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No. 67608-3-I

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

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

v.

MICHAEL FULBRIGHT, *Respondent.*

OPENING BRIEF
of
Appellant
BANK OF AMERICA, N.A.

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

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INTRODUCTION

This case presents an issue of first impression: whether Washington’s Condominium Act, RCW 64.34.364, vitiates a mortgagee’s statutory right to redeem residential property sold in foreclosure, RCW 6.23.010. That issue is also pending before this Court in Appeal No. 66445-7-I, where Bank of America, N.A., has requested leave to file a Brief *Amicus Curiae*.

The Superior Court ignored a vital – and, indeed, controlling – provision of the Condominium Act, resulting in a misinterpretation of that Act’s impact on statutory redemption that cannot stand as precedent.

This Court should cure that error by issuing a decision that will confirm and vindicate the plain and unambiguous legislative intent; sustain the careful balance of the Condominium Act, the Race-Notice Act, and the Redemption Act; and provide definitive guidance to the lower courts on an issue of significance to all financial institutions in the State of Washington. This Court should hold that:

1. The Redemption Act provides a right of redemption to any creditor whose lien is “subsequent in time” to the lien on which the property was sold. RCW 6.23.010(1)(b).
2. The Condominium Act provides condominium associations with a “super-priority” lien for assessments that takes priority only over liens or encumbrances recorded after the condominium recorded its declaration. RCW 64.34.364(2)(a).

3. The Condominium Act provides that this lien for assessments is created and perfected on the date that the condominium records its declaration. RCW 64.34.364(7). Its language is plain and unequivocal: “Recording of the [condominium association] declaration constitutes record notice and perfection of the lien for assessments.”

4. As a result, a deed of trust recorded after the condominium declaration is recorded is “subsequent in time” to the assessment lien and subject to redemption under RCW 6.23.010.

5. The foreclosing condominium association, Tanglewood at Klahanie, recorded its condominium declaration on December 20, 2006. Bank of America recorded its deed of trust on March 9, 2007. Bank of America’s deed of trust is “subsequent in time” to Tanglewood’s lien as a matter of undisputed fact. Bank of America thus qualifies as a statutory redemptioner.

6. The plain and unambiguous language of RCW 64.34.364(7) should have ended the inquiry. Unfortunately, the Trial Court ignored that provision.

7. Instead, the Trial Court erroneously assumed – at Respondent Michael Fulbright’s invitation – that Tanglewood’s assessment lien arose “on the due date of the unpaid assessments” (CP 351).

8. That error led the Trial Court to adopt an unnecessary, strict, and punitive reading of the Condominium Act and the Redemption Act to deny redemption on the theory that, because Bank of America’s

deed of trust was recorded prior to the “due date of the unpaid assessments,” it was not “subsequent in time” to Tanglewood’s lien.

9. That decision ignores the plain language of RCW 64.34.364; subverts the very purpose of RCW 6.23.010(1)(b); abandons time-honored standards for assessing legislative intent; undermines public policy; and creates an absurd and inequitable result in which a third party acquires a residential property for \$14,481.83 while the former owner and the primary lender sustain a loss of nearly \$300,000.

If, for some reason, this Court should ignore RCW 64.34.364(7) and hold that, contrary to the statute’s plain language, the condominium lien is created “on the due date of the unpaid assessments” – and not on the date the declaration is recorded and the lien is perfected – then the only interpretation of the legislature’s intent that would harmonize the Condominium Act and the Redemption Act consistent with statutory purpose, public policy, and equity is that the Condominium Act’s creation of a super-priority lien for assessments renders all subordinated liens “subsequent in time” to that lien and subject to redemption under RCW 6.23.010.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in failing to apply the plain, unambiguous, and unequivocal language of RCW 64.34.364(7), which states that the recording of the condominium association’s declaration “constitutes record notice and perfection of the lien for assessments.” Because the condominium association’s assessment lien is created and

perfected on the date the declaration is filed, a deed of trust recorded after the declaration is recorded is “subsequent in time” to the assessment lien and subject to redemption under RCW 6.23.010.

