

No.: 68152-4

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

FAIRWAY ESTATES ASSOCIATION OF APARTMENT OWNERS,  
a Washington nonprofit corporation,

Appellant,

vs.

UNKNOWN HEIRS and DEVISEES of ROBERT D. YOUNG; ESTATE OF  
ROBERT D. YOUNG, deceased; UNKNOWN HEIRS and DEVISEES of ZELLA  
E. YOUNG; ESTATE OF ZELLA E. YOUNG, deceased; UNKNOWN HEIRS and  
DEVISEES of MONETA HARRIS a/k/a MONETA YOUNG a/k/a MONETA M.  
JORSTAD; ESTATE OF MONETA HARRIS a/k/a MONETA YOUNG a/k/a  
MONETA M. JORSTAD, deceased; JUDY HAVENS and JOHN DOE HAVENS,  
wife and husband or state registered domestic partners,

Defendants,

SAND POINT COUNTRY CLUB, INC., a Washington non-profit corporation;

Respondent,

FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, a Delaware  
corporation as successor in interest to TRANSAMERICA HOMEFIRST, INC.; *et al.*,

Defendants.

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON  
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REPLY BRIEF

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## I. ARGUMENT

### A. Respondent Sand Point Did Not Create A “Leasehold Condominium.”

Respondent Sand Point Country Club (“Sand Point”) misstates an issue on appeal, asserting that it “created a *leasehold condominium*, with each condominium unit being the leasehold interest therein. . . .” Br. of Resp. at 1. Sand Point did not create a “leasehold condominium,” as subsequently defined under RCW 64.34.220 (a condominium regime that expires upon expiration of an underlying ground lease). Rather, Sand Point created a conventional condominium regime of units in fee simple, *not subject to any ground lease*, that Sand Point immediately owned upon creation; rather than selling the units as any other developer would ordinarily do, Sand Point then leased this unit to third party Fairway Estates LP, who in turn assigned its lessee interest in this unit to Defendants Young. Br. of App. at 8-10. Sand Point asserts that the original lessee of the subject unit, third party Fairway Estates LP, is no longer in existence. Br. of Resp. at 4 n. 2. Such asserted fact is not in the record before the Court.

Sand Point attempts to confuse the issue by implying that the Declaration of Condominium and the units created thereunder only exist so long as there is a lease - and thus are *subject to* this unit lease. Rather, it is the other way around: The lease is subordinate to the Declaration of

Condominium, and as such the Declaration of Condominium - and its lien on the unit - will continue to exist even after expiration of the unit lease, facts that Sand Point admit. Br. of Resp. at 7.

**B. The Mandate That Every Condominium Unit in Washington is Subject to the Statutory Assessment Lien Cannot Be Avoided By Any Contrary Declaration of Condominium Term.**

Thus, as the lease is subordinated to the Declaration of Condominium and its statutory lien for assessments, the lease by Sand Point to Defendant Young has no effect on the continuing existence of the condominium regime, the Declaration of Condominium and the statutory lien rights of the Association. It should then be a simple matter to apply RCW 64.32.200(2) and RCW 64.34.364(1)'s *mandate* that every condominium unit (the fee, not just a tenant's interest) is subject to the statutory lien for assessments, to conclude that this unit *is subject to the statutory lien for unpaid assessments*, and thus subject to foreclosure.

Our Legislature deemed it so basic and fundamental a public policy that every condominium association holds a lien on the units subject to that Declaration, that it chose the most direct and plain language to so express that right:

All sums assessed by the Association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment shall constitute a lien on such apartment.

RCW 64.32.200(2); and

(1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.

\* \* \*

(9) The lien arising under this section may be enforced judicially by the association or its authorized representative in the manner set forth in Chapter 61.12 RCW.

RCW 64.34.364 (1), (9). Our Legislature enacted the statutory lien provisions in furtherance of a clear public policy that Washington associations should be able to recover unpaid assessments that are necessary and vital to fund the maintenance, insurance and repairs of the condominium building(s) that benefit all of the unit owners in a condominium - including here, Sand Point.

