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No. 67267-3

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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BELLEVUE PACIFIC CENTER LIMITED PARTNERSHIP,  
a Washington limited partnership,

Plaintiff/Respondent,

v.

BELLEVUE PACIFIC TOWER CONDOMINIUM OWNERS  
ASSOCIATION, a Washington non-profit corporation,

Defendant/Appellant.

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STATE OF WASHINGTON  
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APPELLANT BELLEVUE PACIFIC TOWER  
CONDOMINIUM OWNERS ASSOCIATION REPLY BRIEF

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ORIGINAL

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## I. INTRODUCTION

The belittlement and misrepresentation contained in Respondent Bellevue Pacific Center Limited Partnership's ("Limited") response brief exemplifies what it has been like to serve as a board member at the Bellevue Pacific Tower Condominium ("Tower") with Limited as the declarant. Contrary to Limited's characterization of Tower and its board as a static body with a questionable set of motives and behavior, in reality Tower home ownership is heterogeneous and has fluctuated regularly over the year. Through all of the situations sensationalized in Limited's response, the common denominator has been Limited, itself.

Rather than focusing on what the declarations actually say and harmonizing them, Limited glosses over the facts, feigns surprise and misstates Appellant Bellevue Pacific Tower Condominium Owner's Association's ("Tower COA") arguments for purposes of setting up a straw man to knock down. For example, rather than discuss Art. 6.5.3 of the Tower Declaration ("Tower Dec.") and Art. 6.7 of the Bellevue Pacific Center Condominium Declaration ("Center Dec."), which are not discussed anywhere in its brief, Limited focuses instead on the public offering statement ("POS") that only those persons purchasing directly

from the declarant are provided. But these two articles directly impact the use of parking stalls by the Tower. Limited cannot expect that by ignoring them they will disappear. Limited's misdirection, as it successfully misdirected the Tower Board in 2000, cannot continue.

## II. SUMMARY OF CONTRADICTIONS

Limited glosses over the nuances of the Tower and Center Decs. and leaves out certain facts. The following chart depicts some of those nuances which have been ignored by Limited and which are discussed in Tower COA's opening brief and below:

Page	Limited's Position	What Really Happened
1, 10	In early 2000 Tower unit owners decided they wanted to use the courtyard parking for free.	Limited's sales facility rights, granted under Tower Dec., Art. 25.1.2, ended on 12/31/99 and owners expected parking to revert to them. CP 118.
10	Tower COA hired an attorney in 2000 to analyze the issue of allocation of parking stalls.	Doug Meyers specifically disputes that Tower COA hired an attorney to look into the allocation issue. CP 394-96.
2, 26	The 2001 lawsuit was over the "proper interpretation of the Declarations."	The 2001 litigation arose "over the allocation of building expenses and with Limited over the allocation of voting rights." Resp. Br. at 11.
2, 32	In 2007 the Tower COA suddenly "decided [the Tower Dec.] did not mean at all what it said."	In 2007 the sale of the Commercial and Garage Units prompted a review of the Center Dec. and the expiring special declarant rights under the Center Dec. Only then did the problem with how the courtyard parking was being handled come to light. CP 291-92.

