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No. 67267-3

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

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

Appellant,

v.

BELLEVUE PACIFIC CENTER LIMITED PARTNERSHIP, a
Washington limited partnership,

Respondent.

BRIEF OF RESPONDENT BELLEVUE PACIFIC CENTER
LIMITED PARTNERSHIP

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STATE OF WASHINGTON
2012 JAN 4 PM 2:57

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I. INTRODUCTION

This case involves the interpretation of the condominium declaration for the Bellevue Pacific Tower Condominium (“Tower”). Bellevue Pacific Limited Partnership (“Limited”) was the declarant of the condominium. It recorded the declaration in 1995. The issue on appeal is whether the Tower declaration granted to Limited or to the Tower’s owners’ association (“COA”) the power (a) to allocate nine courtyard parking stalls to individual residential units within the Tower and (b) to rent the courtyard stalls until so allocated.

In language as clear as humanly possible, the Tower’s condominium declaration granted Limited those rights. The public offering statement (“POS”) given to each purchaser clearly explained this.

Despite the clear language of these documents, some owners of Tower units wanted the right to use the nine courtyard stalls for free parking. The President of the Tower’s COA explained to unit owners in February of 2000 that Limited, as the declarant, had the right to rent and allocate the stalls under the Tower’s declaration. To satisfy its unit owners’ desire for free courtyard parking, the Tower’s COA then leased four of the courtyard stalls

from Limited for the next eight years - from the spring of 2000 through the end of 2007.

In 2001, the Tower and Limited were parties in a lawsuit involving disputes over the proper interpretation of the Center and Tower declarations. Tower did not raise in that lawsuit any issue regarding Limited's right to allocate or rent the courtyard parking stalls – which Tower was renting at the time. In 2003, Tower and Limited settled the claims between them in the lawsuit. They executed a settlement agreement that included a broad mutual release of any claims that were or could have been made in the lawsuit.

In January of 2008, Tower's Board (with a new battery of attorneys) apparently decided that the Tower Declaration did not mean at all what it said – i.e., that Limited had the right to allocate and rent the courtyard stalls – but rather meant exactly the opposite. Tower seized control of the nine courtyard stalls and stopped paying rent. Limited sued. The trial court granted summary judgment on liability. In a later trial on the issue of damages, the trial court awarded Limited \$78,550 in damages together with reasonable attorneys' fees of \$69,920.25

On this appeal, Tower challenges only the trial court's grant of partial summary judgment on liability. Its brief ignores the clear wording of the Tower declaration, advances a claim it released in 2003, and seeks to make legal arguments it did not raise below. Tower's brief ignores not only the very clear language in the Tower declaration, but also a course of conduct stretching over eight years and showing the mutual understanding of the parties that Limited had the right to allocate and rent the courtyard stalls.

II. STATEMENT OF ISSUES

1. Does the declaration for the Tower condominium grant Limited the right to allocate the nine courtyard parking stalls and to rent them until allocated?

2. Does the declaration for the Center condominium in any way provide otherwise?

3. Did the parties by their conduct for eight years manifest their understanding that the Tower declaration gave Limited the right to allocate and rent the nine courtyard stalls?

4. Did Tower release the claims it now advances when it executed the 2003 Memorandum of Understanding?

5. Are Tower's claims barred by the doctrine of res judicata?

6. Should this Court consider on appeal arguments that Tower did not raise in the trial court?

7. Does a party waive an affirmative defense by failing to plead or argue it below?

III. STATEMENT OF THE CASE

A. BACKGROUND

Limited formed the Bellevue Pacific Center Condominium ("Center") in 1995 when it recorded the declaration for the Center. (CP 216) The Center condominium is housed in a single high rise building in downtown Bellevue. A multi-use building, the Center consists of three Units – a Commercial Unit (retail and office space), a Garage Unit (public parking garage), and a Residential Unit (171 apartment residences). (CP 196, §4.1). The Residential Unit is a separate condominium known as the Bellevue Pacific Tower Condominium ("Tower"). (CP 76) Limited was also the declarant for the Tower. (CP 122) It recorded the Tower's declaration at the same time that it recorded the Center's declaration in 1995. (CP 76, 216) Included in the Appendix is a sketch showing the relative boundaries of the three units in the Center. (CP 52)

The building that houses the Center includes a garage on its lowest four levels. The lowest of the garage floors, known as floor P1, is part of the Tower condominium and contains 122 parking stalls. (CP 164; CP 83, §3.1) The Tower declaration grants the declarant (Limited) the power to allocate these to individual condominium units as and when those units are sold, thus permitting Limited to sell units with parking. (CP 83, §3.1; CP 69, ¶6)

The upper three floors of the building's garage form the Garage Unit of the Center condominium. The Garage Unit is a commercial garage open to public parking.

B. THE CONDOMINIUM DECLARATIONS

Under both the Condominium Act (RCW chpt. 64.34) and the definitions contained in the Center's declaration, those portions of the Center condominium other than its three Units are deemed common elements. (§5.1, CP 197; RCW 64.34.020 (6)) A limited common element is, by definition, a common element that has been reserved in the declaration or survey maps of a condominium for the exclusive use of a particular Unit in the condominium. (§6.1 on CP 197; RCW 64.34.020(25)) The Center's declaration reserves some of its common elements for the use of the Commercial Unit,

some for the use of the Tower (its Residential Unit) and some for the use of both. (§§6.2 – 6.4 at CP 197-199)

The limited common elements allocated to the Tower are described in Section 6.2 of the Center declaration. (CP 197) They are also shown on the survey map and plans of the Center by use of the designation “RLCE” (residential limited common element). (CP 197, §6.2; CP 417) The nine courtyard parking stalls are marked as “RLCE” on the Center’s survey map. (CP 417)

The Center declaration contains one other provision regarding parking for the Tower. Section 6.6 of the Center declaration provides that up to 45 of the parking stalls located on Floor 1 of the Garage Unit (just outside the boundary of Level P-1 of the Residential Unit) can be allocated by Limited as the Center declarant to either the Garage Unit, the Residential Unit, or both. (CP 199) If allocated to both, the stalls would be “zoned” stalls made available for use both by patrons of the commercial garage and residents of the Tower, with priority to the latter. (CP 199)

The Tower declaration, recorded by Limited simultaneously with the Center’s, describes the property comprising the Tower as follows:

Section 3.1. Property. The real property comprising the Condominium [i.e., comprising the Tower] is described in Schedule A and consists of the Residential Unit as defined in the Mixed Use Condominium Declaration, plus certain limited common elements allocated to the Residential Unit under the Mixed Use Condominium Declaration, together with certain easement rights pertaining thereto. (emphasis supplied) (CP 83).

