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No. 88853-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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BANK OF AMERICA, N.A.

Petitioner,

v.

MICHAEL FULBRIGHT, et ux.,

Respondents.

ANSWER TO AMICUS MEMORANDUM

MICHAEL FULBRIGHT

For a Published Decision of

The Court of Appeals (Division One), No. 67608-3-1

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 ORIGINAL

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INTRODUCTION

This Answer by Respondent Michael G. Fulbright is in response to the Amicus Memorandum filed by the American College of Mortgage Attorneys (the “Mortgage Attorneys”). The Mortgage Attorneys and the Petitioner, Bank of America, N.A. (“Bank of America”), are asking the Court to reverse the Court of Appeals decision in this case and overrule the Court of Appeals decision in *Summerhill Vill. Homeowners Ass’n v. Roughley*, __ Wn. App. __, 289 P.3d 645 (2012).

The Mortgage Attorneys do not address the threshold question of whether the Court should even accept the Petition for Review. They do not identify any conflict with any other Supreme Court decision or any substantial public interest (RAP 13.4(b)(1) and (4)). The decisions in this case and *Summerhill* have an extremely narrow and limited application. The decisions only concern mortgages or deeds of trust recorded after a condominium regime is established and they do not in any way affect an owner’s redemption right. The decisions come into play only when a condominium owners association governed by the Washington Condominium Act (RCW Ch. 64.34.) judicially forecloses its assessment lien, after naming and serving a mortgagee or deed of trust lender as a defendant, and the lender then fails to pay the limited lien priority or otherwise respond to the foreclosure action before a sheriff’s sale occurs.

Furthermore, due to the recent amendment to RCW 6.23.010, these cases do not apply to any future condominium lien foreclosures. Laws of 2013, Ch. 53, § 1 (SB 5541).

After presuming the Court will accept the Petition for Review, the Mortgage Attorneys attempt to manufacture an ambiguity in the now prior version of RCW 6.23.010. Unless stated otherwise, any reference to “Redemption Statute” in this Answer means the version of RCW 6.23.010 prior to SB 5541, and the term “mortgage” includes deeds of trust (consistent with use of the term in the Amicus Memorandum and RCW 64.34.020(29)).

ARGUMENT

A. Judicial Construction is Not Applicable when the Plain Meaning of a Statute is Clear.

As summarized in *Lake v. Woodcreek Homeowners Ass'n*:

Statutory interpretation begins with the statute's plain meaning. Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009). While we look to the broader statutory context for guidance, we "must not add words where the legislature has chosen not to include them," and we must "construe statutes such that all of the language is given effect." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wash.2d 674, 682, 80 P.3d 598 (2003). If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007).

168 Wn.2d 694, 704, 229 P.3d 791 (2010). As stated in *Densley v.*

Department of Retirement Systems:

Only statutes that are ambiguous require judicial construction and statutes are not ambiguous simply because different interpretations are conceivable.

162 Wn.2d, 210, 221, 173 P.3d 885 (2007) (citation and internal quotation marks omitted).

According to the Mortgage Attorneys (and Bank of America), the following portion of the Redemption Statute is ambiguous:

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage on any portion of the property, or any portion or any part thereof, separately sold, **subsequent in time** to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners. (emphasis added).

The Mortgage Attorneys erroneously contend that “subsequent in time” is ambiguous in the context of a judicial foreclosure of a condominium assessment lien and a mortgage recorded before the assessment delinquency.

B. This Appeal Concerns Redemption After Judicial Foreclosure of a Condominium Assessment Lien, Not the Priority of Competing Mortgages or Redemption After a Mortgage Foreclosure.

The Mortgage Attorneys attempt to confuse the issue with questions that could arise between competing mortgages when there is a delay in recording the initial mortgage (“Mortgage A”) and a subsequent

mortgage (“Mortgage B”) is recorded before Mortgage A is recorded. Amicus Memorandum, pages 5-7. Mortgage Attorneys are correct in claiming that lien priority is based on when the owner granted the mortgages if the Mortgage B lender was aware of Mortgage A before recording Mortgage B, and based on recording dates when the Mortgage B lender was not aware of Mortgage A before recording Mortgage B. Any uncertainty about the Redemption Statute in that situation was resolved long ago. See *Malm v. Griffith*, 109 Wash. 30, 33, 186 P. 647 (1919).

This case and *Summerhill* do not involve competing mortgages or redemption by a mortgage lender following the judicial foreclosure of another mortgage. This case and *Summerhill* concern redemption rights of a lender with a recorded mortgage following judicial foreclosure of a condominium assessment lien. For this case, the phrase “subsequent in time” just requires determining the relevant times for a recorded mortgage and a condominium assessment lien.

C. The Application of the Redemption Statute to a Condominium Assessment Lien Foreclosure is Not Ambiguous.

The Mortgage Attorneys begin their argument with the false premise that the condominium assessment lien is “measured from” the recording date of the condominium declaration. Amicus Memorandum, pages 1-2. They continue from this false premise to assert that the time of

a condominium assessment lien is somehow ambiguous under the Redemption Statute. Amicus Memorandum, page 4.

It is axiomatic that a condominium assessment lien cannot arise or exist before the condominium regime is established, which requires recording a condominium declaration. RCW 64.34.200(1). But the defect in the Mortgage Attorneys' initial premise is that the priority or time of a statutory lien is determined by the terms of the statute creating the lien, and not necessarily measured from any particular recording date, like the Mortgage Attorneys presume. For example, the effective date of a mechanic's lien is based on when work commences, rather than the subsequent recording date of the lien notice. RCW 60.04.061 and .091.