When interpreting a statute, the reviewing court's aim is to ascertain the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn*, 146 Wn.2d at 9-10. Interpretations that give meaning and effect to every word are favored over those that render parts of the statute redundant or superfluous. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1*, 149 Wn.2d 660, 685, 72 P.3d 151 (2003), quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). Applying these canons of construction, the plain meaning of RCW 64.32.200(2) and RCW 64.34.364(1) is that every condominium **unit** in Washington is burdened by a condominium association lien. The

statutes do not say “the association has a lien on *only a unit owner’s tenant’s leasehold interest* if a unit owner has elected to lease the unit.”

Nowhere in either statute is the lien restricted to just a tenant’s interest, and Sand Point (who drafted the Declaration and lease) cannot resort to drafting sleight of hand and definitional nuances to avoid the mandate of these statutes. That is the heart of this case, no matter how much Sand Point may attempt to confuse the issue.

Ignoring the statutory mandate of RCW 64.32.200(2) and RCW 64.34.364(1), Sand Point argues that the “Declaration expressly limits the attachment of the assessment lien to the leasehold interest. . . .” Br. of Resp. at 2. The Declaration of Condominium does not limit the statutory lien to only Sand Point’s tenant’s leasehold interest. Br. of App at 23-26. But even if Sand Point had drafted this Declaration of Condominium to attempt to limit the lien in such a way, *such a provision would violate the statutory mandate of RCW 64.32.200(2) and RCW 64.34.364(1)*. In other words, there is no provision Sand Point could have drafted and put in the Declaration that would avoid the requirements of RCW 64.32.200(2) and RCW 64.34.364(1) that every condominium unit in Washington is subject to a lien for assessments.

**C. Sand Point Confuses the Lease Provision Subordinating the Lease to the Declaration of Condominium, With the Statutory**

***Mandate That Every Condominium Unit Is Subject to a Lien for Unpaid Assessments.***

Sand Point resorts to argument in its [Re]statement of Facts, improperly asserting that “Appellant would like to have this Court construe this provision [(Lease provision subordinating Lease to Declaration of Condominium)] so that it provides for Sand Point’s fee interest to be ‘subordinated and made inferior,’ but the wording of the provision simply is not subject to such a construction.” Br. of Resp. at 7.

Sand Point attempts to inject confusion between the relationship of the lease to the legal authority that imposes a lien on this unit: RCW 64.32.200(2) and RCW 64.34.364(1) *mandate* that every condominium unit in this state is encumbered by a lien securing unpaid assessments. In contrast, Sand Point’s subordination of its pre-existing lease (to lessee third party Fairway Estates LP) to the Declaration of Condominium meant that the expiration of the lease to lease assignee Defendant Young would have no effect on the continuing existence of the Declaration of Condominium. Br. of App. at 19-21. When the lease of this unit to lease assignee Young expires, the Declaration of Condominium will continue to exist, and the statutorily mandated lien on the unit *will also continue to exist*. *Id.* If the statutory lien only reaches Sand Point’s tenant’s leasehold interest, the unit would continue to exist after lease expiration, but with no

statutory lien on the unit, contrary to the direct statutory mandate. RCW 64.32.200(2), RCW 64.34.364(1).

**D. Declaration of Condominium Clearly Provides That Lien Encumbers the Unit, Not Just the Tenant’s Leasehold Interest.**

Sand Point asserts that the 1996 Restated Declaration § 17.3 provides authority to assert that the statutory lien is limited to only the tenant’s leasehold interest, quoting § 17.3: “[U]npaid amounts ‘constitute a lien against the Owner’s Unit who has defaulted until paid.’” Sand Point quotes this section out of context: The full sentence of this excerpt appears at the very end of § 17.3 of the 1996 Restated Declaration, and only addresses the attorney fees and costs that are also secured by the statutory Declaration of Condominium lien. Nothing in the complete sentence modifies the Declaration of Condominium definition of “unit” or the extent of the statutory Declaration of Condominium lien. Br. of App. at 23-4. Nothing in the complete sentence modifies all of the lien provisions of Restated Declaration §§ 17.1, 17.3, which specifically refer to the lien on the Unit. In this context, “Owner’s Unit” simply references the particular unit burdened by the lien, not that the lien is limited to the lessee’s leasehold interest only.