This definition includes the nine courtyard stalls marked as “RCLE” on the Center survey map. (CP 417)

The Tower declaration separately addresses the parking available to the Tower. Section 3.3 states as follows:

Section 3.3. Parking spaces. There are a total of 131 parking spaces in the Condominium, consisting of 122 enclosed parking spaces located on Level P-1, and 9 exposed parking spaces located in the courtyard area surrounding the main entrance to the Condominium. In addition, up to 45 parking spaces located on Floor 1 of the Building may be allocated as limited common element to the Residential Unit under the Mixed Use Condominium Declaration for use by the Owners of the Units in accordance with certain terms and conditions set forth in the Mixed Use Condominium Declaration. (Emphasis supplied) (CP 83)

Article 6.5.1 of the Tower declaration states that parking spaces and storage spaces “are or shall be allocated to Unit(s) by *Declarant* pursuant to Schedule B or an amendment to Schedule B

executed solely *by Declarant.*” (emphasis supplied)(CP 85)¹ Section 6.6.2, entitled “Rental Of Parking And Storage Spaces *By Declarant,*” states that “*the Declarant* may rent a parking space that is unallocated and collect all income from the rental.” (emphasis supplied)(CP 85) Section 25.2.2 describes the declarant’s right to allocate parking stalls to residential units as a development right of the declarant. (CP 120) That section states that “*Declarant reserves the right to make the initial allocation* of storage areas and parking spaces as Limited Common Element to particular Unit(s)” prior to or contemporaneously with the closing of the sale of the Unit. (emphasis supplied)(CP 120-121)

Together, these sections of the Tower Declaration clearly grant Limited, as the declarant, the right to allocate the nine courtyard stalls to particular residential units as those units are sold and to rent the courtyard stalls, retaining the rental income, until such time as the stalls are allocated to a unit.

Lest there be any doubt as to this clear language, each purchaser of a condominium was provided a copy of a public offering statement, or POS. (CP 53). The POS for the Tower

¹ Schedule B to the declaration is a table showing each unit’s assigned stalls, votes and allocated percentage interest in the condominium. (CP144)

condominium addresses the issue of parking stalls in various places. Section C3.1, a portion of the POS entitled "Parking and Storage", states as follows:

3.1 There are a total of 122 parking spaces in the Condominium located on Level P-1 and nine (9) exterior (exposed) spaces around the circular driveway which extends from the fourth floor level of the Building. *These may be allocated by Declarant to particular Units as a limited common element in accordance with Section 6.5 of the Declaration. (emphasis supplied) (CP67)*

Section C.6 of the Declaration, dealing with "Limited Common Elements" states that "allocations of parking spaces and storage spaces *will be made by the Declarant at the time of unit sales*". (emphasis supplied) (CP 69) Section E.2, dealing with "Development Rights" explains that "the Declarant has reserved . . . the right to make allocations to Units of parking spaces and storage areas as Limited Common Elements and to change those allocations with respect to spaces not previously allocated . . ." (CP 72)

In short, Limited's right as declarant of the Tower to allocate the nine courtyard stalls to an individual condominium unit or units is spelled out clearly in multiple places in the Tower declaration and in the POS. The nine courtyard stalls are specifically reserved for the use of the Tower in the Center declaration. (CP197, 417) The

Tower declaration specifically identifies them as part of the Tower Condominium. (CP 83)

C. THE ISSUE OF CONTROL OF THE COURTYARD STALLS ARISES

Beginning in 1995, as Limited sold units in the Tower, it allocated parking stalls to them, periodically amending Schedule B to the Tower declaration to reflect the updated assignments. (See, for example, Amendment No. 2 at CP 142-146; CP 54, ¶4)

In 1999, the issue of control of the nine courtyard stalls surfaced when certain unit owners in the Tower claimed that they should be entitled to use the courtyard stalls for free parking. (CP 318, ¶4 & ¶5; CP 396, ¶8) A number of unit owners complained to the President of the Tower's Board, Mr. Douglas Myers. (CP 398) They were irritated at their inability to use the courtyard stalls for guest parking. (CP 398) There were a number of conversations among Tower's unit owners regarding the right to control use of the stalls. (¶5, CP 318)

The Tower's COA hired an attorney to analyze the issue for it. (¶5, CP 341) On February 7, 2000, the President of the Tower's COA wrote a memo to all unit owners in the Tower. (CP 345). His memo explained that the nine open-air courtyard stalls were to be

allocated by Limited, as declarant, for the exclusive use of specific units. (CP 345) His memo explained that “the drive court spaces are treated in exactly the same fashion as the space(s) you may have allocated to your unit(s).” (CP 345)

To address the desire of the Tower unit owners for free parking in the courtyard stalls, the Tower’s COA entered into a written lease for four of the stalls with Limited in April of 2000. (CP 288-289) It continuously leased those stalls through December of 2007, a period of almost eight years. (CP 56, ¶11) The Tower’s COA notified all of its unit owners of the lease of the four courtyard stalls for their use. (¶8, CP 319; CP 332)

D. THE MEMORANDUM OF UNDERSTANDING

A year later, in 2001, the Tower was at odds with the Center over the allocation of building expenses and with Limited over the allocation of voting rights among the three Units of the Center in the Center’s declaration. (CP 55, ¶6; CP 342, ¶7).² A lawsuit ensued among the Tower, on one hand, and Limited and the Center on the other. Forty individual Tower homeowners intervened in the lawsuit

² The issue regarding voting rights was ultimately appealed to this Court and resolved in favor of Limited in Bellevue Pacific Center Condominium Owners’ Association v. Bellevue Pacific Tower Condominium Association, 124 Wn.App. 178, 100 P.3d 832 (2004).

as parties plaintiff to assert claims against Limited. (¶5, CP 55; CP 260). With the exception of the issue regarding voting rights, the lawsuit was resolved by a mediated settlement in 2003. (CP 55, ¶6) The resolution was incorporated in a Memorandum of Understanding signed at the conclusion of mediation. (CP 348) Paragraph 2 of that document contained a broad mutual release which read as follows:

Except as to the claims excluded, and subject to the other terms of this agreement, each party releases every other party from any and all claims which have been or could have been asserted in the Lawsuit, as well as all past and present officers, directors, attorneys, insurers and other agents of the parties. (CP 348)

The Tower's COA never raised the issue of control of the nine courtyard stalls in the lawsuit, though nothing prevented it from doing so had it desired.

**E. THE ISSUE OF CONTROL OF THE COURTYARD STALLS
REDUX**

After almost eight years of continuously leasing four of the courtyard stalls, a new President of the Tower's COA wrote to Limited in January of 2008 to inform it that the Tower was contesting Limited's authority to allocate or control the nine courtyard stalls. (CP 291) Despite the absence of any language in the Tower declaration supporting its position, the Tower COA

claimed that only it had the right to allocate or control the use of the nine courtyard stalls. (CP 291-292) It warned Limited that it would remove any signs restricting the use of the courtyard stalls, would pay no further rent for their use, and had the sole right to govern the use of the stalls. (CP 291, 292) Shortly thereafter, it recorded a formal "Notice of Ownership" with the King County Recorder's Office. (CP 57, ¶12, CP 294). The Notice stated that the nine courtyard stalls were "owned solely and exclusively by" the Tower and could not be sold, transferred, rented or used without its permission. (CP 295) The effect of this was to make the courtyard stalls available to owners and their guests for free parking – exactly the issue that had been raised and resolved in 2000. (CP 345).

