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No. 67608-3-I

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

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**BANK OF AMERICA, N.A.,** *Appellant,*

v.

**MICHAEL FULBRIGHT,** *Respondent.*

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**REPLY BRIEF**  
of  
*Appellant*  
**BANK OF AMERICA, N.A.**

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Appeal from the Superior Court of King County,  
the Honorable Suzanne Barnett, Case No. 11-2-16855-7 SEA

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## INTRODUCTION

Respondent's Brief fails to refute Appellant Bank of America's qualification as a redemptioner subsequent in time to the foreclosed COA lien.

As detailed in its Opening Brief, Bank of America is an authorized redemptioner under Washington law for two independent reasons: (1) its lien against the condominium was subsequent in time to the perfected condominium association ("COA") lien; and (2) the redemption statute was not drafted – and should not be interpreted – to foreclose the redemption rights of the primary lienholder whose interest was subordinated and extinguished by a COA lien.

Mr. Fulbright acknowledges his involvement in another appeal before this Court involving similar issues (Resp. Br. at 8), but he does not reveal his efforts to obtain windfalls by blocking Bank of America's redemption of other foreclosed condominiums. Bank of America has filed three lawsuits with the King County Superior Court in order to preserve the status quo and toll the expiration of the redemption period on those condominiums (Cause Nos. 11-2-26940-0 SEA, 11-2-35753-8 KNT and 11-2-40229-1 SEA). In those cases, as here, Mr. Fulbright acquired condominiums for approximately 5% market value and then refuses to

acknowledge Bank of America's redemption rights, damaging both the borrowers and Bank of America.

The appeal pending before the Court in *GMACM, LLC v. Summerhill Village Condominium Association* (No. 66455-7-I), does, as Mr. Fulbright points out, involve similar questions about lienholder rights after foreclosure of a COA lien; however, it also differs from this case in critical respects – notably because, in the GMAC case, the parties dispute whether GMAC took timely steps to redeem the property, which is not an issue here.

More important, the GMAC and Bank of America arguments differ concerning whether the foreclosed deeds of trust were subsequent in time to each foreclosed COA lien. In both cases, the relevant COA declaration was recorded *before* the lender recorded its deed of trust. But in its briefing, GMAC did not argue that its deed of trust was subsequent in time to the COA lien – and, in fact, said it was not. Thus, GMAC never took Bank of America's position here – that Bank of America's Deed of Trust is, as a matter of fact, subsequent in time to the COA lien.

The GMAC case thus could be resolved on procedural grounds or points of law not fully vetted.

Here, the Court has the opportunity to put to rest the notion – which is refuted by the plain language of the COA Act – that a lienholder

cannot redeem from a foreclosure on a COA lien. The fact that the condominium declaration was recorded prior to Bank of America's Deed of Trust is fatal to Mr. Fulbright's position and supports finding in favor of Bank of America.

(A) **Bank of America's Deed of Trust Is "Subsequent in Time" to the Tanglewood Association's COA Lien as a Matter of Fact.**

Under Washington law, only certain parties are entitled to redeem a property sold at a sheriff's sale. Such parties include a "creditor having a lien by . . . deed of trust . . . subsequent in time to that on which the property was sold." RCW 6.23.010(1)(b). In this case, the property is a condominium that is part of the Tanglewood at Klahanie Condominium Association. The Tanglewood Association recorded its condominium declaration on December 20, 2006 under King County Recording No. 20061220000983 (the "Tanglewood Declaration") (CP 40-98).

By law, the recording of the declaration "constitutes record notice and *perfection* of the lien for assessments" that result from any assessments levied against a unit. RCW 64.34.364(7) (emphasis added). Per RCW 64.34.364(7): "[N]o further recording of any claim of lien for assessment under this section shall be required to perfect the association's lien . . . ."

Here, per RCW 64.34.364(7), Tanglewood Association created and *perfected* the COA lien on December 20, 2006 when the Tanglewood Declaration was recorded (CP 40-98). Furthermore, under RCW 64.34.364(7), once the Tanglewood Declaration was recorded in 2006, no further recording of any claim of lien for assessments was required to perfect the foreclosed Tanglewood Association lien. Bank of America's Deed of Trust was recorded in 2007, which is subsequent in time to the 2006 Tanglewood Declaration (CP 141-58). Therefore, Bank of America is an authorized redeptioner "subsequent in time" per RCW 6.23.010(1)(b).