3, 25, 26, 28, 30, 36	Limited and Tower COA engaged in a course of conduct demonstrating “mutual understanding” of the use of the courtyard stalls.	Limited created the mutual understanding by agreeing with its own agents. Indeed, Limited’s agent signed the first lease on behalf of Tower COA. CP 394-96.
8	Limited had the right to rent the courtyard parking stalls until they were allocated to a unit.	Tower Dec., Art. 6.6.2, provides that Limited only has the right to rent parking stalls to which they had reserved allocation rights. Art. 6.5.3 does not reserve to Limited the right to allocate the courtyard stalls.
20	The two declarations are for different (though related) condominiums.	The Tower and Center Decs. direct that they be read together. See Tower Dec., Art. 6.5.3, which incorporates Center Dec., Art. 6 and 25.
23	The 9 courtyard stalls are just like the 122 parking stalls on P1.	While the 9 courtyard stalls may be a common element of the Tower under Limited’s analysis, they are encumbered by the Center Dec. unlike the 122 parking stalls on P1 and may only be reallocated through specific permission, which is not granted in Tower Dec., Art. 6.5.3.
44	The issue of the right to allocate is covered by the 2003 release and therefore precludes Tower COA’s affirmative defenses.	The allocation of all 9 parking stalls to unit 703 did not take place until 2009. Hence the issue of whether this allocation is an initial allocation did not arise until then and cannot be covered by the 2003 MOU.
45	All of Limited’s parking assignments would be invalid if Tower COA is correct in its “initial allocation” theory.	Art. 25.2.2 provides that Limited may make allocations before or contemporaneously with the sale of unit, which it did through 2008. CP 118-19; 714-22.

### **III. LIMITED'S ARGUMENTS ARE CONTRADICTED BY THE DOCUMENTS ON WHICH IT RELIES**

#### **A. Limited Ignores Key Language in the POS**

Limited focuses on the POS throughout its brief, arguing that the POS warned potential unit owners that the declarant had the right to allocate the nine driveway stalls. Resp. Br. at 8-9. However, Limited overlooks two key facts: (1) Only those unit owners who purchase from the declarant obtain a copy of the POS. See RCW 64.34.405. Persons who purchase directly from a unit owner are entitled to a resale certificate that does not include the POS. See RCW 64.34.425. (2) But more importantly, the POS section on which Limited relies, the Narrative Description, contains the following language:

This Narrative Description is intended to provide only an introduction to the Condominium and is not a complete or detailed discussion. Consequently, the other parts of this Statement [which include the declaration] should be reviewed in depth, and if there should be any inconsistency between information in this part of this Statement and information in the other parts, the other parts will govern.

CP 65. That is, the declaration's language will govern when it contradicts that of the Narrative Description of the POS. Hence, even if Limited were

correct in its reading of the POS, the POS does not control. Yet, Limited is not correct. The POS supports Tower COA's interpretation.

**B. The POS Actually Supports Tower COA's Position**

The section of the POS describing parking provides that spaces may be allocated "in accordance with Section 6.5 of the [Tower] Declaration." CP 67. As pointed out in Tower COA's opening brief, this article provides for the allocation of parking stalls by Limited, the declarant, and contains three sub-articles, 6.5.1, 6.5.2 and 6.5.3. Open. Br. at 9. The third, 6.5.3 restricts the declarant's right to allocate, which Limited omits completely from its brief. Article 6.5.3 provides:

References to parking spaces and storage spaces in this Article 6 include storage spaces and parking spaces **which may be allocated** to the Residential Unit in accordance with the terms of the Articles 6 and 25 of the Mixed Use Condominium Declaration. **The use of such spaces is also subject to the terms and conditions set forth in the Mixed Use Condominium Declaration.**

CP 86 (bold emphasis added).

Again, that is, the declarant only reserved to itself the right to allocate those spaces on P-1 and the 45 spaces that "may" be allocated to either the Tower or the Garage unit. The declarant made no further

reservation of rights of reallocation for the nine courtyard parking stalls. In reading Article 6 of the Center Dec. together with the Tower Dec. – as directed – one finds that limited common elements assigned to the Tower by the Center Dec., unless specifically reserved for reallocation, may be used by “each Owner ... his or her agents, servants, tenants, family members, invitees and licensees.” CP 200. Such permission is found in Article 6.7 of the Center Dec. – another article that Limited fails to discuss in its brief.