2. Although the plain language of RCW 64.34.364(7) should have ended the inquiry, the Trial Court erred by adopting an improper and strict interpretation of the Condominium Act’s impact on the Redemption Act’s “subsequent in time” language that ignores standards for interpreting legislative intent; refutes the purpose of the Redemption Statute; defies public policy; and creates an absurd and inequitable result.

A reversal based on error number 1 would render error number 2 moot.

STATEMENT OF THE CASE

(A) Tanglewood Records Its Condominium Declaration.

On December 20, 2006, the Tanglewood at Klahanie condominium association recorded its condominium association declaration under King County Auditor’s File No. 20061220000983 (CP 40-98).

(B) Bank of America Records Its Deed Of Trust.

On March 6, 2007, Jeanne Lewis purchased a Tanglewood at Klahanie condominium using a \$277,000.00 loan from Bank of America (CP 380-86). She signed a promissory note secured by a deed of trust on the condominium that named Bank of America as beneficiary (CP 138). On March 9, 2007, Bank of America recorded the deed of trust under King County Auditor’s File No. 20070309001521 (CP 141-58).

Bank of America later assigned the note and deed of trust to an affiliate, BAC Home Loans Servicing, LP. The assignment was recorded under King County Auditor's File No. 20110426000087 (CP 159). Effective July 1, 2011, BAC Home Loans Servicing merged into Bank of America. Under federal law, which governs the merger, BAC Home Loans Servicing's rights and interests in property and choses of action have been transferred to and vested in Bank of America.

(C) The Foreclosure and Sale.

By purchasing the property, Ms. Lewis became a member of the Tanglewood condominium and agreed to abide by its condominium association declaration (CP 156-58). In May 2008, however, she stopped paying her monthly condominium assessments (CP 370).

On January 27, 2009, Tanglewood began judicial foreclosure proceedings to collect Ms. Lewis' delinquent condominium assessments (King County Superior Court No. 09-2-05222-1 SEA) (CP 165-69). The lawsuit named Bank of America as a defendant because it was a beneficiary on the deed of trust (*Id.*). Because of an internal error in routing the complaint, Bank of America did not make an appearance in the proceedings (CP 134-36).

On June 24, 2009, the Superior Court entered a Default Judgment, Order, and Foreclosure Decree against Ms. Lewis and Bank of America (CP 170-74). The Foreclosure Decree declared that Bank of America's deed of trust was "inferior and subordinate to the plaintiff's lien and ... forever foreclosed except only for the statutory right of redemption

allowed by law, if any; IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the period of redemption shall be one year from the date of the Sheriff's sale after which time the Sheriff shall issue the Sheriff's deed to the purchaser" (CP 173).

On May 7, 2010, Appellee Michael Fulbright purchased the condominium at public auction (CP 175-76). Mr. Fulbright paid \$14,481.83 – approximately five percent of the condominium's original purchase price (CP 142, 175). The Sheriff issued a Certificate of Purchase of Real Estate, which Mr. Fulbright recorded under King County Auditor's File No. 20100615000422 (CP 198-200). A court order confirmed the sale and disbursed funds to Tanglewood (CP 201-03).

(D) Bank of America Tries To Redeem The Property.

On April 29, 2011, Bank of America initiated its right of redemption under RCW 6.23 *et seq.* (CP 204-05). There is no dispute that Bank of America took all necessary steps to complete redemption (CP 109).

On April 29, 2011, as contemplated by RCW 6.23 *et seq.*, Bank of America delivered to the Sheriff: (a) a redemption request letter; (b) an affidavit from BAC Home Loans Servicing estimating the redemption payment due; and (c) certified copies of the deed of trust and assignment of deed of trust (CP 204-27). The request letter asked Mr. Fulbright to deliver a verified statement of the rents and profits received and expenses paid and incurred pursuant to RCW 6.23.090 (*Id.*).

Mr. Fulbright refused to provide the redemption amount or otherwise cooperate with the redemption process (CP 228-29). On May 3, 2011, Bank of America delivered a second letter to the Sheriff with a conservative calculation of the redemption payment due to Mr. Fulbright: \$20,748.10 (CP 35-37). Bank of America requested confirmation that, if it tendered that sum to the Sheriff, the Sheriff would issue the Certificate of Redemption to Bank of America (*Id.*).