In April of 2009, Limited filed Amendment No. 11 to the Declaration for the Tower Condominium (¶13, CP 57). This Amendment formally allocated the nine courtyard stalls to Unit 703, which Limited had retained as a rental unit. (CP 57) Four months later, the Tower filed Amendment No. 12 to the declaration (CP 300), which purported to cancel Amendment No. 11. No notice of Amendment No. 12 had been given to Limited, and the Declaration prohibited such amendments without a full vote of the members and the consent of the unit affected. (CP 117, §23.2).

F. THE PROCEEDINGS BELOW

Limited filed this lawsuit on September 21, 2009. (CP1) Its Complaint sought a declaratory judgment that the nine courtyard stalls had been properly allocated to Unit 703 and sought damages because of Tower's interference with Limited's use and control of the stalls. (CP 5-8)

Tower then filed its Answer and Counterclaim. (CP 9) The counterclaim sought a declaratory judgment to the effect that the Tower's COA was entitled to control the nine stalls. See, ¶s 3.5 to 3.8 at CP 14-15.

Limited later moved for partial summary judgment on the issue of liability. (CP 27-37) Its motion was based upon the clear wording of the Center and Tower declarations, the mutual release contained in the 2003 Memorandum of Understanding, and the doctrine of res judicata. Tower opposed the motion largely on the grounds set forth in its Answer. (CP 370) In opposition to the Motion for Summary Judgment, Tower contended that §6.7 of the Center's Declaration (governing right to use common areas of Center allocated to more than one Center Unit) controlled and that all Tower unit owners therefore had the right to use the nine courtyard parking stalls. (CP 373-374; 382-387) This was the same

position stated in its Answer and Counterclaim, though it is different from the argument Tower advances on this appeal.

Certain of the legal arguments that Tower now advances on appeal regarding its affirmative defenses were not even mentioned in Tower's opposition to the Motion for Summary Judgment. (CP 370-393)³

The trial court granted Limited's Motion for Partial Summary Judgment. (CP 492, l.18-19) In comments made at the close of oral argument, the trial judge stated that while he was granting the motion because of the release contained in the 2003 Memorandum of Understanding, he also recognized that his decision could be affirmed on appeal on any of the grounds advanced by Limited. (CP 576, l.1-4)

Tower then filed a lengthy Motion for Reconsideration. (CP 493) For the first time, Tower argued that RCW 64.34.30(3) (non-waiver provision) invalidated the release in the 2003 Memorandum of Understanding. (CP 497-499) However, not even on the motion

³ Tower did not then claim that the Limited's allocation of the stalls was improper because it was not the "initial" allocation to Unit 703, did not claim the allocation was improper because there was no time limit governing the right to allocate, and did not claim that the 2003 Memorandum of Settlement was invalid as an improper waiver of rights under the Condominium Act.

for reconsideration did it argue that the allocation of stalls to Unit 703 was invalid because it was not the “initial” allocation or because there was no time limit within which the development right of allocation was to be exercised. (See, CP 493-504) The trial court denied the motion for reconsideration. (CP 609)

A month before trial, Tower filed a motion to amend its Answer to add new counter-claims for declaratory relief to the effect that Limited’s allocation of the nine courtyard stalls to Unit 703 was invalid because it was not the “initial” allocation and because the Tower declaration did not contain a time limit for exercise of the right to allocate parking stalls. (CP 612-622) Limited opposed the motion as untimely, prejudicial, and futile. (CP 768-789) The court denied the motion. (CP 795) Tower has not assigned error to the denial of its motion to amend its Answer to add these counter-claims. (See, ps. 3-5 of Tower’s opening brief)

After trial on the issue of damages, the court below entered judgment awarding Limited damages in the amount of \$78,550 and attorneys’ fees of \$69,920.25. (CP 999-1000). Tower has now appealed that judgment, though its appeal addresses only the issue of liability. It seeks to reverse the grant of partial summary judgment on the liability issue.

IV. ARGUMENT

A. TOWER'S INTERPRETATION OF THE CONDOMINIUM DECLARATIONS MAKES NO SENSE.

1. The Parking Stalls Have Never Been "Reallocated" Under Either the Tower or Center Declaration.

All of Tower's arguments are premised on a single assumption – that Tower's interpretation of the two condominium declarations is correct. Should that premise prove false, all of Tower's arguments topple of their own weight. The starting point for any analysis of Tower's arguments is therefore the meaning of the condominium declarations. If Tower's interpretation is incorrect, all else in its brief is mere surplusage.

The trial judge never reached the issue of the meaning of the condominium declarations. He plucked the low hanging fruit by basing his decision on the more obvious issue – the effect of the release in the 2003 Memorandum of Understanding. That rendered irrelevant the meaning of the declarations. The opposite is equally true. One never gets to the issue of the release if the declarations grant Limited, as the declarant, the right to allocate the nine courtyard stalls to the apartment units. An appellate court can sustain a trial court's grant of summary judgment upon any theory established by the pleadings and supported by the proof, even if

the trial court did not consider that theory. Coppernoll v. Reed, 155 Wn.2d 290, 296, 119 P.3rd 1318 (2005); Lamon v. Butler, 112 Wn.2d 193, 200, 770 P.2d 1027 (1989).

The courtyard in which the nine stalls are located is a common element of the Center. The courtyard parking stalls are identified in Section 3.3 of the Center declaration as part of the parking spaces in the Center condominium. (CP 196). Article 6.2.5 of the Center declaration then allocates the main entrance and its courtyard parking as a limited common element of the Residential Unit.⁴ Those nine courtyard stalls are marked on the Center's survey map as "RCLE" (residential limited common element).

Under the Center's declaration, the only parking stalls the Center declarant could allocate separately were the 45 zoned stalls in the Garage Unit.⁵ Limited had the right to allocate each of these as a limited common element either to the Residential Unit, to the Garage Unit or to both for joint use. §25.2.2 at CP 27.

⁴ A "limited common element" is a portion of the common elements allocated for the exclusive use of "one or more but fewer than all of the units." RCW 64.34.020.

⁵ All other stalls were defined by the Center declaration either as part of a Unit (the 122 stalls on level P-1 of the Residential Unit and all but 45 of the stalls on the upper three levels of the building's garage to the Garage Unit) or as a limited common element for exclusive use of a Unit (the 9 courtyard stalls so designated for the Residential Unit).

The Tower declaration recites in Section 3.1 that the property constituting the Tower Condominium includes the limited common elements allocated to the Residential Unit under the Center declaration. (CP 83) This definition includes the nine courtyard stalls. Section 3.3 of the Tower declaration (quoted in full above at page 7) identifies the nine courtyard stalls as part of the "Parking Spaces" of the Tower. (CP 83) It also recites that an additional 45 zoned parking spaces might be allocated to the Tower under the Center declaration.

The power to allocate Tower's parking spaces (the 122 enclosed parking spaces located on Level P-1 and the nine courtyard stalls) was given exclusively to Limited as the declarant of the Tower condominium. The language of the Tower declaration could not be clearer. Sections 6.5.1, 6.5.2 and 25.2.2 all provide that parking spaces are to be allocated by the "Declarant" (i.e., Limited) of the Tower condominium. Section 6.5.1 even states that they are to be allocated "solely by Declarant". Section 6.6.2 grants the "Declarant" the right to rent any unallocated parking spaces. There is no ambiguity here.