The condominium assessment lien is established and governed by RCW 64.34.364 (the "Condominium Lien Statute"). The mere recording of a condominium declaration does not in and of itself establish any assessment liability for or lien against any unit. Once a condominium is established, RCW 64.34.304(1)(b) authorizes condominium associations to adopt budgets and impose assessments. RCW 64.34.308(3) provides for an association board's adoption of budgets and the owners ratification of the budgets. RCW 64.34.360(1) specifically provides that the declarant (the condominium developer or converter) is responsible for common expenses accruing before an association makes a common expense

assessment. As the Court of Appeals noted in this case:

Recording of the declaration simply gives notice to the world that assessment liens may arise **in the future** against units in the condominium. (emphasis added)

BAC Home Loan Servicing, LP v. Fulbright, ___ Wn.2d. ___, 298 P.3d 779, 782 (2013).

The condominium assessment lien is established by RCW 64.34.364 (the “Condominium Lien Statute”). Subparagraph (1) says:

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

Where is the ambiguity in that? A condominium association has a lien for unpaid unit assessments “from the time the assessment is due”, not from the time the condominium declaration is recorded, or any other time.

RCW 64.34.364(2) then gives a condominium lien priority over most items, but not “a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent”.

(emphasis added.) For purposes of a condominium assessment lien foreclosure, it is obvious that the relevant time for a mortgage is the recording date of the mortgage. RCW 64.34.364(3) then goes on to provide the condominium lien with a limited, six-month, priority over mortgages recorded before an assessment delinquency. This section simply grants the limited priority, without any reference to the recording

date of the condominium declaration. Again, where is the ambiguity?

D. The Condominium Lien Statute Does Not Show Any Intent to Provide a Redemption Right for Neglectful Lenders.

The Mortgage Attorneys also argue that the Redemption Statute is somehow rendered ambiguous because of the legislative intent they divine from other provisions in the Condominium Lien Statute, while ignoring the plain language in RCW 64.34.364(1) and (2). First, they argue that RCW 64.34.364(9), which provides for reducing the redemption period to eight months in some cases, somehow indicates the 1990 legislature intended lenders that ignore a condominium lien foreclosure suit should still have redemption rights. Amicus Memorandum, page 9. The decisions in this case and *Summerhill* do not affect or in any way limit the judgment debtor's (unit owner's) redemption right. The length of the redemption period is relevant even though lenders like Bank of America are not authorized redemptioners. RCW 64.34.364(9) only addresses the potential length of the redemption period, not who has a redemption right.

RCW 64.34.364(9) also provides for judicial foreclosure under RCW Ch. 64.12. RCW Ch. 61.12.093 allows the complete elimination of all redemption rights when an owner abandons a unit. That certainly does not indicate any legislative intent to preserve redemption rights for neglectful lenders like Bank of America.

Second, the Mortgage Attorneys argue that RCW 64.34.364(5)'s elimination of the condominium lien priority when an association forecloses non-judicially (by private trustee's sale) must indicate legislative intent in favor of redemption rights for neglectful lenders. *Id.* That is pure speculation by the Mortgage Attorneys, with no supporting legislative history. There is no basis for concluding it indicates anything except a legislative determination that mortgages should not be eliminated by a private trustee's sale, which does not involve the service of process and judicial oversight required in a judicial foreclosure action.

The Mortgage Attorneys also point to a commonly held but erroneous assumption that expanded redemption rights result in higher bidding. Amicus Memorandum, pages 8 and 9. The majority opinion in *U.S. v. Stadium Apts., Inc.* questions this assumption. 425 F.2d 358, 365-66 (9th Cir 1970). Experience demonstrates the questions are well founded. Since the *Summerhill* opinion, competitive bidding has increased at condominium lien foreclosures, not decreased.

A review of the entire Condominium Lien Statute demonstrates the drafters were quite cognizant of various issues and mechanics involved when foreclosing an assessment lien. In addition to the provisions discussed above: (1) RCW 64.34.364(2) exempts an association lien from RCW Ch. 6.13 (homestead provisions); (2) RCW 64.34.364(9) provides

that an association may bid at the foreclosure sale; (3) RCW 64.34.364(10) contains the right to a court appointed receiver; and (4) RCW 64.34.364(12) provides for pursuit of a personal judgment without foreclosing or waiving lien rights. The legislature could have easily provided redemption rights for lenders like Bank of America, but did not. As the Court of Appeals noted in *Summerhill*:

This is a highly technical statutory scheme, not for casual tinkering by courts. We will not rewrite the redemption statute because a lien-holder's lack of diligence has had unexpected consequences.

Summerhill at 649.

CONCLUSION

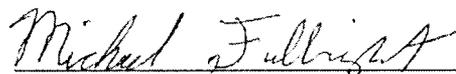
The 1990 Legislature could have given recorded mortgages complete priority over future assessments or given assessment liens complete priority over mortgages recorded after the condominium declaration. Instead, they specifically stated that condominium assessment liens begin on the assessment due date and provided that recorded mortgages have priority over future assessment liens, except for the limited priority amount. This approach benefits responsible lenders by limiting what they must pay. The consequence for neglectful lenders is clear under the plain language of the Redemption Statute: no redemption right. Given the attention to detail in the Condominium Lien Statute, there

is no reason to conclude the 1990 Legislature was unaware of the terms of the Redemption Statute or that the consequence was unintentional.