Mr. Fulbright delivered a letter to the Sheriff further objecting to any attempt by Bank of America to redeem the property (CP 237-38). On May 4, 2011, Bank of America delivered a third letter to the Sheriff, asking whether the Sheriff would accept the tender of \$20,748.10 even if the Certificate of Redemption was not provided, or whether the tender would be refused (CP 239-40). On May 5, 2011, the Sheriff advised that, if Bank of America tendered the estimated redemption amount of \$20,748.10, the Sheriff would deposit the funds in a trust account pending direction from the Superior Court or an agreement between the parties (CP 241-42). On May 6, in reliance on the Sheriff's representation, Bank of America tendered a cashier's check in the amount of \$20,748.10 (CP 243-44). The Sheriff issued a receipt, but not a Certificate of Redemption, to Bank of America (CP 243).

(E) This Lawsuit and the Decision Below.

On May 9, 2011, Bank of America brought this action against Mr. Fulbright, seeking a declaratory judgment that Bank of America was an authorized redemptioner under Washington law and directing the Sheriff

to issue a Certificate of Redemption to Bank of America (CP 1-8). Mr. Fulbright filed an answer and counterclaim seeking to quiet title to the property in his favor (CP 106-13).

The parties agreed that there were no disputed issues of fact (CP 121, 151). Bank of America moved for summary judgment on July 14, 2011 (CP 114-133). After a hearing on August 12, 2011, the Trial Court ruled that Bank of America was not an authorized redemptioner and quieted title in Mr. Fulbright's favor (CP 404-407).

Mr. Fulbright did not contend that Bank of America's redemption request was untimely, inadequate, or otherwise procedurally improper (CP 109). His position throughout was that the condominium association lien arose at the time of the delinquent payment – not when the condominium declaration was recorded and the lien was perfected as a matter of law – and considerable argument focused on statutory interpretation based on that mistaken position. That argument led to an erroneous decision that Bank of America was not a redemptioner because its deed of trust, although recorded after the condominium declaration, was not “subsequent in time” to the condominium lien (CP 404-407).

Bank of America filed this appeal (CP 408-13).

THE RELATED APPEAL

Mr. Fulbright, although the Respondent here, is counsel of record for Plumline Management Corporation Profit Sharing Plan in a related appeal pending in this Court: *GMAC, LLC v. Summerhill Village Condominium Association* (Appeal No. 66455-7-I). In that case,

Plumblin, a third party, purchased a condominium for less than \$11,000 through a condominium assessment foreclosure action that extinguished GMAC's deed of trust in the property. Plumblin refused to accept GMAC's redemption request. The Superior Court denied GMAC's Motion for Declaratory Relief and Issuance of Redemption Quote based on the same mistaken reading of the Condominium Act at issue here.

Because the GMAC appeal proceeded first on this Court's docket – and because that appeal does not explain or challenge the Superior Court's misreading of the Condominium Act – Bank of America sought leave to file a Brief *Amicus Curiae* in that appeal.

THE STATUTORY BACKGROUND

This appeal turns on the interplay of two statutes adopted nearly ninety years apart. “Statutory provisions should be read together with others ‘to achieve a harmonious and unified statutory scheme.’” *Subcontractors & Suppliers Coll. Servs. v. McConnachie*, 106 Wn.App. 738, 741, 24 P.3d 1112 (2001). In this case, that statutory scheme finds its roots in the common law.

The Common Law. The common law doctrine of lien priority is “first in time, first in right.” 18 William B. Stoebuck and John W. Weaver, *Washington Practice, Real Estate: Transactions* § 14.5 (1998). Under that doctrine, “generally, liens take precedence in order of time, the first in time being the first in right.” *Hollenbeck v. City of Seattle*, 136 Wash. 508, 514, 240 P. 916 (1925).

The Redemption Act. During the reign of the “first in time, first in right” doctrine, the Washington legislature vested property owners and lienholders with the statutory right to redeem real property when a foreclosure extinguished their interests in that property. Laws of 1899, ch. 53, § 7.

As now codified in RCW 6.23.010, the Redemption Act provides:

(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 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 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.