Mr. Fulbright strains to disagree. First, he invites the Court to undermine the very purpose of the Redemption Act, RCW 6.23 *et seq.*, by suggesting that if Bank of America had paid the lien, "the Sheriff's sale would not have extinguished or otherwise affected the 2007 Deed of Trust" (Resp. Br. at 7). As Washington case law makes clear, the purpose of the Redemption Act is to give lienholders a second chance to protect their interests – "to allow creditors to recover their just demands." *Millay v. Cam*, 135 Wn.2d 193, 207, 955 P.2d 791 (1998). Ignoring this public policy directive is essential to Mr. Fulbright's position.

Next, Mr. Fulbright challenges Bank of America's right of redemption by disputing the applicability of RCW 64.34.364(7), which

states, in unequivocal language, that recording of the declaration “constitutes record notice and perfection of the lien for assessments.” Mr. Fulbright’s earlier pleadings omitted any reference to, citation to, or quotation from RCW 64.34.364(7). But in objecting to Bank of America’s Motion for Leave to File a Brief Amicus Curiae in Appeal No. 66455-7-I, Mr. Fulbright acknowledged that GMAC’s Opening Brief had included the statute’s full text, and he dismissed Bank of America’s concern that “the Court will ignore RCW 64.35.364(7)” (Resp. to Amicus Mot. at 4). In other words, Mr. Fulbright accepts its relevance here.

Mr. Fulbright erroneously contends that Bank of America did not include this argument “in its briefing for the summary judgment motion” (Resp. Br. at 16-17, *citing* CP 114-33, 399-403). The briefing says otherwise. Bank of America specifically argued the applicability of RCW 64.34.364(7) in direct response to Mr. Fulbright’s position that the 2007 Deed of Trust was not chronologically “subsequent in time” to the Tanglewood Association’s lien (CP 400-01). Bank of America argued that “pursuant to RCW 64.34.364(7), the COA Lien was *perfected* and *created* by statute on [December 20, 2006]. Consequently, [the] 2007 Deed of Trust was *chronologically* subsequent in time to the COA Lien” (CP 400-01) (emphasis in original).

Mr. Fulbright's Brief underscores the relevancy and applicability of RCW 64.34.364(7). He states: "Without RCW 64.34.364(7), an association would have to record monthly lien notices as assessments became due *to avoid losing its lien priority* under RCW 65.08.070" (Resp. Br. at 17) (emphasis added). Thus, it is important to note that Mr. Fulbright readily admits that RCW 64.34.364(7) and the recording of the 2006 Tanglewood Declaration perfected the lien *priority* of the foreclosed Tanglewood Association lien. The Bank of America 2007 Deed of Trust was "subsequent in time;" therefore, Bank of America is a qualified redemptioner.

Mr. Fulbright then attempts to downplay the relevancy and significance of RCW 64.34.364(7), by arguing for the first time, that under RCW 64.34.364(15), "lenders must look to the association statements, not the recording records, to ascertain the existence of actual assessment liens at any given time" (Resp. Br. at 17).

First, section 15 has no bearing on this appeal. The issue is whether Bank of America's Deed of Trust is subsequent in time to the foreclosed COA lien. RCW 64.34.364(15) simply authorizes the COA to furnish information to the owner or the mortgagee about the amount of any unpaid assessments:

The association upon written request shall furnish to a unit owner or a mortgagee a statement signed by an officer or authorized agent of the association setting forth the amount of unpaid assessments against that unit. . . .

RCW 64.34.364(15). *See* Washington State Bar Association, Real Property, Probate & Trust Section, Comments to the Washington Condominium Act, Feb. 7, 1990 at 44 n.13 (“[S]ubsection (15) provided unit owners a method to determine the amount presently due and owing.”) But RCW 64.34.364(7) makes it clear that the lien itself is *perfected* at the time of the declaration’s recording. Indeed, if Mr. Fulbright’s interpretation was accepted, RCW 64.34.364(7) would be meaningless – contrary to all rules of statutory interpretation.

