

STATE OF WISCONSIN  
SUPREME COURT

**RECEIVED**

**10-07-2015**

**CLERK OF SUPREME COURT  
OF WISCONSIN**

---

WALWORTH STATE BANK,

Plaintiff-Respondent-  
Petitioner,

Appeal No.  
2014AP000940

v.

ABBEY SPRINGS CONDOMINIUM  
ASSOCIATION, INC. and  
ABBEY SPRINGS, INC.,

Defendants-Appellants.

---

ON REVIEW OF A DECISION OF THE COURT OF APPEALS  
DISTRICT II DATED MARCH 26, 2015

---

On Appeal from the Circuit Court of Walworth County  
The Honorable Phillip A. Koss  
Case No. 2013CV000855

---

***AMICUS CURIAE BRIEF OF***  
**COMMUNITY ASSOCIATIONS INSTITUTE**

---

Lydia J. Chartre, SBN 1045789  
Whyte Hirschboeck Dudek S.C.  
555 East Wells Street, Ste. 1900  
Milwaukee, WI 53202  
414-273-2100

Attorneys for Community  
Associations Institute, Amicus Curiae

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTEREST OF THE AMICUS CURIAE ..... 1

ARGUMENT ..... 1

I. Condominium Act Permits Associations to Own Property  
and Adopt Policies Governing That Property. .... 1

    A. Declaration Defines Condominium Units and  
    Common Elements. .... 2

    B. Condominium Associations May Own Private  
    Property and Adopt Policies Governing Access. .... 3

    C. The Policy Does not Conflict With § 703.165,  
    Which Addresses Enforcement and Priority of  
    Liens for Unpaid Condo Assessments. .... 5

    D. The Policy Did Not Render Title Unmarketable. .... 6

II. Walworth Has No Standing to Challenge the Condo Policy  
and Its Argument Would Rewrite the Condominium Act. .... 8

III. Risks of Diminution in Value Are Already Factored in  
Lending and Payment of Condo Assessments is Addressed  
in Mortgages. .... 11

CONCLUSION ..... 14

FORM AND LENGTH CERTIFICATION ..... 49

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)..... 50

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)..... 51

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Apple Valley Gardens Assoc., Inc. v. MacHutta</i> , 2009 WI 28, 316 Wis. 2d 85, 763 N.W.2d 126 .....	passim
<i>Bankers Trust Co. v. Bregant</i> , 2003 WI App 86, 261 Wis. 2d 855, 661 N.W.2d 498 .....	6, 7, 8
<i>Ela v. Amer. Merchants' Union Express Co.</i> , 29 Wis. 611 (1872).....	9
<i>Gebhardt Bros., Inc. v. Brimmel</i> , 31 Wis. 2d 581, 143 N.W.2d 479 (1966) .....	10
<b>STATUTES</b>	
<b>Declaration</b> .....	2, 3, 11
Wis. Stat. § 703.02.....	2, 3, 4
Wis. Stat. § 703.04 .....	2
Wis. Stat. § 703.05 .....	2
Wis. Stat. § 703.09 .....	2
Wis. Stat. § 703.13 .....	3
Wis. Stat. § 703.15.....	3, 4
Wis. Stat. § 703.30 .....	3
Wis. Stat. § 703.165 .....	5, 6
<b>OTHER AUTHORITIES</b>	
A. Bazelon, FHA Update: “Temporary” Guidelines are Extended,” Community Leader, WI Chapter Community Associations Institute, Winter 2014 .....	13
L. Gibbs, “Good Luck Getting a Mortgage on a Condo,” Time, 6/1/2014, printed 10/6/2015 .....	13
<a href="http://www.freddiemac.com/uniform/unifsecurity.html">http://www.freddiemac.com/uniform/unifsecurity.html</a> .....	13

<https://www.fanniemae.com/singlefamily/security-instruments> ..... 13

MORTGAGE, Wisconsin—Single Family—Fannie  
Mae/Freddie Mac UNIFORM INSTRUMENT, Form 3050  
printed 10/5/2015 from  
[www.freddiemac.com/uniform/pdf/3050.pdf](http://www.freddiemac.com/uniform/pdf/3050.pdf) ..... 13

Wis. Realtors Ass’n, “Best of the Legal Hotline: Working with  
REO Transactions,”  
<https://www.wra.org/WREM/Mar09/REOTransactions/> ..... 9

## INTEREST OF THE AMICUS CURIAE

CAI is an international organization, with 61 chapters in the United States and internationally. CAI's Wisconsin Chapter consists of numerous condominium association unit owners and property management companies. On behalf of its members, CAI regularly expresses its position on issues of significance nationally including those that arise under Wisconsin law. CAI also publishes a bi-monthly magazine offering information on current issues affecting community associations, provides educational and training opportunities to its members and the public, and provides a searchable research library with hundreds of archived articles.