Continuing in the vein of grasping for any language in the Declaration that may serve to subvert the statutory mandate that a lien exists on every condominium unit, Sand Point argues that general terms at

the end of the 1996 Restated Declaration serves to limit the lien to only a tenant's interest (“‘sale,’ ‘sold’ . . . shall mean the assignment of lessee's interest. . . in units). Br. of Resp. at 9. Under the very sentence cited by Sand Point, these *general* terms apply only to “assignment of lessee's interest” and thus to *voluntary* conveyances, and don't apply to the *specific* terms providing for a lien on the unit - as the term “unit” is defined - and right to foreclose that lien provided under Restated Declaration §§ 17.1, 17.3. Br. of App. at 23-4. Indeed, § 17.1 expressly recites RCW 64.32.200(2), confirming the extent of the statutory lien.

**E. General Recitals in Declaration of Condominium Do Not Limit the Statutory Declaration of Condominium Lien On the Unit.**

Sand Point asserts that general recitals in the original 1975 Declaration and 1996 Restated Declaration somehow operate to limit the statutory lien mandated by RCW 64.32.200(2) and RCW 64.34.364(1). Br. of Resp. at 11. Those general recitals plainly indicate an intent of Sand Point to lease out the units that it created and owned, and recite that Sand Point did actually lease out units that it owned, but does nothing more than exactly that. Nothing in the recitals purport to limit the Declaration of Condominium lien to that of only Sand Point's tenant's leasehold interest. Even if the recitals did attempt to so do, it would be void as contrary to the statutory mandates of RCW 64.32.200(2) and RCW 64.34.364(1).

Sand Point asserts that the “ownership interest created. . . is a leasehold ownership interest, not a fee simple ownership interest.” Br. of Resp. at 11. This is simply incorrect, and contrary to Sand Point’s admissions that it owns this unit in fee simple. Br. of Resp. at 4; Opposition to Motion For Summary Judgment at 6 (CP 403). Sand Point did not create a leasehold condominium, subject to a ground lease, the expiration of which would terminate the condominium regime (as subsequently regulated by RCW 64.34.220). The subject unit was created by the Declaration of Condominium, and is subject to the statutory lien under RCW 64.32.200(2) and RCW 64.34.364(1) for assessments, as is every other condominium unit in Washington. This is at its heart a simple case of a unit owner who turned around and rented out its unit, and now wants to claim that only its tenant’s leasehold estate is subject to the statutory lien.

No matter how many times Sand Point attempts to twist these impermeable facts, these are the facts; applying RCW 64.32.200(2) and RCW 64.34.364(1)’s mandates that every condominium unit is subject to a lien for assessments, Sand Point’s unit is subject to this lien - not just Sand Point’s tenant’s lessee interest. Applying these statutes, there is no provision, definition, or condition that Sand Point could have drafted and inserted into the Declaration of Condominium that would circumvent this clear legislative mandate that the unit is subject to the lien.

This result is exactly why other land developers would either (1) enact a standard declaration of condominium (no ground lease; landowner executes a declaration of condominium creating units and simply sells off the units), or (b) enacted a standard leasehold condominium as now defined under RCW 64.34.220 (landowner grants ground lease to developer who then creates declaration of condominium subject to ground lease, developer deeds leasehold interests to third parties, and entire condominium regime terminates upon expiration of *superior* underlying ground lease). Sand Point tried to have its cake and eat it too (own the units and not be subject to statutory assessment lien).

**F. Condominium is Not a RCW 64.34.220 Leasehold Condominium.**

Sand Point devotes significant space in its brief arguing that reference to RCW 64.34.220's leasehold condominium provisions are irrelevant. Br. of Resp. at 13-16. Reference to RCW 64.34.220 was made to emphasize what this condominium regime *is not*, which is highly relevant to determining what kind of condominium Sand Point created. Br. of App. at 17-18. Ground leases that terminate a condominium regime *are* the focus of RCW 64.34.220, entitled Leasehold Condominiums. In this case, because of the subordination of the lease to the Declaration of Condominium, there is no present ground lease, the expiration of which will terminate this unit or the Declaration of

Condominium. There is no issue over whether RCW 64.34.220 applies to this case; it does not.