Mr. Fulbright misapprehends the import of the *Mira* decision as well. In that case, the U.S. District Court held that RCW 64.34.364(1) “provides that assessment liens automatically *attach* at the time the assessment is due.” *Mira Owners Ass’n v. Lawrence*, C10-630RAJ, 2011 WL 677425 at \*3 (W.D. Wash. Feb. 16, 2011) (emphasis added). The court thus confirmed that section 7 provides for record notice and perfection of the lien, while section 1 provides for the attachment of that pre-recorded, pre-existing lien. The court then proceeded to determine the relative priority of federal tax and COA liens. What the court did not

conclude, however – contrary to Mr. Fulbright’s contention contends – is that the COA lien did not *exist* until an assessment amount was attached.

To be sure, a specific amount of money owed must be attached in order to make the COA lien *enforceable*.<sup>1/</sup> *Mira*, 2011 WL 677425 at \*2. But the Redemption Act is not based on when a lien becomes enforceable; it operates according to when the lien first *existed*, i.e., when it was recorded and *perfected*.

The foreclosed Tanglewood Association lien and the holding of *Mira* are akin to how a home equity line of credit (“HELOC Loan”) operates. A HELOC Loan is a revolving homeowner line of credit secured by a deed of trust. The Borrower draws on the HELOC Loan and pays the balance off or down over a span of time. Repayment of the HELOC Loan is secured by a deed of trust against real property. If the borrower defaults, then the *recording date* of the HELOC Loan deed of trust establishes the *lien priority* for purposes of foreclosure – lien priority is *not* based upon the *default date*.

The same reasoning applies here. Per RCW 64.34.364(7), *recording* the Tanglewood Declaration *perfected* a COA lien in

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<sup>1/</sup> For this reason, Mr. Fulbright’s argument that Bank of America’s interpretation would render meaningless the phrase “from the time the assessment is due” is without merit (Resp. Br. at 19.) Obviously, a COA cannot have a foreclosable interest *prior* to a delinquent assessment.

perpetuity. For purposes of determining lien priority between Tanglewood Association and Bank of America, and as with a HELOC Loan, the homeowner default date is immaterial. Rather the determinative factor is *when* the COA lien was *initially perfected*. Here, Tanglewood Association perfected its lien in 2006 with recording the Tanglewood Declaration, whereas Bank of America's Deed of Trust was recorded in 2007. Therefore, Bank of America's lien was subsequent in time and therefore qualifies as a redemptioner.

RCW 6.23.010 authorizes redemption by a creditor whose lien is "subsequent in time to that [lien] on which the property is sold." Given that the "[r]ecording of the declaration constitutes record notice and perfection of the [COA] lien for assessments," Washington law recognizes the existence of the COA lien at the time of recording. RCW 6.23.010(1)(b); RCW 64.34.364(7). Here, the Tanglewood Declaration, the document that perfected the Tanglewood Association lien, was recorded in 2006. In comparison, the Bank of America Deed of Trust was recorded in 2007 and is thus "subsequent in time" per RCW 6.23.010(1)(b).

**(B) Alternatively, Bank of America Should Be Recognized as an Authorized Redemptioner as a Matter of Law.**

Leaving aside the undisputed fact that 2007 Deed of Trust is “subsequent in time” to the COA lien because it was recorded after the Tanglewood Declaration, the parties’ remaining arguments also strongly favor recognizing Bank of America as an authorized redemptioner.

First, the cases marshaled by Mr. Fulbright do not endorse his position. Mr. Fulbright asserts: “The Washington courts have consistently refused to extend the right of redemption to parties not expressly authorized by statute” (Resp. Br. at 21). But he relies on cases that are largely irrelevant to the issue here.

Redemption was not authorized in *Fidelity Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 53, 767 P.2d 1382 (1989) and *Capital Investment Corp. of Washington v. King County*, 112 Wn. App. 216, 228, 47 P.3d 161 (2002), because the right to redeem cannot be transferred separately from the underlying title or lien. That situation has no bearing here. Also, in *Graves v. Elliot*, 69 Wn.2d 652, 419 P.2d 1008 (1966), a senior lienholder who was *not* foreclosed was trying to redeem. There is no dispute here that Bank of America’s interest in the condominium was foreclosed and extinguished.

Mr. Fulbright argues that *Rustad Heating & Plumbing Company v. Waldt*, 91 Wn.2d 372, 588 P.2d 1153 (1979), “did not disregard any plain, unambiguous language or rewrite any statute as now requested by Bank of America” (Resp. Br. at 22). This statement is inaccurate and downplays the

significance of *Rustad* to the interpretative question in this appeal.