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

The only revision to the statute occurred in 1987, when the legislature codified the Washington Supreme Court’s holding in *Rustad Heating & Plumbing Co. v. Waldt*, 91 Wn.2d 372, 374, 588 P.2d 1153 (1979), that a deed of trust was a “mortgage” under the statute by expanding the definition of redemptioner to include deed of trust beneficiaries and successors in interest.

Washington’s Race-Notice Recording System. “Washington’s recording system was enacted to ensure that a deed recorded first in time

was superior to any other conveyance” *Seattle Mortg. Co. v. Unknown Heirs of Gray*, 133 Wn. App. 479, 495, 136 P.3d 776 (2006); RCW 65.08.070. This Race-Notice Act “make[s] the deed first recorded superior to any outstanding unrecorded conveyance of the same property unless the mortgagee or purchaser had actual knowledge of the transfer not filed of record.” *Kim v. Lee*, 145 Wn.2d 79, 86 (2001), *corrected*, 43 P.3d 1222 (2001), *quoting Tacoma Hotel, Inc. v. Morrison & Co.*, 193 Wash. 134, 140, 74 P.2d 1003 (1938). The Race-Notice Act thus gives a recorded security interest in property priority over unrecorded or subsequently recorded encumbrances.

The Condominium Act. In 1989, the legislature adopted the Condominium Act, RCW 64.34 *et seq.*, which included an exception to the Race-Notice Act. Based on the Uniform Common Interest Ownership Act, this Act ensures the financial well-being of condominium associations without discouraging lenders from making loans to condominium purchasers by granting the association a super-priority lien for six months of delinquent condominium assessments. The Act provides, in relevant part:

- (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 [condominium] 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....

RCW 64.34.364(1)-(3).

The key provision of the Act for purposes of this appeal, which neither the Trial Court nor Mr. Fulbright discussed, is RCW 64.34.364(7).

That section states: **“Recording of the [condominium] declaration constitutes record notice and perfection of the lien for assessments”** (emphasis added).

The Real Property, Probate & Trust Section of the Washington State Bar Association published comments on the Act, emphasizing that a condominium association’s foreclosure on its assessment lien would extinguish a mortgage lender’s lien – which would, in turn, trigger application of the Redemption Act, whose purpose is to provide rights of redemption for extinguished lienholders:

A significant departure from existing practice, the priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the assessments demanded by the association which are prior

to its mortgage rather than having the association foreclose on the unit and eliminate the lender's mortgage lien.

The Washington State Bar Association, Real Property, Probate & Trust Section, *Comments to the Washington Condominium Act*, Feb. 7, 1990 at 43 n.3 (emphasis added). As stated in the Washington Practice Series: “[T]he redemptioner’s lien must be junior to that of the foreclosing mortgagee; the idea is that only one whose title or lien may be extinguished may have ‘another bite at the apple.’” 27 Marjorie Dick Rombauer, *Washington Practice, Creditors’ Remedies – Debtors’ Relief* § 3.19(a)-(b) (2010) (emphasis added).

ARGUMENT

BECAUSE ITS DEED OF TRUST IS “SUBSEQUENT IN TIME,” BANK OF AMERICA IS ENTITLED TO REDEMPTION

Under RCW 6.23.010(1)(b), a mortgage lender qualifies as a redemptioner if its mortgage or deed of trust is “subsequent in time to that on which the property was sold.” Bank of America’s deed of trust is “subsequent in time” to the Tanglewood lien for two independent reasons: First, Bank of America recorded its deed of trust in 2007, while Tanglewood recorded its condominium declaration – which created and perfected Tanglewood’s lien – in 2006. Second, the statutory grant of a super-priority lien to Tanglewood renders Bank of America’s deed of trust “subsequent in time” to that lien for purposes of the Race-Notice Act and the Redemption Act.

(A) **Bank of America’s Lien Is “Subsequent In Time”
As A Matter Of Fact**

The Trial Court failed to observe the plain language of the Condominium Act, which specifies the date on which a condominium assessment lien is created and perfected – and which, by its terms, applies that lien only to encumbrances recorded “subsequent in time” to that lien.