**G. Sand Point's Present Statement of a Future Intent to Terminate the Condominium Upon Expiration of its Tenant's Lease Has No Effect On Whether the Unit is Subject to Statutory Lien.**

Sand Point asserts that "it is a fact that when the Lease terminates, SPCC will become the sole owner, with right of possession, of *all* of the Condominiums [units], free of the Lease and the interests of all persons holding a partial lessee's interest under the lease. As such, SPCC will then have the right immediately to terminate the condominium structure and remove the property from condominium status. . . ." Br. of Resp. at 15 (emphasis added). This assertion assumes facts not in evidence:

Ownership of units other than the unit subject to this foreclosure action are not in evidence. This assertion also assumes that Sand Point would not sell or transfer any unit at this condominium that it may presently own, including this unit, now or in the future.

Sand Point's assumptions are inherently flawed. There is no guarantee that Sand Point (a) owns all the units now such that it could have the 80% of owners needed to terminate; (b) would own all the units in approximately 50 years when the lease of this unit expires, such that it would have the 80% of owners needed to terminate; or (c) would actually *elect* to terminate the condominium regime (nothing *requires* termination).

Indeed, many events can transpire over the next approximately 50 years of Sand Point's tenant's lease that could divest Sand Point of title to this unit and any other units it may own. What if Sand Point sells the unit? What if Sand Point becomes insolvent and the unit is forcibly sold in bankruptcy or state receivership proceedings? What if a county real property tax foreclosure occurs? What if a creditor of Sand Point attaches and executes on the unit? What if Sand Point granted a deed of trust on the unit and that secured creditor subsequently foreclosed? In any such events, Sand Point won't own this unit or all of the units and as such may not have the 80% of unit owner consents needed to terminate required by RCW 64.34.268(1). It will then be out of Sand Point's control to terminate the condominium - which then leads to the following parade of horrors: The condominium regime will continue after the unit lease expires; if the statutory lien is limited to simply this unit's tenant's leasehold, the Association at that time will have *no power to enforce a lien on the unit for unpaid assessments*, contrary to RCW 64.32.200(2) and RCW 64.34.364(1). The ability to recover unpaid assessments will then be severely limited or unenforceable, which will in turn starve the Association of necessary funds to fulfill the Association's obligation to maintain, insure and repair the condominium buildings for the benefit of all of the then-unit owners.

Sand Point obviously makes the foregoing assertion (future intent to terminate) to persuade the Court that there would be no situation where the condominium regime continues to exist but the Association has no statutory lien and thus is powerless to foreclose on anything. However, RCW 64.32.200(2) and RCW 64.34.364(1)'s statutory lien mandates do not concern itself with the possible futures of a condominium regime (will it continue forever or possibly get terminated) - these statutes deal with the present, and in the present this unit is subject to a statutory lien securing unpaid assessments.

**H. Deed of Trust Act Inapplicable to Judicial Foreclosures.**

Sand Point asserts that the Washington Deed of Trust Act, Ch. 61.24 RCW, somehow limits Creditor's Declaration of Condominium lien interest in the Unit. Br. of Resp. at 17; CP 389. The Deed of Trust Act governs the *procedures* for foreclosing on a deed of trust by trustee's sale; the *substantive* rights of the parties to a deed of trust are governed by the four corners of any particular deed of trust. This case is a judicial (lawsuit) foreclosure of a Declaration of Condominium lien. The Deed of Trust Act has no applicability to this case.

**I. Execution Statute Applicable to Jointly Owned Real Property Irrelevant to This Case.**

Sand Point asserts that "RCW 61.12.170 provides 'only the debtor's interest may be levied on and sold at execution. . . ." RCW

61.12.170 is entitled "Recording" and the statute simply states "See Ch. 65.08 RCW." Nothing more. Ch. 65.08 RCW is the Recording Act. Searching the possible statutes that contain this language, RCW 6.17.170 under the Executions Act, entitled "Levy On Jointly Owned Real Estate," appears to be the statute Sand Point intended to cite. If that is the case, Sand Point has quoted only part of the statute, out of context. The statute expressly applies only to the situation where "[i]f a judgment debtor owns real estate jointly or in common with any other person, only the debtor's interest may be levied on and sold on execution." The statute is not applicable to this case.