To begin with, Bank of America does not propose that this Court disregard any plain, unambiguous language or rewrite any statute; instead, this Court should enforce the plain, unambiguous language of RCW 64.34.364(7), and thus hold that Bank of America's lien arose "subsequent in time" to the COA lien as a matter of fact and law. But if this Court should for some reason veer from the plain, unambiguous language of the COA Act, then any differing interpretation should fulfill the purpose of the COA Act and the Redemption Act.

Like Mr. Fulbright, the sheriff's sale purchaser in *Rustad* posited a strict and literal interpretation of the statute – in that case, the pre-1987 definition of redemptioner. That definition only provided the right of redemption to a foreclosed mortgagee. The statute did not provide the right of redemption to a foreclosed deed of trust beneficiary.

The Washington Supreme Court concluded that a deed of trust is indistinguishable in principle from a mortgage and looked through the form of the transaction to determine its substance. *Rustad*, 91 Wn.2d at 376. Thus, *Rustad* held that a deed of trust is a species of mortgage and allowed the foreclosed deed of trust beneficiary to redeem.

As with *Rustad*, the Revised Code of Washington instructs courts to avoid strict construction: "The provisions of this code shall be

liberally construed, and shall not be limited by any rule of strict construction.” RCW 1.12.010. Moreover, courts “should avoid a literal reading resulting in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over the express but inept wording.” *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981); *see also State v. Brasel*, 28 Wn. App. 303, 309, 623 P.2d 696 (1981).

RCW 1.12.010 and related case precedent ensure that statutes are liberally construed to effectuate the underlying purpose for the laws. This Court should look at the substance and purpose of RCW 6.23.010(1)(b) and find that a creditor who is “subsequent in time” is indistinguishable in principle from a “junior” creditor. To find otherwise would be to deny redemption to a foreclosed junior lienholder – exactly the opposite conclusion reached by *Rustad*.

Not surprisingly, Mr. Fulbright also discounts the consistent view of secondary sources that the Redemption Act applies to *junior* lienholders, which is akin to a lienholder subsequent in time. (Resp. Br. at 30-31). Mr. Fulbright admits that references to these sources “may seem to support Bank of America's position in this case, but that is only because they are taken out of context” (Resp. Br. at 31). The supposedly missing “context,” he claims, is the COA super-priority lien statute.

If the Redemption Act is meant to apply in a purely chronological fashion, then the secondary sources could have easily indicated that. Instead, the commentators agree with Bank of America that the Redemption Act is intended to allow *junior* lienholders to redeem.<sup>2/</sup> Mr. Fulbright cannot cite a single secondary authority favorable to his position because, quite simply, none exists.

Even accepting Mr. Fulbright's view that Bank of America's Deed of Trust is somehow not chronologically "subsequent in time" to the COA lien, Bank of America should nevertheless be considered an authorized redemptioner, because the COA foreclosure extinguished its interest in the condominium.

(C) **Public Policy and Practice Do Not Support Mr. Fulbright's View.**

The Redemption Act is designed to ensure that the foreclosing lienholder, the sheriff sale purchaser and the redemptioner are made whole. Here, if Tanglewood Association was the winning bidder, then the Redemption Act would have ensured that Tanglewood Association was made whole if Bank of America redeemed.

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<sup>2/</sup> "Statutory redemption is designed to promote several public policies. Most obviously, it gives the debtor, whose title has been lost, and *junior lienors*, whose liens have been extinguished, a grace period, beyond the sale, to salvage something." 27 Marjorie Dick Rombauer, *Washington Practice, Creditors' Remedies – Debtors' Relief* § 3.19 (2010) (emphasis added).

Likewise, Mr. Fulbright, the winning third-party bidder, is made whole by Bank of America's redemption. Under RCW 6.23.020(2), if Bank of America redeems, Mr. Fulbright is refunded his entire bid amount of \$14,481.83, interest at 12.000% per annum, plus any taxes and assessments that Mr. Fulbright has incurred. RCW 6.23.020(2).

Bank of America's position is completely consistent with this statutory arrangement. Mr. Fulbright, a third-party bidder at the sheriff's auction, satisfied the Tanglewood Association's judgment. Bank of America, as an authorized redemptioner, will repay Mr. Fulbright's winning bid, together with any other applicable costs, plus interest. Bank of America would obtain ownership of the condominium, having lost its Deed of Trust securing \$277,000 in loan proceeds. Bank of America could then mitigate its losses and re-sell the condominium at market value and extinguish the borrower's debt.

