbrance of common elements, or termination of a condominium, a lender's security may be dramatically affected by acts of the association. For that reason, this section permits ratification of those acts of the association which are specified in the declaration as a condition of their effectiveness.

2. There are three important limitations on the rights of lender consent. They are: (1) a prohibition on control over the general administrative affairs of the association; (2) restrictions on control over the association's powers during litigation or other proceedings; and (3) prohibition of receipt or distribution of insurance proceeds prior to application of those proceeds for rebuilding.

3. It is important that lenders not be able to step in and unilaterally act as receiver or trustee of the association. There may, of course, be occasions when a court of competent jurisdiction would order

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