RCW 64.34.364(7) states: “Recording of the [condominium] declaration constitutes record notice and perfection of the lien for assessments.” Tanglewood thus created and perfected its super-priority lien on the date its condominium declaration was recorded – and not, as the Trial Court believed, on the due date of the delinquent payment that triggered attachment of the lien (CP 404-07).

By the plain terms of the statute, a mortgage lender is immune from the condominium lien if its mortgage or deed of trust is “recorded before the recording of the declaration.” RCW 64.34.364(2)(a). Super-priority applies only to a mortgage lender whose mortgage or deed of trust is recorded subsequent in time to the declaration and “before the date on which the assessment sought to be enforced became delinquent.” RCW 64.34.364(2)(b). Thus, by the statute’s terms, any mortgage lender subject to the assessment lien is “subsequent in time” for purposes of the Redemption Act.

“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.’” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283

(2010), quoting *State v. Engle*, 166 Wn.2d 572, 578, 210 P.3d 1007, 1010 (2009). “If the statute is unambiguous after a review of the plain meaning, the court’s inquiry is at an end.” *Lake*, 169 Wn.2d at 726, 243 P.3d at 1288, citing *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The statute’s meaning and intent are plain: The lien is created and perfected – and record notice of its existence is given – on the date the declaration is recorded. RCW 64.34.364(7).

Tanglewood recorded its condominium declaration on December 20, 2006 (CP 40-98). Bank of America recorded its deed of trust on March 9, 2007 (CP 141-58). Because Bank of America’s deed of trust is “subsequent in time” to Tanglewood’s perfected lien, Bank of America fulfills the statutory definition of a redemptioner.

Tanglewood believes that Bank of America’s lien is not “subsequent in time” because RCW 64.34.364(1) provides that “[t]he association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due” (CP 357). But RCW 64.34.364(7) is unequivocal and unambiguous: the recording of the condominium declaration is “record notice and perfection of the lien.” Section 64.34.364(1) merely provides that the perfected, pre-existing lien attaches to the unit “at the time the assessment is due.” See *Mira Owners Ass’n v. Lawrence*, No. C10-630RAJ, 2011 WL 677425, *3 (W.D. Wash. Feb. 16, 2011) (“That statute provides that assessment liens automatically attach at the time the assessment is due”).

Encumbrancers, especially potential primary lenders, must be able to rely on the public record. The condominium association declaration is the initial means by which Tanglewood could and did give record notice of its lien to Bank of America and other potential encumbrancers. Indeed, Tanglewood's condominium declaration paraphrases RCW 64.34.364(1) in giving record notice of its continuing lien for assessments (CP 64-66).

The operative act, for purposes of the Race-Notice Act, the Redemption Act, and the Condominium Act, is the recording of Tanglewood's declaration. Bank of America's deed of trust was "subsequent in time" to Tanglewood's lien as a matter of fact. No further statutory interpretation was necessary or appropriate.

This plain reading of the statute also fulfills the public policy underpinnings of these laws, which is to provide certainty to encumbrancers about the priority of their interests and the potential for a super-priority lien while securing the condominium's interest in unpaid assessments. By fixing the date of the creation and perfection of the assessment lien as the date of recording, the Condominium Act, like the Race-Notice Act, assures that all potential subsequent encumbrancers have record notice of the lien and its effect before it attaches – and that the condominium association and other potential purchasers of the property know whether a foreclosure sale based on the lien will be subject to redemption.^{1/}

^{1/} Like any lienholder – and, of course, the judgment debtor – Bank of America could have participated, but was not obliged to participate, in the condominium

(B) Alternatively, Bank of America's Lien Is "Subsequent In Time" As A Matter Of Law

A factual comparison of the two recording dates should have ended the inquiry, as the Redemption Act intended. The Trial Court compounded its error, however, by then embracing the unprecedented premise that, if Bank of America's deed of trust were somehow recorded "prior" to the condominium assessment lien, the Condominium Act vitiated any right of redemption because the legislature's creation of super-priority did not render Bank of America's deed of trust "subsequent in time" to that lien.