**J. Unit is Subject to Statutory Assessment Lien Regardless of Who May Be Personally Liable for Assessments.**

Sand Point asserts that the Association can only foreclose out the real property interests of the party who is personally liable on the assessment debt (here, deceased Defendant Young). Br. of Resp. at 17. Sand Point attempts to confuse the issue by asserting that because the Declaration just happens to use the word "Owner" in the definitions section to refer to the unit owner Sand Point's tenant/lease assignee (here, Defendant Young), that the statutory assessment lien only burdens the tenant's leasehold interest, not the fee owner of the unit (Sand Point). Id. The 1996 Restated Declaration labeled the unit lease assignees such as Young an "owner" for purposes of the definitions section, but could just as

well have labeled them “Lease Assignee” or “Tenant” or anything else.  
(CP 232-233, 271).

To assert that referring to the unit lease assignees as the “owner” divests the Association of its statutory assessment lien on the unit owned in fee simple by Sand Point elevates form over substance, and in any event would be contrary to the plan language of RCW 64.32.200(2) and RCW 64.34.364(1).

No part of the 1996 Restated (Amended) Declaration modifies any portion of the 1975 Declaration’s provisions establishing that the Unit is encumbered by the Declaration of Condominium lien. Indeed, the 1996 Restated Declaration § 17.1 is in substance identical to the 1975 Declaration § 17.1 that Sand Point itself approved and executed as original Declarant. (CP 271, 148-149).

The 1996 Restated Declaration, § 1.24, 17.1 established *in personam* liability for assessments upon each Lease Assignee (Tenant), by defining *Owner* as the Lease Assignees (Tenants) holding leasehold interests in the units. (CP 232-233, 271).

However, the 1996 Restated Declaration definition of *Unit*, §§ 1.32, 1.2, continues to remain, unmodified, the actual condominium units established under the 1975 Declaration, § 3. (CP 234,229,122-124) And again, all units are subject to the Declaration of Condominium lien on the

*Unit*, § 17.1, which has not in substance changed between the 1975 Declaration and 1996 Restated Declaration.

As to judicial foreclosures of security interests in real property where the owner of the property is not the same as the *obligor* on the obligation secured by that security interest, Washington law has long recognized that a creditor can foreclose on its collateral. *Seattle-First National Bank v. Hart*, 19 Wn. App. 71, 72-3 (1978) (mortgagee foreclosed on mortgage on real property granted and owned by lessors who had mortgaged the property to secure a loan by mortgagee to their lessees). *Hart* thus establishes, similar to the case at bar, that an owner of property (here, Sand Point) that grants a security interest (here, Declaration of Condominium lien) in real property that it owns (the Unit) to secure an obligation owed to a creditor (here, the Association) by another (the Tenant) is absolutely valid and enforceable.

Recognizing this principle (security interests in real property where the owner of the property is not the same as the *obligor* on the obligation secured by that security interest), our Legislature deferred to the provisions of the particular Declaration of Condominium to define who may be personally liable for assessments, RCW 64.32.200(1), but expressly provided that the Declaration of Condominium lien encumbers the unit, RCW 64.32.200(2) - regardless of who owns the unit. Recognizing that a Declaration may impose personal liability on the unit owner or a unit

owner's lessee, our Legislature defined an "Apartment Owner" as someone who either owns a unit in fee simple, or holds a leasehold interest in the unit. RCW 64.32.010(2).

Thus, for this particular unit there is a difference between who is *personally liable* for assessments (Tenants) versus who owns *the collateral* that serves as security for unpaid assessments (Sand Point). That difference does nothing to invalidate Creditor's Declaration of Condominium lien interest in the Unit. To hold otherwise would be *reforming* the Declaration of Condominium to modify the Declaration and Lease documents. The Declaration of Condominium lien encumbers the Unit and Sand Point's fee ownership interest in the Unit, and not simply the leasehold interests of Sand Point's Tenants, Young. Nothing in the 1975 Declaration, 1996 Restated Declaration, Lease or amendments thereto changes this lien encumbrance upon the fee interest in the Unit. Nothing in these documents states that the "Unit" is only a leasehold. The "Unit" exists into perpetuity and survives expiration of the lease of this Unit granted by Sand Point as owner of the Unit to Fairway Estates LP as Lessee, as subsequently assigned to Young.