**C. The Declarations Govern Which Stalls may be Converted to Limited Common Area**

Limited points out that until the courtyard stalls are allocated to a unit, they are not only limited common area of the Center allocated to the Tower, but they are also common area of the Tower. Resp. Br. at 20-21. Once allocated to a unit, they become limited common area of the Tower allocated to a unit. Id. However, only the declaration can grant permission to change common area to limited common area. Limited’s assertion then begs the question – which stalls may be changed from common area to limited common area under the Tower Dec.? Tower Dec., Art. 6.5.3 provides that only the 45 stalls on floor 1 have that distinction. Indeed, if Limited’s interpretation is correct, then Limited’s

reservation to itself of the right to allocate those 45 parking spaces on floor 1 is superfluous. See CP 86 (Art. 6.5.3).

**D. If Limited Is Correct, the Declaration's Reservation of Courtyard Parking for Sales Purposes is Meaningless**

Only because Art. 25.1.2 of the Tower Dec. permitted it to do so, Limited made use of the nine courtyard parking stalls for sales purposes through 1999. CP 118 (Art. 25.1.2). When that right terminated pursuant to Art. 25.1.2, Limited invented the right to control and allocate the stalls to Tower units. Indeed, if Limited had the unfettered right to control and allocate the nine courtyard stalls, as it now claims, the reservation of rights to use those stalls for sales facilities would be meaningless and superfluous.

Had Limited really intended to reallocate these nine parking stalls it would have specifically reserved that right in the Tower and/or Center Decs., as it did with those 45 stalls on floor 1 of the Garage (Tower Dec. 6.5.3) and as it reserved the use of those stalls for sales purposes (Tower Dec. 25.1.2). Further, it would have created a separate tax parcel for the nine stalls, so that when it came time to reallocate them to individual units,

Tower COA would not continue to pay the property tax on them. See RCW 64.34.040; CP 443 (Rog 5). But Limited did none of these things.<sup>1</sup>

**E. Limited’s Agents who Managed the Tower Created the “Mutual Understanding” on Which Limited now Relies**

Limited and its representatives are responsible for the position taken by Tower COA in 2000 vis-à-vis Tower’s rental of four courtyard parking spaces. Tower COA did not receive advice independent of Limited or its management company, Cosmos, which Limited installed to manage the Tower. CP 394-96. Tower COA relied on Limited and its agents’ interpretation of parking rights until 2007, when Limited sold the Commercial and Garage unit. CP 291. That occurrence necessitated an independent review of both the Center and Tower Decs. by Tower COA. Id.

Limited facilitated its land grab in 2000 by placing its representatives on the board and having its agent – Cosmos – manage the Tower. See CP 395-96. Limited’s representatives “explained” to Tower COA that Limited had the right to allocate the courtyard stalls. Resp. Br. at 26, CP 396, ¶ 7. Indeed, Limited’s agent who managed the Tower

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<sup>1</sup> Indeed, Limited represented to the City of Bellevue in its permit application that “[s]hort term visitor parking off the entry court is screened from the street.” CP 432. “Short term visitor parking” refers to the courtyard stalls at issue here.

signed the first lease on behalf of the Tower COA for four of the nine courtyard stalls in 2000. CP 396, ¶ 7. Under these circumstances, any “mutual understanding” is illusory.

#### **IV. LIMITED’S RELIANCE ON PAST PRACTICES IS MISPLACED**

Limited incorrectly argues that because Tower COA raised the specter of RCW 64.34.030 – the anti-waiver provision of the Condominium Act – for the first time in its motion for reconsideration, it cannot now raise the issue of waiver on appeal. But “[r]aising an issue in a motion for reconsideration is sufficient to preserve for it appeal.” Dixon v. Crawford, McGilliard, Peterson & Yelish, 163 Wn. App. 912, 919 n.7, 262 P.3d 108 (2011). Thus, the question of whether RCW 64.34.030 prevents waiver of Tower unit owners’ property rights through the board’s signature on the 2003 MOU is properly before this Court.

##### **A. Past Practice Cannot Waive the Dec.’s Requirements**

Limited argues that one never gets to the issue of waiver if its interpretation of the Tower and Center Decs. is correct. Resp. Br. at 17. Tower COA agrees that the interpretation of the declarations is the key

fact here, particularly given that errant board practice cannot waive property rights of condominium unit owners.<sup>2</sup> RCW 64.34.030.