As discussed above, even venturing into these waters is contrary to the plain language of the statutes. But after committing its essential error, the Trial Court refused to harmonize the Redemption Act and the Condominium Act based on a literal reading of the phrase "subsequent in time" outside of the essential context of Washington's Race-Notice Act. That reading fails to fulfill fundamental precepts of statutory interpretation, but also fails to acknowledge that, in creating an exception to the "first in time" underpinnings of the Redemption Act and the Race-Notice Act, the Condominium Act's impact and meaning is chronological.

association's foreclosure sale. In an ideal world, that could have happened. But the right of redemption exists – as a matter of statute, not equity – to protect those whose interests were extinguished, for whatever reason, by foreclosure. Its purpose is to create the proverbial "second chance." *See Millay v. Cam*, 135 Wn.2d 193, 207, 955 P.2d 791 (1998) (en banc) (stating that the purpose of the redemption statute "is to allow creditors to recover their just demands"). The Redemption Act grants both Ms. Lewis (the judgment debtor) and Bank of America the statutory right to redeem, whether or not they bid at the sale and whether their non-participation was accidental, intentional, or negligent.

By deeming the condominium lien for assessments “prior to” the recorded deeds of trust described in subsection (2)(b) – which can, by dint of RCW 64.34.364(2), consist only of deeds of trust recorded after the condominium declaration – RCW 64.34.364(3) rendered those mortgages “subsequent in time” to the assessment lien for purposes of the Race-Notice Act – and thus, for purposes of the Redemption Act.

In determining legislative intent, “the entire sequence of all statutes relating to the same subject matter should be considered.” *In re Donnelly's Estates*, 81 Wn.2d 430, 435, 502 P.2d 1163 (1972), *citing Connick v. Chehalis*, 53 Wn.2d 288, 290, 388 P.2d 647 (1958). The Redemption Act’s “subsequent in time” language was not crafted in the context of the Condominium Act – which did not exist until ninety years later – or even in the context of the Race-Notice Act. Instead, that language originated in 1899, when Washington embraced a singular, chronological approach to priority: “first in time, first in right.”

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

The Redemption Act's purpose "is to allow creditors to recover their just demands." *Millay*, 135 Wn.2d at 207. "Statutory redemption is designed to promote several public policies. Most obviously, it gives the debtor, whose title has been lost, and junior lienors, whose liens have been extinguished, a grace period, beyond the sale, to salvage something." 27 Marjorie Dick Rombauer, *Washington Practice, Creditors' Remedies – Debtors' Relief* § 3.19 (2010).

The Trial Court's reasoning contravenes the statute's purpose and public policy underpinnings, and also results in "unlikely, absurd, or strained consequences." "[N]o construction should be given to a statute which leads to gross injustice or absurdity." *State v. Coffey*, 77 Wn.2d 630, 637, 465 P.2d 665 (1970) (internal quotations omitted) (en banc). Yet the Trial Court's construction creates, for no explicable reason, two artificial categories of lienholders who are subordinate to the condominium lien – those whose liens supposedly arose prior in time and those whose liens arose subsequent in time. It denies, for no rational reason, the benefit of the Redemption Act to those subordinated to the condominium lien even though the purpose of the Redemption Act is to grant a second chance to lienholders whose interests were extinguished by foreclosure.

No public policy is served by creating a super-priority lien yet denying redemption to those subordinated by that lien, particularly when the result penalizes the primary lender with the largest financial interest. *See, e.g.*, James L. Winokur, *Meaner Lienor Community Associations: The*

“Super Priority” Lien and Related Reforms Under the Uniform Common Interest Ownership Act, 27 Wake Forest L. Rev., 353, 354-55 (1992) (stating “it would be folly to ignore the needs of mortgage lenders”). The decision below would, in derogation of the Redemption Act’s reason for existence, favor a third-party purchaser – a stranger to the original purchase and loan transactions – over the first mortgagee, which held a significant, now extinguished, interest in the property. Because the property owner and any subordinate lienholders whose liens were recorded “subsequent in time” to the super-priority lien are entitled to redeem, this result is arbitrary and absurd.