Ultimately, even if the 1975 Declaration and 1996 Restated Declaration attempted to divest the Association of its Declaration of Condominium lien interest in the units, and limit such lien to only the unit owner's tenant's leasehold interest, such an attempt would be void *ab*

*initio* under the unwavering mandate of RCW 64.32.200(2) and RCW 64.34.364(1) that all condominium units in Washington are encumbered by an association lien.

Sand Point points to the 1916 case of *Canyon Lumber Co. v. Sexton et al*, 93 Wash. 620, 626, 161 P. 841 (1916) for the proposition that if the “owner” of the unit has only a leasehold interest, only the leasehold interest may be foreclosed. Br. of Resp. at 17. The case simply does not apply to a statutory assessment lien on a condominium unit under RCW 64.32.200(2) and RCW 64.34.364(1), which automatically encumbers every unit (and not just a tenant’s interest therein), regardless of whether there is a tenant leasehold or not. *Canyon Lumber* involved a mechanics lien foreclosure where the mechanics lien encumbered only a tenant’s leasehold interest, because only the tenant ordered the materials that gave rise to the lien right, not the fee owner. *Canyon Lumber*, 93 Wash. at 624.

**K. Sand Point’s Assertion That No Declaration of Condominium Lien Can Foreclose Out An Owner’s Interest in a Unit Would Effectively Render All Statutory Declaration of Condominium Liens Void.**

Sand Point asserts that RCW 64.34.364(2) supports the argument that its fee interest in the Unit cannot be foreclosed because it is an owner and not a lienholder. Br. of Resp. at 18; CP 388. Sand Point confuses a fee simple unit owner with a competing third party lienholder, two

distinctly different interests in real property: RCW 64.32.200(2) and RCW 64.34.364(1) plainly and simply establish that every condominium association has a lien interest on units subject to the Declaration of Condominium. One is hard put to imagine a more direct and concise statement of legislative intent. Anyone who has *any* interest in any condominium unit in our state has that interest subject to a Declaration of Condominium lien. Our Legislature enacted other statutory provisions (*i.e.*, RCW 64.34.364(2),(3)) that statutorily *subordinate* Declaration of Condominium liens to certain third party competing *lienholders* - real property tax liens, mortgages and deeds of trust - but not to *owners* of units. To subordinate the Declaration of Condominium lien to any interest of the *fee owner* means that the association creditor would have nothing to foreclose on - what ownership interest would a winning bidder at sheriff's sale obtain? Nothing. This argument makes no sense.

Accordingly, Sand Point's reference to a UCC Article 9 lien definition has no effect on RCW 64.32.200(2) and RCW 64.34.364(1). Br. of Resp. at 18. Sand Point cites to *Summerhill Village Homeowners Ass'n v. Roughly*, 166 Wn. App. 625, 270 P.3d 639 (2012) as an example of the application of RCW 64.34.364(2). Br. of Resp. at 18. However, *Summerhill* examined the relative lien priority of the statutory assessment lien *to that of a competing deed of trust creditor* under RCW 64.34.364(3),

and did not examine whether an association can even foreclose on the unit and extinguish the record fee owner's interest.

Plaintiff seeks judgment *in rem* and decree of foreclosure foreclosing out any interests of all of the named defendants, and as such does not seek any monetary award against Sand Point *in personam*. However, because of Sand Point's record title to the Unit, they are a necessary party to this judicial foreclosure action: The person or entity that holds record title to real property *is* a necessary party in a judicial foreclosure action, and failure to name such party as a defendant also results in any foreclosure having no effect on such party's interest. *Hallgren Co. v. Correl, Inc.*, 13 Wn. App. 263, 265-6 (1975).