In the face of such clear language, how does Tower fabricate an argument that magically transfers to the Tower COA

the right to allocate the nine courtyard stalls that was expressly granted to the declarant by the Tower declaration?

The answer is that it does so through sleight of hand. It ignores the very factor that it claims to take into account – that the two declarations are for different (though related) condominiums. It claims that because the Center declaration by its very terms allocates the courtyard and the nine stalls to Tower as a limited common element of the Center, and because Limited as the declarant of the Tower condominium did not reserve the right to “reallocate” limited common elements, the declarant of the Tower condominium has no right to “allocate” the nine courtyard stalls to unit owners in the Tower.

While the courtyard stalls are, within the context of the Center declaration, a limited common element of the Center assigned for exclusive use to one of the Center’s three Units (the Residential Unit), they are in the context of the Tower declaration simply part of the real property making up the Tower condominium. See, Section 3.3 of the Tower declaration (CP 83) to the effect that the real property comprising the Tower condominium consists of the Residential Unit as defined in the Center declaration and

“certain limited common elements allocated to the Residential Unit under the Mixed Use Condominium Declaration”.

As declarant of the Center condominium, Limited had no power to simply change the allocation of the courtyard stalls from a limited common element of the Residential Unit to a limited common element of the Commercial Unit. The nine stalls were allocated by the declaration to the Residential Unit for its exclusive use. Only an amendment to the Center declaration approved by its Residential Unit (Tower) could change that allocation. See, 23.2 of Center declaration at CP 217.

Because the courtyard stalls are part of the Tower’s real property, but are not within the unit boundaries of any of the 171 residential units of the Tower, the 9 courtyard stalls (along with the 122 stalls on level P-1) were initially a common element of the Tower. Common elements include all portions of a condominium other than the Units. RCW 64.34.020 (6) and §1.1.9 of Tower declaration at CP 80. Each parking stall in the Tower (whether part of the 122 on level P-1 or part of the nine courtyard stalls) became a limited common element of a Unit in the Tower (one of the 171 residences) only when allocated to that unit by Limited as declarant of the Tower. See, §6.1 and 6.2.2 of Tower declaration at CP 84

providing that common elements, including parking spaces, become limited common elements once they are allocated to a Unit for its exclusive use.

The Tower declaration granted its declarant (Limited) the right to make the initial allocation of parking spaces to residential units. §25.2.2 of Tower declaration at CP 120; §§6.5.1 and 6.5.2 at CP 85. In the context of the Tower declaration, any allocation of a stall to a unit is the “initial” one if it is the first time such a stall has been allocated to a unit. When a parking stall of the Tower is first assigned by Limited to an apartment unit of the Tower, it is not being “reallocated” as a limited common element of the Center – i.e., it is not being shifted, for example, from the Residential Unit to the Commercial Unit. Instead, it is being allocated for the very first time as a limited common element of the Tower reserved for the use of a designated apartment unit. It has not previously been a limited common element of the Tower – only a common element.

What Tower has done on this appeal is play fast and loose with the language of the declarations, switching from one to the other as if in some fast paced shell game. It claims that the initial allocation of a courtyard stall to a residence within the Tower represents a “reallocation” of that stall because the nine courtyard

stalls were allocated within the Center declaration as a limited common element for the exclusive use of the Residential Unit. But the only way there could be a “reallocation” of the stalls within the Center would be to have them reallocated from the Residential Unit to the Commercial or the Garage Unit. That never happened. Once allocated for exclusive use by the Tower as a limited common element of the Center, the nine stalls simply become a common element of the Tower, just like the unassigned 122 parking stalls on level P-1. When any one of these 131 total stalls was later allocated by Limited as declarant of the Tower to an apartment unit, it became a limited common element of the Tower reserved for the exclusive use of that apartment unit. In that process, the stall has not been “reallocated” under the Center declaration or under the Tower declaration. Under the Center declaration, it remains a limited common element of Center allocated to the Residential Unit for its exclusive use. Under the Tower declaration, it has been allocated for the first time to an apartment unit as a limited common element of that unit. The whole argument is made of smoke and mirrors – a mere conjurer’s trick.

2. The Extrinsic Evidence Supports Limited's Position.

Tower concedes that a condominium declaration is to be analyzed under the rules of construction applicable to contracts. (p. 28 of Tower's brief).⁶ The goal of interpreting such a document (as is true of similar documents such as restrictive covenants and dedications in a plat) is to give effect to the intent or purpose of the document. Hollis v. Garwall, Inc., 137 Wn.2d 683, 695, 974 P.2d 836 (1999).

As with contracts, rules of construction provide guidance. One of the most basic of those is that courts are to give effect to every word used by the grantor and not to render some of the words as mere surplusage, given no meaning or effect. Fowler v. Tarbet, 45 Wn.2d 332, 274 P.2d, 341 (1954). Tower's argument ignores this rule. Its interpretation simply reads out of the Tower declaration the specific language included in Sections 6.5.1, 6.5.2 and 25.2.2 that give Limited, as the declarant, the sole right to allocate the nine courtyard stalls.

The undisputed extrinsic evidence also belies the argument made by Tower. In determining the intent of the declarations, it is

⁶ Limited agrees, but notes that Tower made exactly the opposite argument before the trial court. (CP 379-380)

appropriate to consider the subject matter, the objective and the circumstances of the making of the document. See, Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990). The intent of the Tower declaration can be determined from the Public Offering Statement that Limited issued as declarant to each purchaser of a condominium residence in the Tower. In multiple places, the POS made it clear that the declarant had the right to allocate the nine courtyard stalls. See, Sections C.3.1 (the 122 parking spaces on Level P-1 and the 9 courtyard stalls, "may be allocated *by Declarant* to particular Units . . . "); C.6 ("Allocations of parking spaces and storage spaces will be made *by Declarant* . . . "), and E.2 (Declarant reserves right to "make allocations to Units of parking spaces . . . "). (CP 67,69,72) (emphasis supplied)

When considering the intent of the parties to a contract, courts look to the subsequent acts and conduct of the parties. Berg v. Hudesman, supra, 115 Wn.2d at 677-678. That is often persuasive because it shows the parties' own understanding of the document in question.

In 2000, the Tower COA informed each of its unit owners that Limited's rights with regard to the courtyard stalls were exactly the same as its right with regard to the parking stalls on level P-1 –

it had the right to allocate or rent them. (CP 345) The Tower then rented four of the courtyard stalls for eight years – the same stalls that it now claims Limited had no right to allocate or rent. This extended course of conduct shows the Tower COA's own understanding of the intent of the Tower declaration and is entirely inconsistent with its current "interpretation" of that declaration.

Tower submitted to the court below a Declaration of Douglas Myers, President of the Tower's COA in 2000 when the issue concerning the courtyard stalls arose. Mr. Myers explained that he reviewed the Tower declaration with the then property manager for the Tower, who explained to him that Limited had the right to allocate the courtyard stalls. Mr. Myers testified as follows:

I am not a lawyer, but when I read those documents they appeared to say what he claimed they said. (CP 396, l.21-23)

Well. . . . yes. They do indeed. And what they say is utterly inconsistent with what Tower is now arguing.