The determination of this case may have an effect on existing condominium associations and their ownership and the use of recreational facilities and other assets owned by such associations, which are not common elements. Any change in the way the Condominium Act is interpreted will require condominium associations to conform their conduct and policies to the decision in this case.

### ARGUMENT

#### **I. Condominium Act Permits Associations to Own Property and Adopt Policies Governing That Property.**

“Condominium ownership is a statutory creation that obligates individual owners to relinquish rights they might otherwise enjoy in other types of real property ownership.” *Apple Valley Gardens Assoc.*,

*Inc. v. MacHutta*, 2009 WI 28, ¶ 11, 316 Wis. 2d 85, 763 N.W.2d 126.

This case arises from a condominium association’s exercise of its power to own real property separate from condominium units and common elements and to place conditions upon the access to such property. These matters are addressed and resolved by the condominium statutes.

**A. Declaration Defines Condominium Units and Common Elements.**

Wisconsin Statute § 703.02(4) defines “[c]ondominium” to “mean[] property subject to a condominium declaration established under this chapter.” *See also* Wis. Stat. § 703.02(8) (“Declaration”); Wis. Stat. § 703.09 (Declaration includes description of land and the unit, statement of purposes for which building and units are intended and use restrictions, and general description of common elements.); *Apple Valley*, 2009 WI 28, ¶ 14.

A condominium “[u]nit owner” “holds legal title to a condominium unit,” Wis. Stat. § 703.02(17), and is “entitled to the exclusive ownership and possession of [the] unit.” Wis. Stat. § 703.05. Further, “[a] unit, together with its undivided interest in the common elements, for all purposes constitutes real property.” Wis. Stat. § 703.04. “Common elements” “mean all of a condominium except its units.” Wis. Stat. § 703.02(2). The common elements are owned by

unit owners in proportion to their undivided percentage interest as set forth in the declaration. Wis. Stat. § 703.13(1).

WBA argues that the recreational facilities owed by the condominium association “were intended to serve as *defacto* common elements.” (Amicus at 7). There is no such thing. The condominium declarations define the common elements for each condominium unit and at Abbey Springs, the facilities were not common elements of units 18 and 19. Court of Appeals Decision [“Decision”] ¶¶ 2-3; (R.10:6-7;Resp.App.A-6-A-7). Further, WBA cites association bylaws to argue that the facilities were regarded as common elements. However, the *declaration* defines the common elements. If the bylaws conflict with the declaration, the declaration controls. Wis. Stat. § 703.30(4).

**B. Condominium Associations May Own Private Property and Adopt Policies Governing Access.**

“ ‘Association’ ” means all of a condominium’s unit owners acting as a group . . . , in accordance with its bylaws and declaration.” Wis. Stat. § 703.02(1m). Section 703.15(1) provides that “[t]he affairs of every condominium shall be governed by an association that, even if unincorporated, is constituted a legal entity for all purposes.” With certain exceptions, “all policy and operational decisions of the association” are made by its board of directors. *Id.* The association is empowered to collect assessments

for common expenses from unit owners and to exercise any power conferred by the condo instruments or bylaws. *Id.*, sub.(3)(a).

Condo associations have the power to “[a]cquire, hold, encumber and convey any right, title or interest in or to real property.” Wis. Stat. § 703.15(3)(b)4. Associations may own real property and set rules and policies regarding its use. Just as any owner of private property, a condo association may set the terms of use of its private property and limit access to it.