There is no ambiguity. Application of the Redemption Statute after foreclosure of a condominium assessment lien is straightforward under plain meaning of the Redemption Statute and the Condominium Lien Statute. The Court of Appeals was correct in refusing to rewrite the express terms of the statutes, leaving that to the Legislature. Neither the Mortgage Attorneys nor Bank of America point to anything in SB 5541 or its legislative history indicating the 2013 Legislature thought it was clarifying an ambiguity rather than changing the Redemption Statute, or that the 2013 Legislature intended SB 5541 to be retroactive. The fact that the lenders successfully lobbied the 2013 Legislature to amend the Redemption Statute to their liking does not retroactively render the previous language ambiguous. The Court of Appeals decisions in both this case and *Summerhill* are correct.

RESPECTFULLY SUBMITTED this 12th day of August, 2013.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing Answer to Amicus Memorandum and the attached Appendix to the Appellant's and Amicus' attorneys listed below, at the addresses listed below, postage prepaid, on August 12th, 2013.

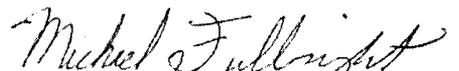
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed at Bellevue, Washington, on August 12, 2013.


Michael Fulbright, WSBA #11821

APPENDIX

RCW 6.23.010

Redemption from sale — Who may redeem — Terms include successors.

***** CHANGE IN 2013 *** (SEE 5541.SL) *****

(1) Real property sold subject to redemption, as provided in RCW 6.21.080, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:

(a) The judgment debtor, in the whole or any part of the property separately sold.

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners.

(2) As used in this chapter, the terms "judgment debtor," "redemptioners," and "purchaser," refer also to their respective successors in interest.

[1987 c 442 § 701; 1899 c 53 § 7; RRS § 594. Prior: 1897 c 50 § 15. Formerly RCW 6.24.130.]

RCW 60.04.061
Priority of lien.

The claim of lien created by this chapter upon any lot or parcel of land shall be prior to any lien, mortgage, deed of trust, or other encumbrance which attached to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant.

[1991 c 281 § 6.]

RCW 60.04.091

Recording — Time — Contents of lien.

Every person claiming a lien under RCW 60.04.021 shall file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment or the last date on which employee benefit contributions were due. The notice of claim of lien:

(1) Shall state in substance and effect:

(a) The name, phone number, and address of the claimant;

(b) The first and last date on which the labor, professional services, materials, or equipment was furnished or employee benefit contributions were due;

(c) The name of the person indebted to the claimant;

(d) The street address, legal description, or other description reasonably calculated to identify, for a person familiar with the area, the location of the real property to be charged with the lien;

(e) The name of the owner or reputed owner of the property, if known, and, if not known, that fact shall be stated; and

(f) The principal amount for which the lien is claimed.

(2) Shall be signed by the claimant or some person authorized to act on his or her behalf who shall affirmatively state they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW. If the lien has been assigned, the name of the assignee shall be stated. Where an action to foreclose the lien has been commenced such notice of claim of lien may be amended as pleadings may be by order of the court insofar as the interests of third parties are not adversely affected by such amendment. A claim of lien substantially in the following form shall be sufficient:

CLAIM OF LIEN

....., claimant, vs , name of person indebted to claimant:

Notice is hereby given that the person named below claims a lien pursuant to *chapter 64.04 RCW. In support of this lien the following information is submitted:

1. NAME OF LIEN CLAIMANT:

TELEPHONE NUMBER:

ADDRESS:

2. DATE ON WHICH THE CLAIMANT BEGAN TO PERFORM LABOR, PROVIDE PROFESSIONAL SERVICES, SUPPLY MATERIAL OR EQUIPMENT OR THE DATE ON WHICH EMPLOYEE BENEFIT CONTRIBUTIONS BECAME DUE:

3. NAME OF PERSON INDEBTED TO THE CLAIMANT:

.....

4. DESCRIPTION OF THE PROPERTY AGAINST WHICH A LIEN IS CLAIMED (Street address, legal description or other information that will reasonably describe the property):

.....

.....

.....

5. NAME OF THE OWNER OR REPUTED OWNER (If not known state "unknown"):

6. THE LAST DATE ON WHICH LABOR WAS PERFORMED; PROFESSIONAL SERVICES WERE FURNISHED; CONTRIBUTIONS TO AN EMPLOYEE BENEFIT PLAN WERE DUE; OR MATERIAL, OR EQUIPMENT WAS FURNISHED:

.....

7. PRINCIPAL AMOUNT FOR WHICH THE LIEN IS CLAIMED IS:

8. IF THE CLAIMANT IS THE ASSIGNEE OF THIS CLAIM SO STATE HERE:

.....

....., Claimant

.....

.....

(Phone number, address, city,
and
state of claimant)

STATE OF WASHINGTON, COUNTY OF

....., ss.

....., being sworn, says: I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan) above named; I have read or heard the foregoing claim, read and know the contents thereof, and believe the same to be true and correct and that the claim of lien is not frivolous and is made with reasonable cause, and is not clearly excessive under penalty of perjury.

.....

Subscribed and sworn to before me this day of

.....