B. THE 2003 GENERAL RELEASE EXECUTED BY TOWER BARS ITS CURRENT CLAIM.

Limited, Tower and Center were parties to a protracted and expensive lawsuit filed in 2001 that involved the interpretation of various provisions of the Center and Tower declarations. These included provisions on voting rights and on the allocation of

operating expenses between Tower and Center. The disputes were settled in mediation. Both Limited and Tower signed a “Memorandum of Understanding Regarding Settlement” in September of 2003 at the conclusion of the mediation. Paragraph 2 of that document stated that “except as to the claims excluded, each party releases every other party from any and all claims which have been *or could have been asserted* in the Lawsuit.” (emphasis supplied)

There is a strong public policy in favor of settlement of disputes. Releases are to be given great weight in order to support the finality of settlements. Nationwide Mutual Fire Insurance Co. v. Watson, 120 Wn.2d 178, 840 P.2d 851 (1992) (court granted summary judgment enforcing broad general release that covered “any and all claims of any kind or nature, known or unknown.”). Accord, Mutual of Enumclaw v. State Farm Mutual, 37 Wn. App. 690, 682 P.2d 317 (1984) (general release encompasses all claims absent an express reservation of right to prosecute a claim).

To evade the effect of the release it signed in 2003, Tower argues that the issue involving control of the courtyard stalls was not then within the contemplation of the parties. It cites cases like Nevue v. Close, 123 Wn.2d 253, 867 P.2d 635 (1994) to support its

position. Those cases involved situations in which an injured party was not aware of an injury when the release was signed. In Nevue, a passenger in a car that had been involved in an accident signed a release for \$150 without being aware that he had suffered a back injury. The injury was latent and only manifested itself after he had signed the release. The court held that because the injury was neither known nor contemplated by either party, it was not covered by the release.

Tower cannot credibly argue that the issue of free courtyard parking for unit owners was not within the contemplation of the parties in 2003. The very issue had arisen in 1999 and 2000. Complaints from unit owners in the Tower regarding courtyard parking prompted the Tower COA to send a memo to its unit owners explaining the declarant's right to allocate the stalls. That memo stated in part as follows:

Lately I seem to be spending a significant amount of time explaining the drive court parking situation. I, like many of you, was told that "guest parking" was one of the amenities of our complex. There is guest parking, unfortunately it isn't free and it is in the garage. Many of you have stated how irritated you are by this situation, and I concur. (CP 345)

The 2001 lawsuit involved multiple issues concerning the interpretation of the Center and Tower declarations. These

included the issue of voting rights under the Center declaration and numerous specific provisions of the Tower declaration concerning such things as tax refunds, record keeping, accounting for initial working capital, comingling of accounts and allocation of expenses. (See, CP 354-361). As the lawsuit progressed, Tower raised more and more issues. (CP 55, ¶6)

The issue of free courtyard parking had arisen three years *before* the Memorandum of Understanding was signed. Both Tower and Limited were involved in discussion of the issue. What Tower is really arguing is that a general release does not bind a party as to facts known to it at the time of the release so long as that party had not yet formulated a legal theory to seek relief based on such facts. What changed between February of 2000 and January of 2008 is that Tower hired new attorneys who concocted a new theory to enable Tower to try to claim control of the courtyard stalls. If that is sufficient to invalidate a general release, then few general releases would ever be enforceable. All one need do to evade a release would be to assert that one had not formulated the “proper” legal theory of recovery at the time the release was signed.

Tower stresses that there was no “dispute” in 2000, but this is mere word play. The issue of control over the courtyard stalls

had arisen by February of 2000. It was raised in meetings of Tower residents and resulted in issuance of a memo from Tower to its residents on the subject. (CP 345) Tower could have made the claim in 2000 that it later advanced in 2008. It chose not to.

Tower also argues that the rule of *eiusdem generis* applies to the interpretation of the release. That rule has no application to the Memorandum of Understanding. General words do not follow specific ones in that document. Its structure is different.

The first paragraph of the Memorandum of Understanding lists certain claims that are excluded from the release. As to those enumerated claims, the parties reserved the right to further litigate the issues. The second paragraph provides that, except as to the enumerated claims in the first paragraph, “each party releases every other party from any and all claims which have been or could have been asserted in the Lawsuit.” No general words follow specific words in the release – instead, it is purposely made as broad as possible to provide a release of claims that could have been asserted in the lawsuit. This is one such claim.

C. RCW 64.34.030 DOES NOT INVALIDATE THE MUTUAL RELEASE IN THE MEMORANDUM OF UNDERSTANDING.

Tower did not plead RCW 64.34.030 as an affirmative defense. (CP 12) It did not raise the issue in response to Limited's motion for partial summary judgment. It first mentioned RCW 64.34.030 in its Motion for Reconsideration of the grant of partial summary judgment. (CP 497-499) It claimed then that that Tower could not "waive" the requirements of RCW 64.34.348, which requires that all unit owners agree to any disposition of shared condominium property. (CP 497-499)

On this appeal, Tower has dropped that argument, substituting in its place the argument that RCW 64.34.030 prevents the Tower Board from agreeing to a "reallocation of the limited common elements of the Center without further action being taken as to RCW 64.34.228." (p. 25 of Tower's brief)⁷. In short, the statute was not raised as an affirmative defense and, when it was first raised on a Motion for Reconsideration, it was raised based upon a totally different argument than Tower now advances.

The failure to plead an affirmative defense will preclude its consideration at trial. Impero v. Whatcom County, 71 Wn.2d 438,

⁷ No limited common elements of the Center are being reallocated among Center units, so it is frankly unclear just what Tower is arguing.

446, 430 P.2d 173 (1967); Harting v. Barton, 101 Wn.App. 954, 962, 6 P.3d 91 (2000). Nor did Tower preserve this argument for appeal. It did not even make the argument in the trial court. When that occurs, the appellate court will not generally entertain the argument. See, RAP 2.5(a); Cole v. Harveyland LLC, 163 Wn. App. 199, 258 P.3d 70 (2011). There is no reason for the Court to consider this newest argument by Tower.

Regardless of the procedural hurdles, the argument lacks substance on the merits. RCW 64.34.030 does not prevent a condominium owners' association from entering into a settlement agreement where there are legitimate disputed issues of law or fact. Both the Washington Condominium Act and the Tower's declaration grant a COA the power to institute or defend litigation, make contracts and incur liabilities, and exercise all powers that would otherwise be possessed by a non-profit corporation. RCW 64.34.304(d), (e) and (s); §§9.3.1.4, 9.3.1.5, and 9.3.1.18 at CP 92-93.

The Official Comments to the Uniform Condominium Act (1980), on which Washington's statute is based, make it clear that the purpose of the nonwaiver clause is to prevent skullduggery by developers in having purchasers waive the protections afforded by

the Act as a condition of purchase. Its purpose is not to prevent an owners' association from resolving disputed issues or from executing releases.