**L. Sand Point's "Absurd Results" are Instead *Undesirable* Results to Sand Point.**

Sand Point asserts as absurd the proposition that it would not be "entitled to redeem from the purchaser at the foreclosure sale." Br. of Resp. at 20. This foreclosure proceeding is not subject to any redemption. RCW 61.12.093. Sand Point had pled no affirmative defense to same. The former occupants, Tenants, are deceased. CP 108-110, 34. The Unit is and has been vacant for years, and no payment of assessment has been received in years as well. CP 20-110, 111-380. None of the heirs to Tenants apparently want to claim any interest in the Unit, as evidenced by the various declaratory judgments entered in this case as to all heirs. CP

463-483, 484-485, 486-492, 493-494. In any event, even if redemption applied, any owner of real property is entitled to redeem the property it still owns during any redemption period, by paying the amounts required to redeem under RCW 6.23.020; *see, Seattle-First National Bank v. Hart*, 19 Wn. App. 71, 72-3 (1978).

Sand Point asserts that its unit is protected from foreclosure of the statutory lien under the Lease § 8 indemnification provision. Br. of Resp. at 20. The Association incorporates by reference its argument as to inapplicability of § 8 in its Brief of Appellant at 32-34.

Sand Point then asserts that somehow its remedies as a unit owner landlord to the various tenants (to take possession of the Unit upon lease payment default) is somehow at odds with and thus somehow modifies or limits the Declaration of Condominium lien. Br. of Resp. at 21. Nothing in any Lease provision (remedy upon default or otherwise) limits (or can limit) the statutory assessment lien on the unit. Sand Point is receiving its lease payments on this Unit, under a clever and very unique system that Sand Point itself devised when it executed (and presumably drafted) the Declaration. See, Br. of App. at 19-20. Thus, there is no default on the Lease and any remedies of Sand Point for any lease default are irrelevant to this foreclosure case. There is nothing at odds between Sand Point's remedies against its tenants and the Association's statutory assessment lien on the Unit.

Sand Point asserts that it is somehow absurd that the Association may foreclose its statutory lien on the condominium units, causing Sand Point to “continue to lose its ownership” in the units. Br. of Resp. at 21. There is absolutely nothing absurd about one person’s property serving as collateral securing the obligation of another. *See, e.g., Seattle-First National Bank v. Hart*, 19 Wn. App. 71, 72-3 (1978). Sand Point obviously does not want to see the legally required results of the Declaration that it itself executed and presumably drafted. Most every other landowner who wants to create a condominium, but retain ownership of the land, will create a leasehold condominium as now heavily regulated under RCW 64.34.220 (where the condominium terminates once the underlying ground lease terminates), and rake in ground rents until the ground lease expires, and at which time the Declaration of Condominium expires and the units cease to legally exist as separate parcels of real property.

Instead, Sand Point “got creative” and created this particular regime under which the Declaration of Condominium and the units created thereby do not sit subject to a ground lease and thus continue into perpetuity, under which Sand Point continues to own the units, and under which Sand Point as owner of each unit would serve as landlord to the Tenant unit occupants. This creative regime provided a rock-solid method to enjoy a steady income stream (rents) for many years, and then the right

to make more money by selling the units once the various tenant leases expired. However, this unique scheme has one serious risk: Because of the obvious danger of a condominium association foreclosure if assessments were not paid for any reason, most every other landowner/developer would not go the route that Sand Point went with this development.

Sand Point is not obligated to make any advance to save its ownership interest from this *in rem* foreclosure. It can, but it need not do so. Sand Point can certainly, like any other real property owner subject to foreclosure, undertake any economic analysis it wishes to determine if it is worthwhile to cure the default or not, which in Sand Point's case may or may not include evaluating the fair market value of the unit in relation to the amount due the Association and any present value of any remaining lease income stream.

Sand Point may or may not have some right or remedy against its tenants for any advance it may make to save its ownership interest from foreclosure, either under the common law (*e.g.*, unjust enrichment) or some other agreement with its tenants, if any, but any absence or ineffectiveness of such right or remedy is a failure of Sand Point to address when it drafted and executed the various Declaration and Lease documents in the 1970s, and does not limit or modify the statutory lien interest in the Unit.