The period provided for recording the claim of lien is a period of limitation and no action to foreclose a lien shall be maintained unless the claim of lien is filed for recording within the ninety-day period stated. The lien claimant shall give a copy of the claim of lien to the owner or reputed owner by mailing it by certified or registered mail or by personal service within fourteen days of the time the claim of lien is filed for recording. Failure to do so results in a forfeiture of any right the claimant may have to attorneys' fees and costs against the owner under RCW 60.04.181.

[1992 c 126 § 7; 1991 c 281 § 9.]

Notes:

***Reviser's note:** The reference to chapter 64.04 RCW appears to be erroneous. Reference to chapter 60.04 RCW was apparently intended.

RCW 61.12.093

Abandoned improved real estate — Purchaser takes free of redemption rights.

In actions to foreclose mortgages on real property improved by structure or structures, if the court finds that the mortgagor or his or her successor in interest has abandoned said property for six months or more, the purchaser at the sheriff's sale shall take title in and to such property free from all redemption rights as provided for in RCW 6.23.010 et seq. upon confirmation of the sheriff's sale by the court. Lack of occupancy by, or by authority of, the mortgagor or his or her successor in interest for a continuous period of six months or more prior to the date of the decree of foreclosure, coupled with failure to make payment upon the mortgage obligation within the said six month period, will be prima facie evidence of abandonment.

[2012 c 117 § 162; 1965 c 80 § 1; 1963 c 34 § 1.]

Notes:

Deed to issue upon request immediately after confirmation of sale: RCW 6.21.120.

RCW 64.34.020
Definitions.

In the declaration and bylaws, unless specifically provided otherwise or the context requires otherwise, and in this chapter:

(1) "Affiliate" means any person who controls, is controlled by, or is under common control with the referenced person. A person "controls" another person if the person: (a) Is a general partner, officer, director, or employer of the referenced person; (b) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the referenced person; (c) controls in any manner the election of a majority of the directors of the referenced person; or (d) has contributed more than twenty percent of the capital of the referenced person. A person "is controlled by" another person if the other person: (i) Is a general partner, officer, director, or employer of the person; (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent of the voting interest in the person; (iii) controls in any manner the election of a majority of the directors of the person; or (iv) has contributed more than twenty percent of the capital of the person. Control does not exist if the powers described in this subsection are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the undivided interest in the common elements, the common expense liability, and votes in the association allocated to each unit.

(3) "Assessment" means all sums chargeable by the association against a unit including, without limitation: (a) Regular and special assessments for common expenses, charges, and fines imposed by the association; (b) interest and late charges on any delinquent account; and (c) costs of collection, including reasonable attorneys' fees, incurred by the association in connection with the collection of a delinquent owner's account.

(4) "Association" or "unit owners' association" means the unit owners' association organized under RCW 64.34.300.

(5) "Baseline funding plan" means establishing a reserve funding goal of maintaining a reserve account balance above zero dollars throughout the thirty-year study period described under RCW 64.34.380.

(6) "Board of directors" means the body, regardless of name, with primary authority to manage the affairs of the association.

(7) "Common elements" means all portions of a condominium other than the units.

(8) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to RCW 64.34.224.

(9) "Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.

(10) "Condominium" means real property, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real property is not a condominium unless the undivided interests in the common elements are vested in the unit owners, and unless a declaration and a survey map and plans have been recorded pursuant to this chapter.

(11) "Contribution rate" means, in a reserve study as described in RCW 64.34.380, the amount contributed to the reserve account so that the association will have cash reserves to pay major maintenance, repair, or replacement costs without the need of a special assessment.

(12) "Conversion condominium" means a condominium (a) that at any time before creation of the condominium was lawfully occupied wholly or partially by a tenant or subtenant for residential purposes pursuant to a rental agreement, oral or written, express or implied, for which the tenant or subtenant had not received the notice described in (b) of this subsection; or (b) that, at any time within twelve months before the conveyance of, or acceptance of an agreement to convey, any unit therein other than to a declarant or any affiliate of a declarant, was lawfully occupied wholly or partially by a residential tenant of a declarant or an affiliate of a declarant and such tenant was not notified in writing, prior to lawfully occupying a unit or executing a rental agreement, whichever event first occurs, that the unit was part of a condominium and subject to sale. "Conversion condominium" shall not include a condominium in which, before July 1, 1990, any unit therein had been conveyed or been made subject to an agreement to convey to any transferee other than a declarant or an affiliate of a declarant.

(13) "Conveyance" means any transfer of the ownership of a unit, including a transfer by deed or by real estate contract and, with respect to a unit in a leasehold condominium, a transfer by lease or assignment thereof, but shall not include a

transfer solely for security.

(14) "Dealer" means a person who, together with such person's affiliates, owns or has a right to acquire either six or more units in a condominium or fifty percent or more of the units in a condominium containing more than two units.

(15) "Declarant" means:

(a) Any person who executes as declarant a declaration as defined in subsection (17) of this section; or

(b) Any person who reserves any special declarant right in the declaration; or

(c) Any person who exercises special declarant rights or to whom special declarant rights are transferred; or

(d) Any person who is the owner of a fee interest in the real property which is subjected to the declaration at the time of the recording of an instrument pursuant to RCW 64.34.316 and who directly or through one or more affiliates is materially involved in the construction, marketing, or sale of units in the condominium created by the recording of the instrument.