The Texas statute is worded identically to the Uniform Act and the Washington statute. In Jistel v. Tiffany Trail Owners Association, 215 S.W.3d 474, 482 (Tex. Civ. App. 2006), the same argument was made that Tower advances here. The court resolved it as follows:

Nothing in the language of Section 82.004 of the Property Code prohibits parties from settling existing, disputed claims in any manner they wish to settle them. Construing Section 82.004 otherwise would violate the State's policy of encouraging "the peaceable resolution of disputes" and the "early settlement of pending litigation through voluntary settlement procedures". . . . It would also lead to great uncertainty in the finality of settlement agreements and judgments. Finally, such a construction would lead to unfair results, as is illustrated by this case. Jistel accepted the benefits under the settlement agreement To permit a party to accept the benefits of a settlement agreement and later claim the agreement was ineffective is unfair.

D. TOWER'S CLAIMS ARE BARRED BY THE DOCTRINE OF RES JUDICATA.

The terms of the 2003 Memorandum of Understanding were incorporated into a stipulated judgment. (CP 275) Paragraph 2 of that judgment provided that the doctrine of res judicata would apply to the judgment. (CP 276, 277) Consent judgments of this type are

considered final judgments to which the principles of res judicata apply. Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000).

The doctrine applies “not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.” Sanwick v. Puget Sound Title Insurance Co., 70 Wn.2d 438, 441, 423 P.2d 624 (1967), quoting from Currier v. Perry, 181 Wash. 565, 44 P.2d 184 (1935). There is no simple or all-inclusive test to be used in determining whether a matter should have been litigated in a prior proceeding. Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 330, 941 P.2d 1108 (1997).

Tower did not raise the issue of the courtyard parking stalls in the 2001 litigation, though it was obviously aware of the issue in view of the events of just a year earlier. The issue involved a question of interpretation of certain portions of Center’s and Tower’s declarations. The simple question is whether this was a potential claim that Tower should have raised in the 2001 litigation rather than seven years later in a different lawsuit.

Application of the doctrine of res judicata requires an identity of four elements: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) quality of the persons for or against whom the claim is asserted. Knuth v. Beneficial Washington, Inc., 107 Wn. App. 727, 31 P.3d 694 (2001). Both Limited and Tower were parties to the 2001 litigation, so elements (1) and (4) of the above test are met. To determine if the causes of action are the same, courts consider the following criteria: (a) whether the second action would impair rights or interests established in the prior judgment, (b) whether the two actions deal with substantially the same evidence, (c) whether the two suits involve an alleged infringement of the same right, and (d) whether the two suits arise out of the same transactional nucleus of facts. Knuth, *supra*, 107 Wash. App. at 732.

The 2003 Memorandum of Understanding included a release of claims that Limited made or could have made in the lawsuit. Allowing Tower to raise the issue of control of courtyard parking now would impair the rights acquired by Limited through the 2003 release and so would impair rights established in the prior stipulated judgment. Knuth, *supra*, 107 Wn. App. at 732. The two actions deal with substantially the same evidence – the Center and

Tower declarations. They involve claimed infringement of the same right – violation of the declarations. Finally, the two suits arise out of the same transactional nucleus of facts because they both rely on the same documents – the two declarations.

The subject matter of the two suits is also the same. The issue of the Tower's right to control parking in the courtyard stalls surfaced several years before the 2001 lawsuit was filed or settled. This situation is comparable to one in which a party to a contract sues for breach of a specific provision, loses, and later files another lawsuit claiming that the same acts represented a breach of a separate provision of the contract. See Pederson v. Potter, supra; Sanwick v. Puget Sound Title Insurance Co., supra.; Knuth v. Beneficial Washington, Inc., supra.

The only difference between 2000, 2003 and 2008 is that the Tower had a different set of attorneys in 2008. They dreamed up a different legal theory upon which to revisit the issue of parking rights. No reason whatsoever appears why Tower could not have raised in 2001 the arguments it advanced in this lawsuit over parking. It simply elected in 2003 not to pursue the issue of parking, no doubt because its then Board could read the clear language of the declarations.

E. TOWER'S "ADDITIONAL" AFFIRMATIVE DEFENSES WERE NOT RAISED BELOW AND ARE NOT VALID IN ANY EVENT.

1. The Issue of "Initial" Allocations.

Limited retains ownership of Unit 703 in the Tower. It rents the apartment to produce revenue. In 2008, Limited recorded the 10th Amendment to the Tower declaration, which allocated a single parking space to Unit 703. In 2009, goaded by Tower's continued assertion of control over the courtyard stalls, Limited executed Amendment No. 11 to the Tower declaration. It allocated all nine of the courtyard stalls to Unit 703. The Tower's declaration allows any unit owner to convey a parking stall allocated to that unit to another unit in the Tower. Limited's plan is to sell the nine courtyard stalls over time to other owners of Tower units.

Section 25.2.2 of the Tower declaration provides in relevant part as follows:

25.2.2. Storage and Parking Allocations. Declarant reserves the right to make the initial allocation of storage areas and parking spaces as Limited Common Element to particular Unit(s), as described in Section 6.5, with such allocations to be made in Schedule B attached hereto (or by amendments thereto). With respect to each Unit, Declarant shall make such allocations prior to or contemporaneously with the closing of the sale of such Unit by Declarant. (CP 120-121)

Tower argues that Limited lost the ability to allocate any further parking stalls to Unit 703 in 2008 when it allocated parking stall 70 on level P-1 to that unit via Amendment no. 10 even though Unit 703 has never been sold by the declarant.. Tower construes the language quoted above as granting the declarant only the right to make a single allocation for each unit.

Limited contends that it reserved in Section 25.2.2 of the declaration the right to make the first allocation of each parking space and storage area – it could not “reallocate” a parking space or storage area once allocated to a unit, but it could allocate other parking spaces or storage areas to the same unit so long as they had not previously been allocated. In short, the phrase “initial allocation” refers to the first time a particular parking space or storage area is allocated, not to the first allocation of any parking space or storage area to an unsold unit.

In its Answer (CP 9), Tower raised four affirmative defenses. (CP 12). The third of these was that Limited’s claims “are barred by RCW 64.34.216(i)(j) and RCW 64.34.228”. The latter statute has nothing to do with the issue of “initial” allocation. Nor does the former. RCW 64.34.216 prescribes what a declaration must contain. Subsection (1)(i) requires a description of the real property

that may be allocated by the declarant as limited common elements. Subsection (j) requires a description of any development rights reserved by the declarant. Nothing in either subsection refers to “initial” allocations.

The issue that Tower now raises is based squarely upon its reading of §25.2.2 of the Tower declaration and, specifically, its contention that the word “initial” refers to the first allocation of any parking space or storage area to a unit. Limited’s affirmative defenses make no reference to this argument. Affirmative defenses are waived unless they are affirmatively pled or are tried by the consent of the parties. Harting v. Barton, supra, 101 Wn. App. at 962 (2000). Tower’s argument regarding the “initial” allocation of the nine courtyard stalls was not pled, was not raised in response to Limited’s motion for partial summary judgment (CP 370-393), and was not raised in Tower’s motion for reconsideration of the order granting partial summary judgment. (CP 493-504).

Tower never raised the argument until, shortly before the trial, it filed a motion to amend its answer to allow it to assert certain counter-claims. (CP 612-622) That motion was denied. Tower has not assigned error to the denial of that motion. RAP 10.3(g) provides that appellate courts will only review errors included in an

Assignment of Error or clearly disclosed in an associated issue pertaining thereto.