The Washington Supreme Court has shown its willingness, as RCW 1.12.010 directs, to undertake a more equitable and expansive interpretation of the Redemption Act. In *Rustad*, the sheriff’s sale purchaser posited a strict and literal interpretation of the statute’s pre-1987 definition of redemptioner, which included a mortgagee but not a deed of trust beneficiary. 91 Wn.2d at 374. The Court concluded that a deed of trust is indistinguishable in principle from a mortgage and looked through the form of the transaction to determine its substance. The Court adopted a common-sense approach to incorporating a new legal development – the deed of trust – into the statute, holding that a deed of trust “is indeed a species of mortgage.” *Id.* at 376.

This Court should employ the *Rustad* approach in interpreting “subsequent in time.” The new legal development here is the condominium assessment lien. The form of the transaction is

subordination of what Tanglewood contends is a prior-filed lien, while the substance of that transaction is to render Bank of America's lien "subsequent in time." The impact on Bank of America's deed of trust is indistinguishable; otherwise, that deed of trust would be treated as if recorded "subsequent in time" to the Tanglewood's lien for all purposes save one: the Redemption Act. The legislature could have had no such punitive intent when passing the Condominium Act. A subordinate lienholder whose interests have been extinguished by foreclosure should retain the statutory right to redemption.

Other sections of the Redemption Act support this interpretation. The Act refers ten times to liens that are "prior" to other liens, without the modifier "in time." See RCW 6.23.020-050, 6.23.070-080. Its emphasis on relative priority, rather than chronological priority, is undoubted – and underscores the propriety of a consistent reading of its language to mean "subsequent in priority."

This reading is also supported by a Washington Supreme Court decision contemporaneous with the 1899 Act. In *Krutz v. Gardner*, 25 Wn. 396, 65 P. 771 (1901), a husband and wife obtained a mortgage on their house. The City of Seattle commenced street improvements and assessed homeowners for the improvements. When the couple did not pay the assessment, the City foreclosed and sold the house to a third party. The mortgage holder was not a party to the foreclosure proceedings. After losing an ejectment action against the third party, the mortgage holder brought a redemption action. The Washington Supreme Court held that

the “assessment lien was still in force” and held by the third party purchaser – and that the mortgage holder could obtain redemption because the City's lien, based on an assessment subsequent to the mortgage, had priority: “And, if it be true that the respondent is the holder of a lien prior and paramount to appellant's mortgage, such lien is analogous to that of a senior mortgagee, and the right of the appellant as a junior mortgagee to redeem from that lien cannot well be doubted, unless that right has been cut off by some means recognized by law.” *Id.* at 400.

Secondary Authorities. Washington secondary authorities interpret the phrase “subsequent in time” in RCW 6.23.010(1)(b) to mean “subsequent in priority.” According to the Washington Practice Series on Real Estate: “Redemptioner’ is defined as a creditor who has a lien by judgment, decree, deed of trust, or mortgage on any portion of the property, which lien is subsequent in priority to that being foreclosed, or the successor in interest to any such creditor.” 18 William B. Stoebuck and John W. Weaver, *Washington Practice, Real Estate: Transactions* § 19.19 (2010) (emphasis added).

The *Washington Practice Series on Creditors’ Remedies and Debtors’ Relief* explains the policy considerations underlying the right of redemption:

Under statutory redemption, the mortgage debtor and ... junior lienors whose interests have been extinguished by a senior interest holder’s foreclosure sale, are allowed a stated time after the sale to buy the land from the sale purchaser....

...

“Redemption” is defined as a creditor who has a lien by ... deed of trust ..., which lien is subsequent in priority to that being foreclosed.... [T]he redemptioner’s lien must be junior to that of the foreclosing mortgagee; the idea is that only one whose title or lien may be extinguished may have “another bite at the apple.”

27 Marjorie Dick Rombauer, *Washington Practice, Creditors’ Remedies – Debtors’ Relief* § 3.19 (2010) (emphasis added).

The Washington Real Property Deskbook likewise confirms that the Redemption Act concerns relative lien priorities – an order from senior to junior, not one based on chronology:

[T]o qualify as a redemptioner, one having a lien by judgment, mortgage, or decree must have a lien subsequent in time to the lien being foreclosed; if the lien of the judgment is prior to the one being foreclosed, the holder of the prior lien does not have a right of redemption because the prior lienholder’s lien is not affected by the foreclosure.