(16) "Declarant control" means the right of the declarant or persons designated by the declarant to appoint and remove officers and members of the board of directors, or to veto or approve a proposed action of the board or association, pursuant to RCW 64.34.308 (5) or (6).

(17) "Declaration" means the document, however denominated, that creates a condominium by setting forth the information required by RCW 64.34.216 and any amendments to that document.

(18) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to: (a) Add real property or improvements to a condominium; (b) create units, common elements, or limited common elements within real property included or added to a condominium; (c) subdivide units or convert units into common elements; (d) withdraw real property from a condominium; or (e) reallocate limited common elements with respect to units that have not been conveyed by the declarant.

(19) "Dispose" or "disposition" means a voluntary transfer or conveyance to a purchaser or lessee of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(20) "Effective age" means the difference between the estimated useful life and remaining useful life.

(21) "Eligible mortgagee" means the holder of a mortgage on a unit that has filed with the secretary of the association a written request that it be given copies of notices of any action by the association that requires the consent of mortgagees.

(22) "Foreclosure" means a forfeiture or judicial or nonjudicial foreclosure of a mortgage or a deed in lieu thereof.

(23) "Full funding plan" means setting a reserve funding goal of achieving one hundred percent fully funded reserves by the end of the thirty-year study period described under RCW 64.34.380, in which the reserve account balance equals the sum of the deteriorated portion of all reserve components.

(24) "Fully funded balance" means the current value of the deteriorated portion, not the total replacement value, of all the reserve components. The fully funded balance for each reserve component is calculated by multiplying the current replacement cost of that reserve component by its effective age, then dividing the result by that reserve component's useful life. The sum total of all reserve components' fully funded balances is the association's fully funded balance.

(25) "Identifying number" means the designation of each unit in a condominium.

(26) "Leasehold condominium" means a condominium in which all or a portion of the real property is subject to a lease, the expiration or termination of which will terminate the condominium or reduce its size.

(27) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of RCW 64.34.204 (2) or (4) for the exclusive use of one or more but fewer than all of the units.

(28) "Master association" means an organization described in RCW 64.34.276, whether or not it is also an association described in RCW 64.34.300.

(29) "Mortgage" means a mortgage, deed of trust or real estate contract.

(30) "Person" means a natural person, corporation, partnership, limited partnership, trust, governmental subdivision or agency, or other legal entity.

(31) "Purchaser" means any person, other than a declarant or a dealer, who by means of a disposition acquires a legal or equitable interest in a unit other than (a) a leasehold interest, including renewal options, of less than twenty years at the time of creation of the unit, or (b) as security for an obligation.

(32) "Real property" means any fee, leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements thereon and easements, rights and interests appurtenant thereto which by custom, usage, or law pass with a conveyance of land although not described in the contract of sale or instrument of conveyance. "Real property" includes parcels, with or without upper or lower boundaries, and spaces that may be filled with air or water.

(33) "Remaining useful life" means the estimated time, in years, before a reserve component will require major maintenance, repair, or replacement to perform its intended function.

(34) "Replacement cost" means the current cost of replacing, repairing, or restoring a reserve component to its original functional condition.

(35) "Reserve component" means a common element whose cost of maintenance, repair, or replacement is infrequent, significant, and impractical to include in an annual budget.

(36) "Reserve study professional" means an independent person who is suitably qualified by knowledge, skill, experience, training, or education to prepare a reserve study in accordance with RCW 64.34.380 and 64.34.382.

(37) "Residential purposes" means use for dwelling or recreational purposes, or both.

(38) "Significant assets" means that the current total cost of major maintenance, repair, and replacement of the reserve components is fifty percent or more of the gross budget of the association, excluding reserve account funds.

(39) "Special declarant rights" means rights reserved for the benefit of a declarant to: (a) Complete improvements indicated on survey maps and plans filed with the declaration under RCW 64.34.232; (b) exercise any development right under RCW 64.34.236; (c) maintain sales offices, management offices, signs advertising the condominium, and models under RCW 64.34.256; (d) use easements through the common elements for the purpose of making improvements within the condominium or within real property which may be added to the condominium under RCW 64.34.260; (e) make the condominium part of a larger condominium or a development under RCW 64.34.280; (f) make the condominium subject to a master association under RCW 64.34.276; or (g) appoint or remove any officer of the association or any master association or any member of the board of directors, or to veto or approve a proposed action of the board or association, during any period of declarant control under RCW 64.34.308(5).

(40) "Timeshare" shall have the meaning specified in the timeshare act, RCW 64.36.010(11).

(41) "Unit" means a physical portion of the condominium designated for separate ownership, the boundaries of which are described pursuant to RCW 64.34.216(1)(d). "Separate ownership" includes leasing a unit in a leasehold condominium under a lease that expires contemporaneously with any lease, the expiration or termination of which will remove the unit from the condominium.

(42) "Unit owner" means a declarant or other person who owns a unit or leases a unit in a leasehold condominium under a lease that expires simultaneously with any lease, the expiration or termination of which will remove the unit from the condominium, but does not include a person who has an interest in a unit solely as security for an obligation. "Unit owner" means the vendee, not the vendor, of a unit under a real estate contract.

(43) "Useful life" means the estimated time, between years, that major maintenance, repair, or replacement is estimated to occur.

[2011 c 189 § 1; 2008 c 115 § 8; 2004 c 201 § 9; 1992 c 220 § 2; 1990 c 166 § 1; 1989 c 43 § 1-103.]