Tower's position is without merit in any event. The evident purpose of Section 25.2.2 of the Tower declaration is to grant the declarant the right to allocate storage spaces or parking stalls to units prior to the time those units are sold. The declarant is given the right to make the first, or "initial", allocation because, after a unit is sold, the owner of that unit may choose to exchange his parking stall or storage area with another owner, thus "reallocating" the stall or storage area. See, §6.7.3 of Tower declaration. (CP 87)

Limited drafted the Tower declaration. In construing a condominium declaration, courts are to apply the rules governing contract interpretation in order to determine the intent of the declaration. See, Hollis v. Garwall, Inc., 137 Wn.2d 683, 974 P.2d 836 (1999) (applying rules of contract interpretation to restrictive covenants). The evident purpose of Limited in preparing the Declaration was to give itself the right to allocate parking stalls and storage units to condominium units before their sale. Tower's interpretation places an artificial constraint on the declarant. For example, if the declarant were in the process of selling a unit to which it had already allocated a parking stall, but the buyer wanted

to purchase an additional parking stall, the declarant would not be able to provide it. From the standpoint of the developer of a condominium project, this makes no sense – and it was the developer who drafted the declaration.

In interpreting a contract, courts are permitted to consider extrinsic evidence. Here, that evidence is both in writing and undisputed. Paragraph E.2 of the Public Offering Statement (distributed to every purchaser of a condominium unit in the Tower) alerted buyers that the Tower declarant had reserved the right to “make allocations to Units of parking spaces and storage areas as Limited Common Elements, and change those allocations with respect to spaces not previously allocated, all pursuant to Section 25.2.2 of the Declaration.” (CP 72). This section of the Public Offering Statement makes it clear that the declarant was reserving the right to add parking stalls (or storage areas) to a unit after first allocating stalls to that unit. The Declarant reserved the right to “change those allocations with respect to spaces not previously allocated” – i.e., add unallocated stalls to units to which stalls had previously been allocated. This is entirely consistent with declarant’s interpretation of the word “initial” contained in Section 25.2.2 – but directly contrary to Tower’s.

People and companies develop condominiums to make money. The ability to allocate parking stalls allows a developer to generate revenue from the sale of units. There is no reason at all to believe that any declarant would choose to limit its right to sell an additional parking stall or storage area to a willing buyer because it had earlier allocated a stall to the unsold unit. When a provision in a contract is susceptible to two possible constructions, one of which would make it unreasonable and imprudent while the other of which would make it reasonable, the courts will adopt the latter interpretation. Berg v. Hudesman, supra, 115 Wn.2d at 672. Tower's argument wrenches from its context a single word and tries to use that word as a tool to gain control of the nine courtyard spaces. Its interpretation does violence to the language and the evident intent of the Tower declaration.

2. The issue of the time limit for exercise of development rights.

RCW 64.34.216 lists what must be included in a condominium declaration. Subsection 1(j) states that the declaration must include a description of any development rights or other special declarant rights reserved by the declarant, together

with a description of the real property to which those rights apply and “a time limit” within which each of the rights must be exercised.

Tower argues that Limited’s 2009 allocation of the nine courtyard stalls to Unit 703 was invalid because the Tower declaration contained no time limit on the exercise of the declarant’s right to allocate stalls. Yet the Tower declaration did include such a time limit. Section 25.2.5 provided that the declarant’s “Development Rights” would continue so long as the declarant owned one or more Units in the Tower condominium. (CP 121)

The statute does not purport to dictate the maximum amount of time for which development rights may survive. Our state Condominium Act is based on the Uniform Condominium Act (1980). RCW 64.34.216 (1)(j) is drawn verbatim from Section 2-105(a)(8) of the Uniform Act. The official comments to that section of the Uniform Act state in relevant part as follows:

The Declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The act imposes no maximum time limit for the exercise of those rights, and the particular language of a Declaration will vary from project to project depending on the requirements of each project. (emphasis added)

The Tower declaration could have provided that development rights would survive for 50 years. Alternatively, it could have provided for a shorter or longer time frame. As drafted, it provided that the development rights would continue only so long as Limited, the declarant, owned a unit in the building. The duration of the development rights was therefore limited by the duration of Limited's ownership. This is a specific time limit, and it in no way violates the statute.

Tower did not raise the issue of time limits on the exercise of development rights either in opposition to the motion for partial summary judgment or in its motion for reconsideration of the order granting partial summary judgment. Tower raised the issue for the first time in its Motion for Leave to File Amended Counterclaims. (CP 612-622) Tower has assigned no error to the denial of that motion. It now wants to assert an argument it never raised below in connection with the motion for partial summary judgment in order to reverse the order granting partial summary judgment.

The issue of the right to allocate and use courtyard stalls arose in 1999 and 2000. This claim (as well as the one regarding initial allocations) is therefore subject to the release Tower

executed in 2003 of claims that it could have raised in the litigation with Limited and the Center COA.

RCW 64.34.216 does not specify what happens if one of the elements required for inclusion in a condominium declaration is omitted by the declarant – if, for example, the declaration omits to state the total number of parking spaces or the square footage of particular Units as required by subsections (1)(e) and (f). For the alleged failure to include a time limit, Tower fashions the nuclear weapon of remedies. It would invalidate the declarant's right to assign stalls. Yet if the declarant had no such right, then *all* its assignments of parking stalls to individual unit owners would be invalid - not just the allocation of the nine courtyard stalls. Every individual who purchased a unit and a parking stall from Limited, the declarant, would now be stripped of the assigned parking stall, and all of the stalls and storage areas would become common elements under Tower's interpretation of the declaration and statute.

Nothing in the statute supports this conclusion. Even were the argument colorable, RCW 64.34.208(4) provides that an insignificant failure of the declaration to comply with the statute shall not impair the creation of the condominium or render

unmarketable (or otherwise affect) title to a unit and common elements. Even were Tower correct in its argument, it would not be entitled to the relief it seeks.

F. THE TRIAL COURT'S AWARD OF ATTORNEYS' FEES AND COSTS WAS PROPER.

Because the trial court's order granting summary judgment adjudicated the issue of liability, the trial involved only the issue of damages - the reasonable rental value of the nine courtyard stalls for the period of time they had been wrongly appropriated by the Tower.

Limited also sought an award of attorneys' fees. Tower's written lease of four stalls included a clause providing for an award of attorneys' fees to the substantially prevailing party in an action relating to the lease.⁸ RCW 64.34.455 provides that a trial court "may award" reasonable attorneys' fees to the prevailing party in a dispute over compliance with the Condominium Act or the declaration or bylaws of a condominium.

Limited sought attorneys' fees under both the lease and the statute in the amount of \$83,586.25. Tower claimed that Limited

⁸ When a tenant holds over after the expiration of the term of a lease, the terms and conditions of that lease apply to the resulting month to month tenancy. Marsh-McLennan Building, Inc. v. Clapp, 96 Wn. App. 636, 980 P.2d 311 (1999).

spent \$27,332 on the issue of the validity of the release and that those fees were not recoverable because there was no attorneys' fees clause included in the Memorandum of Understanding. (CP 887) The trial court entered two sets of Findings and Conclusions - one on liability and damage issues after the trial and one on the issue of attorneys' fees to the prevailing party.