Abbey Springs is entitled to set charges and conditions for access to its private property. There is a waiting list for use of boat slips at the Yacht Club and spaces are limited. (R.10:4;Resp-App.A-4). Certain restaurants and other facilities are “oversubscribed,” and the association gives priority to those units that regularly pay their assessments. *Id.* These facilities are not “free to members” of Abbey Springs. *Id.* It charges market rates for these amenities. *Id.* Comparable amenities are in the area, within a 5-to-15 minute drive. *Id.*

In this case, Abbey Springs owns the recreational facilities and it is entitled to adopt a policy regarding their access and use. There is no dispute as to the existence of this power. Instead, Walworth argues that such policy can be invalidated by the courts because access to the recreational facilities is denied for units with unpaid delinquent assessments. Neither the statutes nor the condo



instruments provide a basis to invalidate the recreational facilities policy. Decision ¶ 21.

**C. The Policy Does not Conflict With § 703.165, Which Addresses Enforcement and Priority of Liens for Unpaid Condo Assessments.**

Under the Condominium Act, “assessments” “means regular and special assessments for common expenses and charges, fines, or assessments against specific units or unit owners . . . .” Wis. Stat. § 703.165(1). “A unit owner shall be liable for all assessments . . . coming due while owning a unit . . . .” Wis. Stat. § 703.165(2). Subsection (3) establishes that until paid, assessments constitute a lien on the units on which they are assessed upon filing of a statement of lien. The lien “may be enforced and foreclosed by an association” in the same manner as foreclosure of a mortgage. Wis. Stat. § 703.165(7). Condo liens are prior to other liens except unpaid first mortgages with priority. Wis. Stat. § 703.165(5)(b). The recreational facilities policy has no conflict with 703.165(5)(b). It does not alter the statutory lien priority. Walworth successfully foreclosed its prior first mortgage lien on condominium units 18 and 19, purchased the units at the sheriff’s sale, and later sold them. Abbey Springs’ recreational facilities policy did not prevent these title transfers.

Nor does the policy conflict with § 703.165(2). The policy did not impose liability for payment of delinquent assessments upon

Walworth or the subsequent purchasers. As noted by the Court of Appeals, “[n]othing in Abbey Spring’s policy gave [it] the *right* to pursue recovery of the unpaid assessments from Walworth.” Decision ¶ 18 (emphasis in original). Neither Walworth nor subsequent purchasers were obliged to pay the delinquent assessments. *Id.* Further, they were free to use other recreational facilities in the area.

Consistent with 703.165, Abbey Springs was free to obtain payment for the delinquent assessments. Even assuming foreclosure of Walworth’s mortgage extinguished the association’s *lien* for delinquent assessments, foreclosure did not eliminate the unit owner’s liability for the assessments as a *debt*. The association may file suit “to recover a money judgment for unpaid common expenses . . . without foreclosing or waiving the lien . . . .” Wis. Stat. § 703.165(7).

**D. The Policy Did Not Render Title Unmarketable.**

Walworth argues that *Bankers Trust Co. v. Bregant*, 2003 WI App 86, 261 Wis. 2d 855, 661 N.W.2d 498, provides the controlling law, whereas this Court’s ruling in *Apple Valley* must be narrowly limited to its facts. The reverse is true.

*Bankers Trust* involved an unsuccessful action by a condominium association attempting to prevent confirmation of a sheriff’s sale purchase, which held that association bylaws requiring

owner-occupancy did not prevent the transfer of good title. The court held that the issue of owner-occupancy compliance under the association bylaws was a separate issue for separate litigation. The decision below is consistent with *Bankers Trust*.

The decision likewise properly applies *Apple Valley* to hold that the recreational facilities policy has no effect on the merchantability of title. In *Apple Valley*, the Court held that a prohibition on condominium rentals did not render the condominium unit owner's title unmarketable because it in no way affected her ability to convey her interest in the unit. 2009 WI 28, ¶ 28. Although the rental prohibition allegedly affected property value, it did not affect the quality of the owner's title. *Id.* The bylaws merely restricted the use of the unit but did not affect its title or alienability. *Id.* As the Court held, condominium bylaws may not properly be construed as impairing the title or rendering it unmarketable. *Id.*, ¶ 30.

The same result follows here. The recreational facilities policy did not render the title unmarketable. Walworth obtained marketable title to the units via the sheriff's sale and it transferred such title to the purchasers. Although the policy allegedly affected the resale value of the property, it did not affect the ability to convey title. Decision ¶ 21.