Notes:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Effective date – 2011 c 189: See note following RCW 64.38.065.

Effective date – 1990 c 166: "This act shall take effect July 1, 1990." [1990 c 166 § 16.]

RCW 64.34.304

Unit owners' association — Powers.

(1) Except as provided in subsection (2) of this section, and subject to the provisions of the declaration, the association may:

- (a) Adopt and amend bylaws, rules, and regulations;
- (b) Adopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from unit owners;
- (c) Hire and discharge or contract with managing agents and other employees, agents, and independent contractors;
- (d) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;
- (e) Make contracts and incur liabilities;
- (f) Regulate the use, maintenance, repair, replacement, and modification of common elements;
- (g) Cause additional improvements to be made as a part of the common elements;
- (h) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, but common elements may be conveyed or subjected to a security interest only pursuant to RCW 64.34.348;
- (i) Grant easements, leases, licenses, and concessions through or over the common elements and petition for or consent to the vacation of streets and alleys;
- (j) Impose and collect any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in RCW 64.34.204 (2) and (4), and for services provided to unit owners;
- (k) Impose and collect charges for late payment of assessments pursuant to RCW 64.34.364(13) and, after notice and an opportunity to be heard by the board of directors or by such representative designated by the board of directors and in accordance with such procedures as provided in the declaration or bylaws or rules and regulations adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule thereof adopted by the board of directors and furnished to the owners for violations of the declaration, bylaws, and rules and regulations of the association;
- (l) Impose and collect reasonable charges for the preparation and recording of amendments to the declaration, resale certificates required by RCW 64.34.425, and statements of unpaid assessments;
- (m) Provide for the indemnification of its officers and board of directors and maintain directors' and officers' liability insurance;
- (n) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration provides;
- (o) Join in a petition for the establishment of a parking and business improvement area, participate in the rate payers' board or other advisory body set up by the legislative authority for operation of a parking and business improvement area, and pay special assessments levied by the legislative authority on a parking and business improvement area encompassing the condominium property for activities and projects which benefit the condominium directly or indirectly;
- (p) Establish and administer a reserve account as described in RCW 64.34.380;
- (q) Prepare a reserve study as described in RCW 64.34.380;
- (r) Exercise any other powers conferred by the declaration or bylaws;
- (s) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and
- (t) Exercise any other powers necessary and proper for the governance and operation of the association.

(2) The declaration may not impose limitations on the power of the association to deal with the declarant which are more restrictive than the limitations imposed on the power of the association to deal with other persons.

[2008 c 115 § 9; 1993 c 429 § 11; 1990 c 166 § 3; 1989 c 43 § 3-102.]

Notes:

Effective date -- 1990 c 166: See note following RCW 64.34.020.

RCW 64.34.308

Board of directors and officers.

(1) Except as provided in the declaration, the bylaws, subsection (2) of this section, or other provisions of this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors are required to exercise: (a) If appointed by the declarant, the care required of fiduciaries of the unit owners; or (b) if elected by the unit owners, ordinary and reasonable care.

(2) The board of directors shall not act on behalf of the association to amend the declaration in any manner that requires the vote or approval of the unit owners pursuant to RCW 64.34.264, to terminate the condominium pursuant to RCW 64.34.268, or to elect members of the board of directors or determine the qualifications, powers, and duties, or terms of office of members of the board of directors pursuant to subsection (7) of this section; but the board of directors may fill vacancies in its membership for the unexpired portion of any term.

(3) Within thirty days after adoption of any proposed budget for the condominium, the board of directors shall provide a summary of the budget to all the unit owners and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than fourteen nor more than sixty days after mailing of the summary. Unless at that meeting the owners of units to which a majority of the votes in the association are allocated or any larger percentage specified in the declaration reject the budget, the budget is ratified, whether or not a quorum is present. In the event the proposed budget is rejected or the required notice is not given, the periodic budget last ratified by the unit owners shall be continued until such time as the unit owners ratify a subsequent budget proposed by the board of directors.

(4) As part of the summary of the budget provided to all unit owners, the board of directors shall disclose to the unit owners:

(a) The current amount of regular assessments budgeted for contribution to the reserve account, the recommended contribution rate from the reserve study, and the funding plan upon which the recommended contribution rate is based;

(b) If additional regular or special assessments are scheduled to be imposed, the date the assessments are due, the amount of the assessments per each unit per month or year, and the purpose of the assessments;

(c) Based upon the most recent reserve study and other information, whether currently projected reserve account balances will be sufficient at the end of each year to meet the association's obligation for major maintenance, repair, or replacement of reserve components during the next thirty years;

(d) If reserve account balances are not projected to be sufficient, what additional assessments may be necessary to ensure that sufficient reserve account funds will be available each year during the next thirty years, the approximate dates assessments may be due, and the amount of the assessments per unit per month or year;

(e) The estimated amount recommended in the reserve account at the end of the current fiscal year based on the most recent reserve study, the projected reserve account cash balance at the end of the current fiscal year, and the percent funded at the date of the latest reserve study;

(f) The estimated amount recommended in the reserve account based upon the most recent reserve study at the end of each of the next five budget years, the projected reserve account cash balance in each of those years, and the projected percent funded for each of those years; and

(g) If the funding plan approved by the association is implemented, the projected reserve account cash balance in each of the next five budget years and the percent funded for each of those years.