Because the composition of boards shifts on a regular basis, the Condominium Act, RCW 64.34 et seq., (“Condo Act”) protects homeowners from the waiver of their property rights by errant boards (or those misled by the declarant), and requires that when property rights are affected, a certain process be followed (i.e. voting) and the changes be recorded so that future condominium owners are not misled. RCW 64.34.030; see also Lake v. Woodcreek Homeowners Ass’n, 169 Wn.2d 516, 533, 243 P.3d 1283 (2010) (“But the Woodcreek board’s general practice does not establish property rights. The Woodcreek declaration and incorporated survey and building plans delineate the property rights of the Woodcreek owners....”). The 2003 memorandum of understanding (“2003 MOU”) signed by Tower COA and Limited was neither voted on nor recorded. Hence, it cannot waive or change property rights granted to Tower unit owners in the Tower Dec.

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<sup>2</sup> Indeed, Limited sets up a “heads I win and tails you lose” situation: Heads I win because my interpretation of the declaration is correct. Tails you lose because even if I am not correct, you waived any right to force me to be correct.

**B. RCW 64.34.348 Voids Limited's Control of Courtyard Parking**

Because Limited now seeks to defeat Tower unit owner's property rights in the nine courtyard parking stalls, it must either be correct in its interpretation of the Tower and Center Decs., or it must show that the 2003 MOU correctly waived those rights under the mandates of the Condo Act. It can do neither.

In its opening appellate brief, Tower COA pointed out that RCW 64.34.228 prevented the reallocation of limited common elements from one unit to another without a declaration amendment. Open. Br. at 25-26. Limited complains that Tower COA has switched positions because Tower COA argued RCW 64.34.348 governed when moving for reconsideration, not RCW 64.34.228. But either statute supports Tower COA. Indeed, RCW 64.34.348 provides stronger support for Tower COA as it provides that any transfer of common elements, unless made pursuant to that statute, is void. RCW 64.34.348(4).

As Limited points out in its responding brief, the courtyard stalls may also be categorized as common elements of the Tower. As common elements of the Tower, unless the Tower Dec. provides the right to reallocate (which it does not) then RCW 64.34.348 prohibits such transfer

– indeed it makes such transfer void as opposed to voidable. See Black’s Law Dictionary 1086-87 (6th ed. 1991) (defining void as “null, ineffectual; nugatory; having no legal force or binding effect....”), compare id. at 1087 (defining voidable as “...It imports a valid act which may be avoided rather than an invalid act which may be ratified.”). Hence, any attempt to control those common areas by Limited would be void at its inception. Likewise, any transfer of control to or from Limited under the 2003 MOU is void.

**C. Res Judicata Does Not Preclude Tower’s Defenses**

Limited makes the strained argument that this lawsuit addressing the right to control courtyard parking dealt with the same issues settled by the 2003 MOU because the two declarations are involved. Nothing could be further from the truth as both Limited and its attorney recognized. CP 342, RP 84:25-87:15. Essentially what Limited wants this Court to say is that any interpretation it now advances under either declaration stands regardless of whether it is correct (and regardless of the mandates of the Condo Act) because it settled a lawsuit related to budgeting and voting rights years earlier that required resort to the declarations. Res Judicata does not reach so far. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d

853, 866, 93 P.3d 108 (2004) (holding that for purposes of res judicata, “the same subject matter is not necessarily implicated in cases involving the same facts.”); Hayes v. City of Seattle, 131 Wn.2d 706, 714, 934 P.2d 1179 (1997) (finding that res judicata did not apply, among other reasons because “nothing in the subsequent action for damages destroyed or impaired any right established in the action for judicial review.”); Mellor v. Chamberlin, 100 Wn.2d 643, 646, 673 P.2d 610 (1983) (finding that although “both lawsuits arose out of the same transaction (sale of property), their subject matter differed” and res judicata did not apply).