## **II. Walworth Has No Standing to Challenge the Condo Policy and Its Argument Would Rewrite the Condominium Act.**

The recreational facilities policy cannot be challenged by Walworth because it was not a unit owner when it filed this action.<sup>1</sup> Therefore, it has no standing. As the court acknowledged in *Bankers Trust*, the transfer of title to condominium units after foreclosure is different than the matter of compliance with condominium association bylaws after the units have new owners. Enforcement of bylaws is a matter for a separate lawsuit after title transferred. The validity of the condo association policy is a matter between unit owners and the association, *see, e.g., Apple Valley*, 2009 WI 28, ¶ 1.

Here, Walworth formulated its opening bid on the property at the sheriff's sale, *after* it was informed of the recreational facilities policy and the delinquent assessments on units 18 and 19, and the fact that unit owners would not have access to the recreational facilities as long as the assessments remained unpaid. Walworth could have adjusted its bid to take into account the lower resale value flowing from the unavailability of the recreational facilities, reducing the bid by the amount of the delinquent assessments. By doing so, Walworth may

---

<sup>1</sup> Although the record allegedly is missing the documents regarding Walworth's foreclosure action (Resp. Brief at 1), the foreclosure action was filed August 9, 2012, foreclosure judgment was entered with Walworth's sheriff's sale purchase confirmed on April 29, 2013, and Walworth sold units 18 and 19 in or around July 2013. (R.17:3,4,5;Pet.App.103,104,105); Decision ¶ 6. Walworth was notified about the recreational facilities policy *prior to* the sheriff's sale. Decision ¶ 5. This action was filed on September 10, 2013. (R.1).

have made the property more enticing to third-party purchasers and would have eliminated the REO<sup>2</sup> headache the bank knowingly stepped into when it purchased the units.

There is no indication that Walworth did not engage in this calculus. It purchased the condo units and it voluntarily paid the delinquent assessments, to obtain access to the recreational facilities for the unit owners. This payment was not required by Abbey Springs, but was a choice to position the property for resale. This choice is akin to a sheriff's sale purchaser repairing or improving the property before resale.

Walworth paid Abbey Springs the delinquent assessments on units 18 and 19, which was a debt owed by its borrowers, in order to expedite the sale of the units. It paid under \$13,000 to increase the resale value by an alleged \$250,000. (Resp. Brief at 40). Walworth's unjust enrichment theory fails because payment was made to Abbey Springs, which was entitled to it. *See Ela v. Amer. Merchants' Union Express Co.*, 29 Wis. 611, 617 (1872) (claim arises where party has money "which of right belongs to another, and which it is against conscience for him to keep"). Walworth must look to its borrowers to reimburse this payment, since it was borrowers' obligation to pay. *See*

---

<sup>2</sup> "REO" means "real estate owned," meaning a property owned by a bank post-foreclosure. Wis. Realtors Ass'n, "Best of the Legal Hotline: Working with REO Transactions," printed 10/5/2015 from <https://www.wra.org/WREM/Mar09/REOTransactions/>.

*Gebhardt Bros., Inc. v. Brimmel*, 31 Wis. 2d 581, 585-86, 143 N.W.2d 479 (1966). Walworth must bear the loss for failing to make arrangements with borrowers for repayment of condo assessments during the loan (see part III, below) and for not seeking reimbursement from borrowers. *See id.*

Walworth advocates a rule allowing courts to hold a condominium association policy invalid on the ground that it negatively affects resale value of condominium units. Such rule has no basis in the Condominium Act or case law, and it would rewrite the Act to upend established rights of associations and unit owners.

Walworth argued that the resale value of condominium units 18 and 19 was significantly lower due to the delinquent assessments. However, nothing in the condominium statutes would allow a court to intervene in the affairs of a condominium association to preserve the property value of condominium units. There would be no stopping point if it were allowed. Walworth would allow subsequent purchasers or lenders to challenge condominium policies and bylaws on the grounds of property value. The condominium statutes do not entitle third parties to challenge the amount a condominium association charges for access to its private property.