(5)(a) Subject to subsection (6) of this section, the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant, may: (i) Appoint and remove the officers and members of the board of directors; or (ii) veto or approve a proposed action of the board or association. A declarant's failure to veto or approve such proposed action in writing within thirty days after receipt of written notice of the proposed action shall be deemed approval by the declarant.

(b) Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) Sixty days after conveyance of seventy-five percent of the units which may be created to unit owners other than a declarant; (ii) two years after the last conveyance or transfer of record of a unit except as security for a debt; (iii) two years after any development right to add new units was last exercised; or (iv) the date on which the declarant records an amendment to the declaration pursuant to which the declarant voluntarily surrenders the right to further appoint and remove officers and members of the board of directors. A declarant may voluntarily surrender the right to appoint and remove officers and members of the board of directors before termination of that period pursuant to (i), (ii), and (iii) of this subsection (5)(b), but in

that event the declarant may require, for the duration of the period of declarant control, that specified actions of the association or board of directors, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(6) Not later than sixty days after conveyance of twenty-five percent of the units which may be created to unit owners other than a declarant, at least one member and not less than twenty-five percent of the members of the board of directors must be elected by unit owners other than the declarant. Not later than sixty days after conveyance of fifty percent of the units which may be created to unit owners other than a declarant, not less than thirty-three and one-third percent of the members of the board of directors must be elected by unit owners other than the declarant.

(7) Within thirty days after the termination of any period of declarant control, the unit owners shall elect a board of directors of at least three members, at least a majority of whom must be unit owners. The number of directors need not exceed the number of units then in the condominium. The board of directors shall elect the officers. Such members of the board of directors and officers shall take office upon election.

(8) Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of the voting power in the association present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the board of directors with or without cause, other than a member appointed by the declarant. The declarant may not remove any member of the board of directors elected by the unit owners. Prior to the termination of the period of declarant control, the unit owners, other than the declarant, may remove by a two-thirds vote, any director elected by the unit owners.

[2011 c 189 § 2; 1992 c 220 § 15; 1989 c 43 § 3-103.]

Notes:

Effective date – 2011 c 189: See note following RCW 64.38.065.

RCW 64.34.360

Common expenses — Assessments.

(1) Until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments must be made against all units, based on a budget adopted by the association.

(2) Except for assessments under subsections (3), (4), and (5) of this section, all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to RCW 64.34.224(1). Any past due common expense assessment or installment thereof bears interest at the rate established by the association pursuant to RCW 64.34.364.

(3) To the extent required by the declaration:

(a) Any common expense associated with the operation, maintenance, repair, or replacement of a limited common element shall be paid by the owner of or assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

(b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited;

(c) The costs of insurance must be assessed in proportion to risk; and

(d) The costs of utilities must be assessed in proportion to usage.

(4) Assessments to pay a judgment against the association pursuant to RCW 64.34.368(1) may be made only against the units in the condominium at the time the judgment was entered in proportion to their allocated common expense liabilities at the time the judgment was entered.

(5) To the extent that any common expense is caused by the misconduct of any unit owner, the association may assess that expense against the owner's unit.

(6) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities.

[1990 c 166 § 5; 1989 c 43 § 3-116.]

Notes:

Effective date – 1990 c 166: See note following RCW 64.34.020.

RCW 64.34.364
Lien for assessments.

*** CHANGE IN 2013 *** (SEE 5077-S.SL) ***

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

(2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit. A lien under this section is not subject to the provisions of chapter 6.13 RCW.

(3) Except as provided in subsections (4) and (5) of this section, the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a nonjudicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.

(4) The priority of the association's lien against units encumbered by a mortgage held by an eligible mortgagee or by a mortgagee which has given the association a written request for a notice of delinquent assessments shall be reduced by up to three months if and to the extent that the lien priority under subsection (3) of this section includes delinquencies which relate to a period after such holder becomes an eligible mortgagee or has given such notice and before the association gives the holder a written notice of the delinquency. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.

(5) If the association forecloses its lien under this section nonjudicially pursuant to chapter 61.24 RCW, as provided by subsection (9) of this section, the association shall not be entitled to the lien priority provided for under subsection (3) of this section.

(6) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.

(7) Recording of the declaration constitutes record notice and perfection of the lien for assessments. While no further recording of any claim of lien for assessment under this section shall be required to perfect the association's lien, the association may record a notice of claim of lien for assessments under this section in the real property records of any county in which the condominium is located. Such recording shall not constitute the written notice of delinquency to a mortgagee referred to in subsection (2) of this section.

(8) A lien for unpaid assessments and the personal liability for payment of assessments is extinguished unless proceedings to enforce the lien or collect the debt are instituted within three years after the amount of the assessments sought to be recovered becomes 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. The lien arising under this section may be enforced nonjudicially in the manner set forth in chapter 61.24 RCW for nonjudicial foreclosure of deeds of trust if the declaration (a) contains a grant of the condominium in trust to a trustee qualified under RCW 61.24.010 to secure the obligations of the unit owners to the association for the payment of assessments, (b) contains a power of sale, (c) provides in its terms that the units are not used principally for agricultural or farming purposes, and (d) provides that the power of sale is operative in the case of a default in the obligation to pay assessments. The association or its authorized representative shall have the power, unless prohibited by the declaration, to purchase the unit at the foreclosure sale and to acquire, hold, lease, mortgage, or convey the same. Upon an express waiver in the complaint of any right to a deficiency judgment in a judicial foreclosure action, the period of redemption shall be eight months. Nothing in this section shall prohibit an association from taking a deed in lieu of foreclosure.