Sand Point asserts as absurd that its ownership interest in the Unit should be subject to foreclosure for nonpayment of assessments because a tenant has failed to meet his or her personal obligation to pay assessments. Br. of Resp. at 22. Rather than absurd, the statutory requirement that the Unit stand as collateral to secure payment of that assessment obligation meets the express lien requirements of Declaration of Condominium § 17.1, RCW 64.32.200(2) and RCW 64.34.364(1). Our Legislature enacted the statutory lien provisions in furtherance of a clear public policy that Washington condominium associations should be able to recover unpaid assessments that are necessary to fund the maintenance, insurance and repairs of the condominium building(s) that benefit all of the unit owners - including here, Sand Point. Furthermore, there is absolutely nothing absurd about one person's property serving as collateral securing the obligation of another. *See, e.g., Seattle-First National Bank v. Hart*, 19 Wn. App. 71, 72-3 (1978) (mortgagee foreclosed on mortgage on real property granted and owned by lessors who had mortgaged the property to secure a loan by mortgagee to their lessees).

**M. Sand Point Not Entitled to Attorney Fees.**

Sand Point asserts various bases under which it is entitled to attorney fees. Br. of Resp. at 23-27. These asserted bases were fully addressed and opposed by the Association in its Brief of Appellant, incorporated by reference. Br. of App. at 31-39.

**N. The Trial Court's Award of Attorney Fees to Sand Point Was Excessive, Unreasonable and an Abuse of Discretion.**

Sand Point asserts that the trial court's award of attorney fees to it was reasonable. Br. of Resp. at 27-28. This asserted basis was fully addressed and opposed by the Association in its Brief of Appellant, incorporated by reference. Br. of App. at 39-44.

Sand Point asserts that the Association failed to raise the issues of Sand Point's block billing and duplicative fees to the trial court. Br. of Resp. at 28. That is incorrect: These issues were raised in the Association's Opposition to Defendant Sand Point Country Club's Motion for Attorney Fees and Costs, at Page 11. CP 495-508.

**O. Sand Point is Not Entitled to Attorney Fees on Appeal.**

Sand Point asserts that it is entitled to attorney fees and costs incurred on appeal. Br. of Resp. at 28. Sand Point asserts this right based on "the reasons set forth at length above, [Sand Point] has a contractual right to recover its attorney fees and costs." *Id.* Assuming "the reasons set forth above" refer to Sand Point's asserted various bases in Brief of Respondent at 23-27, these asserted bases were fully addressed and opposed by the Association in its Brief of Appellant, incorporated by reference. Br. of App. at 31-39. Accordingly, the Association opposes any RAP 18.1 award of attorney fees on the bases asserted in the

Association's Brief of Appellant, incorporated here by reference. Br. of App. at 31-39.

## II. CONCLUSION

The appeal herein seeks reversal of the trial court's Order Granting Sand Point's Motion for Summary Judgment (CP 444-446), denying Sand Point's counterclaim and granting the Association's claims so that it can foreclose its Declaration of Condominium lien on the Unit, and thus foreclose Sand Point's interest in the unit as fee owner of the Unit.

The appeal herein also seeks reversal of the trial court's Judgment Granting Sand Point's Motion for Attorney Fees (CP 519-521), and award the Association its attorney fees incurred in this appeal.

Dated this 24 day of May, 2012.

LAW OFFICES OF JAMES L. STRICHARTZ



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Attorneys for Appellant Fairway Estates  
Association of Apartment Owners, a Washington  
non-profit corporation

CERTIFICATE OF SERVICE

CAROLYN GLAUNER declares and states as follows:

1. I am a legal assistant at the law firm of Law Offices of James L.

Strichartz, am over the age of 18, and am otherwise competent to testify.

2. On the 24<sup>th</sup> day of May, 2012, I deposited with ABC Legal Messengers a true and correct copy of the foregoing Reply Brief to be delivered to counsel for the Respondent on May 24, 2012 at the following address:

Robert G. Casey  
Eisenhower & Carlson, PLLC  
1201 Pacific Avenue, Suite 1200  
Tacoma, WA 98402

and to pro se Respondents at the following address:

Judy Havens and John Doe Havens  
w/t/n/i Dale Havens  
20219 - 104<sup>th</sup> Place SE  
Kent, WA 98031

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

Dated this 24<sup>th</sup> day of May, 2012 at Seattle, Washington.

  
\_\_\_\_\_  
Carolyn Glauner