**D. Washington Public Policy Does not Support Limited’s Position**

The policy implications of what Limited suggests are stunning. A Board would have the ability to waive property rights of unit owners and unit owners would never have their say in whether they were willing to compromise those rights. Mortgage holders could have property securing their debts taken from them without any notice of or input into the process, chilling the ability of homeowners to obtain loans for purchasing condominiums. RCW 64.34.030 preserves the property rights of unit owners by preventing the board from waiving them. The Lake Court recognized this policy when it held that past practices of a board did not

dictate property rights. Lake, 169 Wn.2d at 533. Rather, “[t]he [] declaration and incorporated survey and building plans delineate the property rights of the [] owners...” Id. Limited’s position cannot be the law of Washington or condominium property rights would be illusory.

**V. TOWER COA’S AFFIRMATIVE DEFENSES SHOULD  
HAVE BEEN ALLOWED AT TRIAL**

Even if the summary judgment ruling of the trial court stands Tower COA should have been permitted to raise its affirmative defenses at trial. Nothing in Limited’s motion, the trial court’s order or the transcript of the hearing addresses any of Tower COA’s affirmative defenses. And neither the order denying reconsideration nor the order denying amendment of counterclaims dismissed those affirmative defenses. Limited makes the incorrect argument that because the trial court refused to permit these affirmative defenses to be converted to counterclaims, and because Tower COA did not assign error to that decision, Tower COA should somehow be precluded from raising this issue on appeal.

Such a position does not reflect Washington law, which provides that even if an affirmative defense is not pled with the specificity required by CR 8(c), such error is harmless if the opposing party suffers no surprise at trial. Mahoney v. Tingley, 85 Wn.2d 95, 100-01, 529 P.2d 1068 (1975).

In Mahoney, as here, the affirmative defense complained about was contained in motions and in the defendant's trial brief. Id.; see also CP 612-22, 797-809. Further, Tower COA did, in fact, plead the affirmative defense that Limited claims it did not. Limited's argument that Tower COA should have pled Art. 25.2.2 of the Tower Dec. rather than the governing statute puts form over substance, as the underlying argument remains the same. That is, the failure to reserve development rights in the declaration means that they do not exist. See RCW 64.34.216(j). Here, Limited reserved only the right to make an initial allocation of parking stalls to each unit. CP 118-19. Once each unit received that initial allocation, Limited's special declarant right expired.

**A. Initial Allocation Means Just That**

Limited complains that Tower COA did not raise the issue of "initial" allocations in its motion for summary judgment. Therefore, it incorrectly concludes, Tower COA should be precluded from raising this defense at both trial and on appeal. But this affirmative defense does not go to the issue of whether Limited had the right to reallocate the stalls to units under Center and Tower Decs. Rather it assumes Limited has such a right, but that the right has been extinguished. This affirmative defense

did not arise until 2009 – with the filing of the 11th Amendment. CP 241-43. Tower COA clearly preserved its objection to being prevented from raising this affirmative defense in the trial court. RP 5:6-7:7.

While the parties appear to agree that rules of contract interpretation do apply to condominium declarations, Limited takes that general rule too far by arguing after the fact justifications constitute extrinsic evidence that may be considered when interpreting the declaration. Resp. Br. at 40-41. But the Washington Supreme Court has held that the declarant’s intent is determined from the face of the declaration. Lake, 169 Wn.2d at 526. And ambiguities in the declaration will be interpreted to harmonize with state law. Id. at 530-31. Here, the ambiguity over which Tower COA and Limited disagree harmonizes with state law under either interpretation. That is, state law is not implicated as to whether “initial”, as used in the Tower Dec., applies to the first allocation of a parking stall to a unit, or the first allocation of a specific parking stall. All that state law requires is that the special declarant right of allocation be contained in the declaration, which it is here. RCW 64.34.216(j). Under these circumstances, the ambiguity must be construed against the drafter, Limited, and in favor of Tower COA. Rouse v. Glascam Builders, Inc., 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