(10) 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. If the rental is not paid, the receiver may obtain possession of the unit, refurbish it for rental up to a reasonable standard for rental units in this type of condominium, rent the unit or permit its rental to others, and apply the rents first to the cost of the receivership and attorneys' fees thereof, then to the cost of refurbishing the unit, then to applicable charges, then to costs, fees, and charges of the foreclosure action, and then to the payment of the delinquent assessments. Only a receiver may take possession and collect rents under this subsection, and a receiver shall not be appointed less than ninety days after the delinquency. The exercise by the association of the foregoing rights shall not affect the priority of preexisting liens on the unit.

(11) Except as provided in subsection (3) of this section, the holder of a mortgage or other purchaser of a unit who obtains the right of possession of the unit through foreclosure shall not be liable for assessments or installments thereof that became

due prior to such right of possession. Such unpaid assessments shall be deemed to be common expenses collectible from all the unit owners, including such mortgagee or other purchaser of the unit. Foreclosure of a mortgage does not relieve the prior owner of personal liability for assessments accruing against the unit prior to the date of such sale as provided in this subsection.

(12) In addition to constituting a lien on the unit, each assessment shall be the joint and several obligation of the owner or owners of the unit to which the same are assessed as of the time the assessment is due. In a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. Suit to recover a personal judgment for any delinquent assessment shall be maintainable in any court of competent jurisdiction without foreclosing or waiving the lien securing such sums.

(13) The association may from time to time establish reasonable late charges and a rate of interest to be charged on all subsequent delinquent assessments or installments thereof. In the absence of another established nonusurious rate, delinquent assessments shall bear interest from the date of delinquency at the maximum rate permitted under RCW 19.52.020 on the date on which the assessments became delinquent.

(14) The association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the association shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal and in the enforcement of a judgment.

(15) 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. The statement shall be furnished within fifteen days after receipt of the request and is binding on the association, the board of directors, and every unit owner, unless and to the extent known by the recipient to be false.

(16) To the extent not inconsistent with this section, the declaration may provide for such additional remedies for collection of assessments as may be permitted by law.

[1990 c 166 § 6; 1989 c 43 § 3-117.]

Notes:

Effective date -- 1990 c 166: See note following RCW 64.34.020.

CERTIFICATION OF ENROLLMENT

SENATE BILL 5541

Chapter 53, Laws of 2013

63rd Legislature
2013 Regular Session

REAL PROPERTY--REDEMPTION

EFFECTIVE DATE: 07/28/13

Passed by the Senate March 11, 2013
YEAS 47 NAYS 2

BRAD OWEN

President of the Senate

Passed by the House April 9, 2013
YEAS 93 NAYS 0

FRANK CHOPP

Speaker of the House of Representatives

Approved April 23, 2013, 4:34 p.m.

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5541** as passed by the Senate and the House of Representatives on the dates hereon set forth.

HUNTER G. GOODMAN

Secretary

FILED

April 24, 2013

**Secretary of State
State of Washington**

SENATE BILL 5541

Passed Legislature - 2013 Regular Session

State of Washington 63rd Legislature 2013 Regular Session

By Senators Hobbs, Fain, Hatfield, and Harper

Read first time 02/04/13. Referred to Committee on Financial Institutions, Housing & Insurance.

1 AN ACT Relating to redemption of real property; and amending RCW
2 6.23.010.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 **Sec. 1.** RCW 6.23.010 and 1987 c 442 s 701 are each amended to read
5 as follows:

6 (1) Real property sold subject to redemption, as provided in RCW
7 6.21.080, or any part thereof separately sold, may be redeemed by the
8 following persons, or their successors in interest:

9 (a) The judgment debtor, in the whole or any part of the property
10 separately sold.

11 (b) A creditor having a lien by judgment, decree, deed of trust, or
12 mortgage, on any portion of the property, or any portion of any part
13 thereof, separately sold, subsequent in (~~time~~) priority to that on
14 which the property was sold. The persons mentioned in this subsection
15 are termed redemptioners.

16 (2) As used in this chapter, the terms "judgment debtor,"
17 "redemptioner," and "purchaser(~~τ~~)" refer also to their respective

1 successors in interest.

Passed by the Senate March 11, 2013.

Passed by the House April 9, 2013.

Approved by the Governor April 23, 2013.

Filed in Office of Secretary of State April 24, 2013.

OFFICE RECEPTIONIST, CLERK

To: Mike Fulbright
Subject: RE: Filing Answer to Amicus Memorandum

Received 8-12-2013

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Mike Fulbright [<mailto:mike@fulbrightlegal.com>]
Sent: Monday, August 12, 2013 10:06 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Filing Answer to Amicus Memorandum

Sir or Madame,

Please file the attached Answer to Amicus Memorandum (including Appendix) for the following:

Case Name: Bank of America, N.A. v. Michael Fulbright, et ux.
Supreme Court Case No. 88853-1.

Bank of America, N.A. is the successor by merger to the original Plaintiff, BAC Home Loans Servicing.

My contact info:

Michael G. Fulbright
425-284-3081
WSBA #11821
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Yours truly,

Mike Fulbright
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Bellevue, WA 98005