In both sets of Findings and Conclusions, the trial court determined that Limited was entitled to attorneys' fees under both the lease and the statute. (CP 856, ¶5; CP 996, ¶1) However, it reduced the fee award by \$13,666 - half of the reduction requested by Tower. The trial court interlineated its reasons in handwriting on the proposed Findings and Conclusions on the fee issue. (CP 997, ¶3) The stated reason for the reduction in the fees was that while the 2003 Memorandum of Understanding (which included the release) did not include an attorneys' fees provision, the issues and the work required to litigate those issues pertaining to Limited's right to recover under the lease for use of the four leased stalls involved the same issues that pertained to the Memorandum of Understanding – whether Tower was barred from now contesting Limited's right to rent the stalls.

The trial court should not have reduced the award of fees at all. The issue of the release directly affected the defenses (and counterclaims) that Tower raised on the issue of its liability under the lease. To establish Limited's entitlement to allocate the stalls under the declaration and the Condominium Act, Limited needed to defeat Tower's claims, and the release was one way to do this. The work required to research and present the release issues was integral to Limited's ability to prevail.

Limited has not assigned error to the trial court's decision and does not seek in any way to overturn it. That does not change the fact that Tower's arguments make no sense and that the trial court's reduction of the award of attorneys' fees was not proper, especially since the court had decided to award fees under both the statute and the lease. In any event, the question of the amount of reasonable attorneys' fees to be awarded a prevailing party is well within the discretion of the trial court. Eagle Point Condo Owners Assoc. v. Coy, 102 Wn.App. 697, 715, 9 P.3d 898 (2000); Singleton v. Frost, 108 Wn.2d 723, 731, 742 P.2d 1224 (1987). Tower has shown no abuse of that discretion.

G. LIMITED IS ENTITLED TO AN AWARD OF ITS ATTORNEYS' FEES ON APPEAL.

For the same reason that it was entitled to an award of its reasonable attorneys' fees below (entitlement under lease and RCW 64.34.455), Limited is entitled to such an award for its attorneys fees and costs on appeal. Limited requests such an award pursuant to RAP 18.1(b).

V. CONCLUSION

Having leased four of the courtyard parking stalls for eight years, the Tower COA seized control of all nine of them for no better reason than it wanted them. The fig leaf used to conceal its motives was a convoluted interpretation of the Tower declaration devised to read out of the document (and out of the accompanying POS) clear language that granted to Limited the right to allocate and rent the stalls. The claim Tower advances is in any event one that it released in 2003. Its new "affirmative defenses" were neither pled nor raised below in response to the motion for partial summary judgment – and they lack merit anyway. This Court should affirm the Judgment entered by the trial court and award Limited its reasonable attorneys' fees on appeal.

RESPECTFULLY SUBMITTED this 4th day of January,
2012.

JAMESON BABBITT STITES &
LOMBARD, P.L.L.C.

By 
Henry G. Jameson
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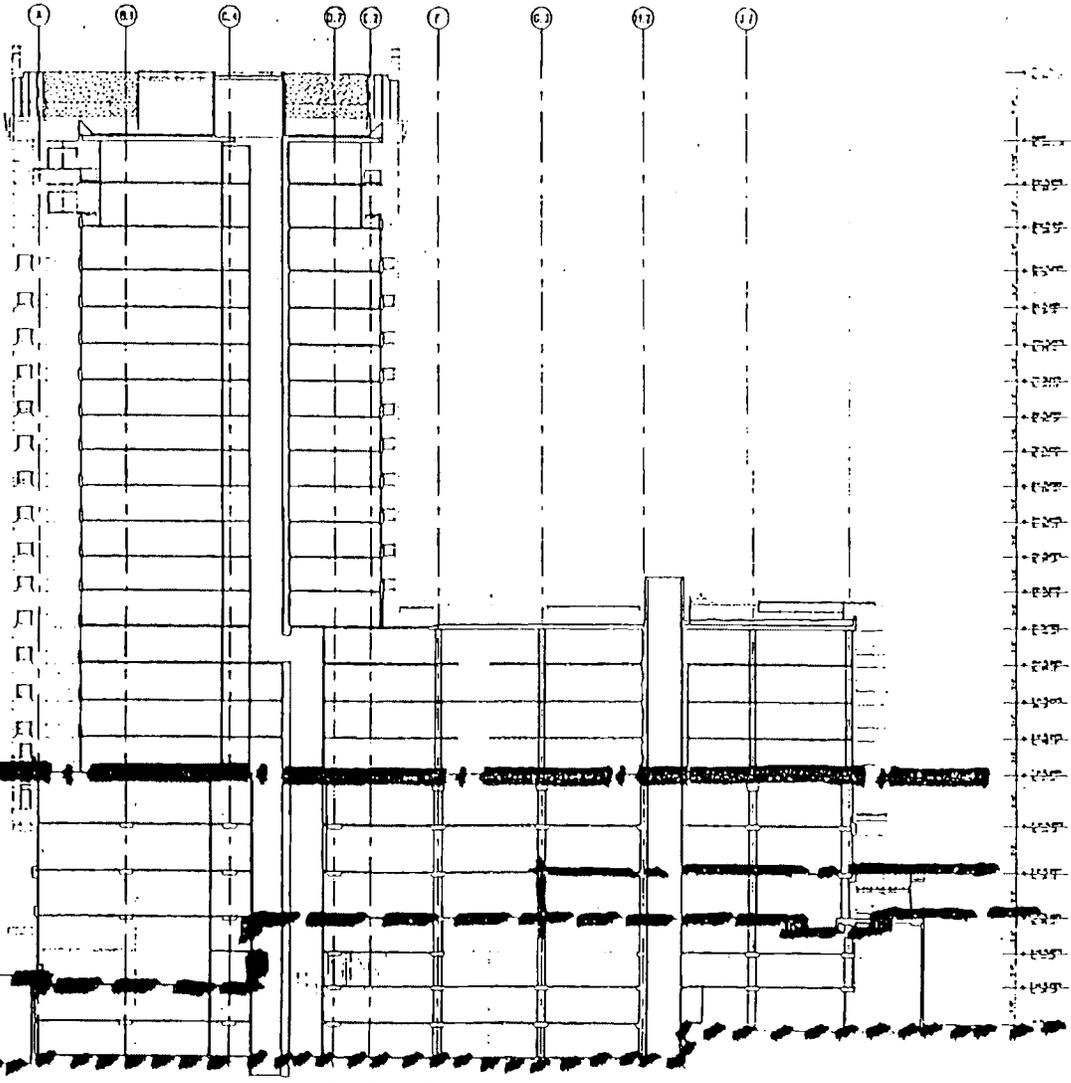
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APPENDIX

RESIDENTIAL
UNIT

COMMERCIAL
UNIT

GARAGE UNIT



24TH FLOOR

7TH FLOOR

2ND / 6TH FLOOR

P-1 / 4TH FLOOR

BUILDING SECTION A-A
SCALE 1/8" = 1'-0"

BELLEVUE PACIFIC
CENTER CONDOMINIUM

COSMOS 100953