### **III. Risks of Diminution in Value Are Already Factored in Lending and Payment of Condo Assessments is Addressed in Mortgages.**

Walworth asks the Court to embark on micromanagement of condominium associations in the interest of increasing condominium value. But value is a complicated matter, affected by various external factors. The potential diminution in value of collateral is an existing fact of life for mortgage lenders for condominiums and other real property. Lenders have no assurance that collateral will increase and not lose value. Property values may decrease for a variety of reasons including external market conditions or the condition of the property.

The lender addresses these risks through obtaining an appraisal of the property before lending. For condominiums, the appraisal necessarily would consider the condo declaration, bylaws, and policies, which describe the nature and use of the property. It addresses the risks of lending and default through requirements regarding debt-to-equity ratio and down payments, and the applicable interest rate.

Lenders also address the risks of lending in other terms of the note and mortgage, including requiring maintenance and insurance of the property and payment of applicable assessments, taxes, and the like. For example, if the mortgagor fails to pay property taxes when due, the mortgagee can pay the taxes, adding the cost to the amounts due under the note. The lender could do the same with property insurance. To

protect against these risks, lenders often escrow for taxes and insurance, requiring the borrower to set aside a fraction of the costs of these items each month to fund them.

Mortgage lenders can do the same for payment of condominium assessments and charges. Indeed, the standard form Fannie Mae/Freddie mortgage for Wisconsin provides for the escrow of condominium fees and assessments and requires borrowers to pay such items. (CAI App.1,4,5). Specifically, the Freddie Mac form mortgage instrument provides:

**3. Funds for Escrow Items. . . .**

At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments,<sup>3</sup> if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. . . . If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall

---

<sup>3</sup> The form mortgage defines "Community Association Dues, Fees, and Assessments" to "mean[] all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization." (CAI App.2).



then be obligated under Section 9 to repay to Lender any such amount.

Printed 10/5/2015 from [www.freddiemac.com/uniform/pdf/3050.pdf](http://www.freddiemac.com/uniform/pdf/3050.pdf)

(CAI App.4).<sup>4</sup>

Additionally, lending for condominium property is more difficult than lending for other property. This is presumably due to the unique nature of condominium ownership and the governing statutes and instruments and higher default rates. To obtain an FHA mortgage, which carries lower down payments than conventional loans, for example, the condominium association must pass an approval process documenting healthy finances and insurance. Gibbs, “Good Luck Getting a Mortgage on a Condo,” Time, 6/1/2014, printed 10/2/2015 (CAI App.18); A. Bazelon, FHA Update: “Temporary” Guidelines are Extended,” Community Leader, WI Chapter CAI, Winter 2014 (CAI App.17).

These requirements address the risks of condominium financing. They take into account the particulars of the borrower’s situation and the particular condominium development. There is no need for intervention by this Court to set new law governing condominium associations for the vague purpose of protecting property “value.”

---

<sup>4</sup> The Wisconsin form mortgage also may be found at <http://www.freddiemac.com/uniform/unifsecurity.html> and <https://www.fanniemae.com/singlefamily/security-instruments>.

**CONCLUSION**

The Decision of the Court of Appeals should be affirmed.

Dated this 6th day of October, 2015.

WHYTE HIRSCHBOECK DUDEK S.C.  
Attorneys for Community Associations  
Institute, Amicus Curiae

By: \_\_\_\_\_  
Lydia J. Chartre  
State Bar No. 1045789

**P.O. ADDRESS:**

555 East Wells Street, Suite 1900  
Milwaukee, Wisconsin 53202-3819  
414-273-2100  
414-223-5000 (fax)

**FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 for a non-party brief produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,994 words.

Dated this 6th day of October, 2015.

WHYTE HIRSCHBOECK DUDEK S.C.  
Attorneys for Community Associations  
Institute, Amicus Curiae

By: \_\_\_\_\_  
Lydia J. Chartre  
State Bar No. 1045789

**P.O. ADDRESS:**  
555 East Wells Street, Suite 1900  
Milwaukee, Wisconsin 53202-3819  
414-273-2100  
414-223-5000 (fax)

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

WHYTE HIRSCHBOECK DUDEK S.C.

By: \_\_\_\_\_  
Lydia J. Chartre

**CERTIFICATE OF COMPLIANCE WITH RULE 809.19(13)**

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19(13). I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

WHYTE HIRSCHBOECK DUDEK S.C.

By: \_\_\_\_\_  
Lydia J. Chartre