Tower COA's position would certainly not invalidate all prior allocations made by Limited, as Art. 25.2.2 of the Tower Dec. specifically provides that the declarant may make initial allocations of parking spaces before or concurrently with the sale of each unit by the declarant. CP 118-19. Indeed, it was not until the 10th Amendment was recorded in 2008 that every unit had had an initial allocation made to it.<sup>3</sup> CP 714-22. Limited cannot seriously be arguing that all of its prior allocations violated the Tower Dec.

**B. Limited's Special Declarant Rights Have Expired**

Just as Tower COA raised its affirmative defense related to initial allocations of parking spaces to units in the trial court, it also appropriately raised its affirmative defense related to the expiration of special declarant rights. Here, Limited attempts to get around the purpose of the act, which is to facilitate the construction of the condominium, in phases if need be. See Resp. Br. at 43 (quoting Uniform Condo Act comments to § 105(a)(8)). Limited has no interest in further construction – that was completed over 10 years ago. CP 710 at 18-23. Rather, it wants to squeeze more money out of the Tower and its residents through the sale of

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<sup>3</sup> Other provisions of the declaration provide a right to residents to swap or sell their

parking spaces without having reserved any right to do so as required under Washington law. The Condo Act requires that the declarant act in good faith in meeting its obligations under the declarations. RCW 64.34.090. Limited's assignment of nine courtyard parking stalls to a studio apartment for the sole purpose of reselling them, rather than benefiting that unit, lacks the good faith that the statute mandates. See CP 711:25-712:9.

#### **VI. ATTORNEY FEES AND COSTS**

Tower COA disagrees with Limited's conclusion that the trial court's award of fees and costs was improperly reduced. As pointed out in its opening brief, this amount should have been reduced further because all of the time spent on the motion for summary judgment related to the release in the 2003 MOU, which does not contain an attorneys' fee clause.

#### **VII. CONCLUSION**

For the foregoing reasons and those stated in its opening brief, Tower COA respectfully moves the Court to grant its appeal, reverse the summary judgment of the trial court and quiet title in the nine courtyard stalls in Tower COA's name consistent with the Tower and Center Decs.

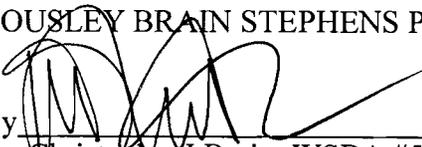
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spaces. CP 86 at Art. 6.7.1.

In the alternative, should the Court determine disputed issues of material fact remain, Tower COA requests that this Court remand to the trial court for further proceedings, including a new trial. In the alternative, should the Court decide that the summary judgment order was in fact appropriate, Tower COA moves the Court to reverse the decision of the trial court and remand with instructions for a new trial permitting Tower COA to put on evidence of its affirmative defenses. Should this Court find that the summary judgment order is appropriate and the trial court did not err in refusing to permit Tower COA's affirmative defenses, Tower COA still seeks an order reducing the attorneys' fee award to eliminate all time spent affirming the release in the 2003 MOU as that document contains no attorneys' fee clause.

DATED this 2nd day of February, 2012.

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**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 3rd day of February, 2012, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

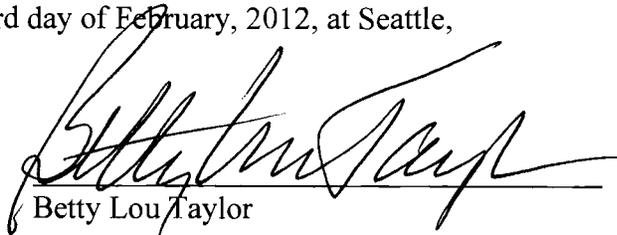
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 3rd day of February, 2012, at Seattle, Washington.

  
Betty Lou Taylor