3 Wash. State Bar Ass’n, *Washington Real Property Deskbook* § 46.15(2), at 46-51 (3d ed. 1996) (emphasis added). These authors understand “subsequent in time” and “prior” to address the same issue: lien priority, not lien chronology. The authors also underscore the difference between a lien that is “prior” and one that is “subsequent” by the practical result of a foreclosure: the holder of a “prior” lien is not affected by foreclosure, while the holder of a “subsequent” lien is dramatically affected – the lien is extinguished – and that lienholder is thus entitled to redemption.

Other Jurisdictions. Although not binding on this Court, well-reasoned decisions from other jurisdictions may provide persuasive authority. *See State v. Chenoweth*, 160 Wn.2d 454, 470-71, 158 P.3d 595 (2007). These decisions are particularly helpful in resolving a matter of

first impression. “[I]n the face of a statutory scheme which fails to contemplate the scenario presented [and] ... a case of first impression in this state, a review of decisions of other jurisdictions is instructive.” *In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161 (2005).

The Alaska Redemption Act, like the Washington statute, uses the phrase “subsequent in time,” allowing redemption by “a creditor having a lien by judgment or mortgage on the property sold or on some part of it subsequent in time to that on which the property was sold.” Alaska Stat. § 09.35.220. The Alaska Supreme Court has declined to read that language literally: “This right of redemption for junior interest holders exists to protect their interests since a foreclosure cuts off all interests junior to the one foreclosed.” *Young v. Embley*, 143 P.3d 936, 942 (Ak. 2006).

Idaho’s Redemption Act defines “redemptioneer” to include “[a] creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold.” Idaho Code § 11-401. Despite the use of the chronological adjective “subsequent” rather than “junior” or “subordinate,” the Idaho Supreme Court understood the statute to refer to lien priority, not lien chronology: “[O]nly a junior mortgagee having a mortgage subsequent to that lien for which the property as foreclosed can redeem.” *Eastern Idaho Prod. Credit Ass’n v. Placerton, Inc.*, 606 P.2d 967, 973 (1980).

The Equities. The equities also reject the Trial Court’s interpretation. If the deed of trust lienholder is not a redemptioneer, the lender and the borrower face considerable risk. The borrower is in default.

If the lender can redeem and sell the property, it will apply the proceeds to the outstanding debt. The lender recoups some of its losses and reduces the borrower's liability. On the other hand, if the lender is not a redemptioner, its sole option is to sue the borrower, placing the borrower at risk for paying the judgment or entering bankruptcy, while exposing the lender to the risk of a non-collectable judgment.

Redemption not only enables the lender and borrower to mitigate their losses, but also assures that the purchaser of the property is made whole, with interest. The purchaser receives the full redemption amount, plus interest at the judgment rate of 12.000 percent per annum and any other available fees. *See* RCW 6.23.020(2).

CONCLUSION and REQUEST FOR RELIEF

For these reasons, the Court of Appeals should reverse the Superior Court in a published opinion that provides much-needed direction by holding that:

1. The Trial Court erred in reading the Condominium Act to create, rather than attach, an assessment lien at the time of the unit owner's delinquency. Under RCW 64.34.364(7), "Recording of the [condominium] declaration constitutes record notice and perfection of the lien for assessments." As a result, a deed of trust recorded after the condominium declaration is recorded is "subsequent in time" to the assessment lien and subject to redemption under RCW 6.23.010.

2. If not, then, by creating the RCW 64.34.364 super-priority lien for condominium assessments, the legislature rendered subordinated

liens “subsequent in time” to the assessment lien and subject to redemption under RCW 6.23.010.

Relief Requested. Because there is no dispute of fact, Bank of America requests the following relief, as authorized in *Metropolitan Federal Savings Loan Association v. Roberts*, 72 Wn. App. 104, 113-14, 863 P.2d 615 (1993). This Court should:

1. Vacate the Trial Court’s judgment improperly denying redemption;
2. Order the Trial Court to toll the period for redemption until the Bank of America’s right to redeem is effectively restored; and
3. Order the Trial Court to require an accounting of rents and profits received during the redemption period, as tolled, in the manner provided by law.

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