Mr. Fulbright's position, on the other hand, would create distorted outcomes – essentially imposing a punitive fine on lenders and leaving foreclosed borrowers at risk of significant money judgments rather than making all parties whole. Bank of America, whose Deed of Trust was extinguished, would have no opportunity to redeem and obtain ownership of the condominium – and market the condominium to discharge the foreclosed borrower's debt. Mr. Fulbright would reap a sizeable profit by

paying only his winning bid of \$14,481.83 – roughly *five* percent of the purchase price of the condominium, while leaving the foreclosed borrower with a debt of over \$300,000.00 and Bank of America with no security to mitigate its loss (CP 139). Mr. Fulbright fails to explain how his significant profiteering to the detriment of the foreclosed homeowner and Bank of America is not strained or absurd, or how it furthers the policies of the Redemption Act and the COA Act.

Mr. Fulbright also seeks to downplay the significant monetary impact on the borrower and Bank of America. He describes the borrower’s liability on the remaining loan balance as “theoretical” and suggests that filing for bankruptcy would discharge this debt (Resp. Br. at 32). Meanwhile, of course, Bank of America’s losses are very real, as is Mr. Fulbright’s windfall profit. Mr. Fulbright essentially contends that the law should be interpreted to preserve the gains of a stranger to the deed of trust, while leaving the borrower and the lender worse off.

The only purpose served by Mr. Fulbright’s approach would be to punish lenders who inadvertently fail to avert a COA foreclosure by timely paying off the COA’s super-priority lien. It would also leave lenders with no option other than to sue the already foreclosed homeowner on the underlying promissory note. This is not a policy of the Redemption Act or the Condominium Act.

The Condominium Act is designed to ensure that the COA does not suffer from missed common expenses payments during the months preceding the sheriff's sale. RCW 64.34.364(2) gives a COA lien priority over other liens and encumbrances, but also carves out exceptions to this priority, notably for mortgages "recorded before the date on which the assessment sought to be enforced became delinquent." *Id.* Within this exception, however, resides its own exception: a COA lien for assessments of up to six months of common expenses has priority over those mortgages. RCW 64.34.364(3). Thus, no matter who forecloses, the COA lien will maintain a limited superiority. Allowing Bank of America to redeem does not upset this outcome. Rather, redemption benefits the COA because the lender has to pay the entire sheriff sale bid, usually the full judgment amount, rather than just six months of assessments.

Mr. Fulbright correctly recounts the comments to the Washington Condominium Act, which state that "mortgage lenders will most likely pay the assessments . . . rather than having the association foreclose on the unit" (Resp. Br. at 22). That is Bank of America's policy; it regularly pays off COA liens and thus avoids the significant time and expense associated with the alternative of redeeming a property. Here, Bank of America failed to pay off the COA lien due to an internal procedural error

(CP 135). Punishing Bank of America would serve no corrective purpose here since the errant behavior was unintentional.

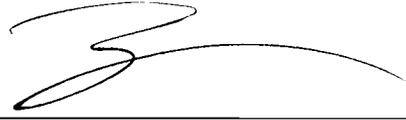
**CONCLUSION**

For these reasons, the Court of Appeals should reverse the Superior Court and grant the relief requested by Bank of America in its Opening Brief.

Dated: January 11, 2012

Respectfully submitted,

By: \_\_\_\_\_



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No. 67608-3-I

DECLARATION OF SERVICE

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on January 11, 2012, I caused a copy of the REPLY BRIEF OF APPELLANT BANK OF AMERICA, N.A. and DECLARATION OF SERVICE to be served to the following in the manner noted below:

Law Office of Michael Fulbright Attn: Michael Fulbright 11820 Northup Way, Ste. E200 Bellevue, WA 98005	<input checked="" type="checkbox"/> First Class Mail
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[X] Courier

6 3. I declare under penalty of perjury under the laws of the state of Washington that the  
7 foregoing is true and correct.

8 DATED this 11<sup>th</sup> day of January, 2012.

9 **ROUTH CRABTREE OLSEN, P.S.**

10 By: Jamie Estrada  
11 Jamie Estrada, Paralegal