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No. 66318-6-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

THE NEWPORT YACHT BASIN ASSOCIATION OF
CONDOMINIUM OWNERS,

Appellant,

v.

SUPREME NORTHWEST, INC., et al.,

Respondents.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

This case involves a property ownership dispute between neighboring property owners. The appellant, Newport Yacht Basin Condominium Association (“NYBA”), is a 415-slip condominium boat moorage association (“the Marina”). Respondent Supreme Northwest, Inc., dba Seattle Boat (“Seattle Boat”) owns property adjacent to the Marina. NYBA claims ownership of three strips of property that will be referred to in this brief as the “Disputed Areas” or “Parcels 4, 5, and 6.” NYBA bases its claim to ownership on a quit claim deed (the “Deed”) that unambiguously transferred ownership of those areas to NYBA. Seattle Boat claims that it owns the Disputed Areas and that NYBA has only non-exclusive easement rights.

Until 1978, the Marina and surrounding lands were owned by John and Carol Radovich and Russell and Constance Keyes. In 1978, Radovich and Keyes created the Newport Yacht Basin condominium marina, which occupied the waters on three sides of a rectangular peninsula. Radovich and Keyes retained ownership of the rectangular peninsula (referred to as the “Commercial Parcel”) as well as other adjacent property. Radovich and Keyes also defined and recorded ten easements over their property and the NYBA property. Easements (now Parcels) 4, 5, and 6 were

located on the Commercial Parcel. Radovich and Keyes leased the Commercial Parcel to a boat repair company, Mercer Marine, run by Doug Burbridge.

From the beginning, NYBA had insufficient parking because Radovich and Keyes did not deliver as many parking spaces as they had promised, and as was required by code. With improvements, Parcels 4, 5, and 6 could hold additional parking spaces, but NYBA was reluctant to expend member funds to improve property it did not own. In settlement of the dispute, in 1980, Radovich and Keyes quit claimed Parcels 4, 5, and 6 in fee title to NYBA. In exchange, NYBA paid back taxes on the Disputed Areas and assumed future responsibility for maintenance and improvement. NYBA recorded the Deed in May 1981.

Over the years, NYBA maintained, repaired, improved, and controlled the Disputed Areas. While Mercer Marine used the Disputed Areas at times, it did so with NYBA's permission and in exchange for NYBA's use of Mercer Marine property at busy times. Mr. Burbridge never challenged NYBA's control of Parcels 4, 5, and 6, though he acquired Keyes's interest in the Commercial Parcel in 1991 and Radovich's interest in 2004.

In 2007, Seattle Boat purchased the Commercial Parcel. Though Mr. Burbridge knew NYBA owned the Disputed Areas, he did not inform Seattle Boat, and the title company missed the recorded Deed. Thus, Seattle Boat began to assert ownership over the Disputed Areas.

Seattle Boat's development plans—which would cause the Marina to lose its restroom and shop facilities as well as 35 parking places—ignore NYBA's ownership of Parcels 4, 5, and 6. The plans also represent a dramatic change in the way the site has been used for the past 30 years. Whereas Mercer Marine primarily repaired boats and sold parts, Seattle Boat sells boats and plans to institute storage for more than 170 boats, which will result in near constant launching of boats at the busy use times of the marina. These activities will worsen the parking situation and increase water traffic and congestion in the waterways. Even if the Deed is held to be invalid, such that NYBA has only easement rights in the Disputed Areas, Seattle Boat's plans are impermissible because they would effectively prevent NYBA's use of the easements, and are contrary to the Marina's historic use of the Disputed Areas.

The NYBA president at the time Seattle Boat acquired the property, Kyle Anderson, mistakenly believed that NYBA had only exclusive easement rights to the Disputed Areas. When the Deed was

located in NYBA's safe, however, it was quickly brought to Seattle Boat's attention. NYBA brought an action to quiet title and for declaratory relief. Seattle Boat impleaded the Burbridges, and the Burbridges in turn impleaded Radovich and Keyes. The action proceeded to a bifurcated trial, with the claims between NYBA and Seattle Boat being resolved first. The first phase concluded with a two-week bench trial after which the trial court entered findings of fact and conclusions of law and a judgment in favor of Seattle Boat. NYBA now appeals many of those findings of facts and conclusions of law, as well as the judgment.

The key issue in this appeal is the validity and effect of the Deed. The Deed met all legal requirements, and NYBA recorded it. Though it unambiguously transfers fee title of the Disputed Areas to NYBA, the trial court found that its intent was not to transfer fee title but to make an unknown correction to the easements. The Deed is not ambiguous. But to the extent it is, under Washington law the court should have resolved any ambiguities in favor of the grantee, NYBA. Moreover, the court strained to find additional grounds to invalidate the Deed, but none of those grounds have basis in the facts or in Washington law.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by entering paragraphs 1.12-1.15, 1.18, 1.20-1.28, 1.32, 1.45-1.47, 1.53, 1.56-1.57, 2.1-2.20, 2.23, 2.25-2.30, 3.1-3.6, and 3.8-3.10 of the Findings of Fact and Conclusions of Law dated August 2, 2010.

2. The trial court erred by granting the Order Granting Defendants' Motion for Entry of Judgment and Taxation of Costs dated November 5, 2010.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does NYBA own the Disputed Areas, where the former owners executed and delivered a valid quitclaim deed to NYBA that unambiguously conveys fee ownership of the Disputed Areas, and NYBA recorded the Deed? CP 3410-11, 3413 (Findings of Fact ("FOF") 1.20-1.22, 1.27); CP 3421, 3433-34 (Conclusions of Law ("COL") 2.1-2.3, 3.1-3.4).

2. Did the trial court err by finding that the intent of the Deed was to make an unknown correction to the earlier grant of easements rather than to convey fee ownership, where the Deed unambiguously purports to transfer fee ownership; where, under Washington law, ambiguities should be resolved in favor of the grantee; and where the

weight of evidence, including testimony from the grantor and grantee, indicates that the Deed was intended to convey fee ownership? CP 3411-14 (FOF 1.23-1.28, 1.32); CP 3421 (COL 2.1-2.3).

3. Did the trial court err by holding that there was no consideration for the Deed, where no one alleged fraud or inequity in the transaction, and NYBA presented undisputed evidence that, in consideration for the Deed, it paid back taxes owing on the property, assumed full responsibility for maintenance and improvement, and promised to pay property taxes going forward? CP 3412-13 (FOF 1.26); CP 3421-22, 3433-34 (COL 2.4, 2.13, 3.2).

4. Did the trial court err by holding that the Deed was unenforceable because it did not comply with local and state subdivision requirements, where no Washington authority exists for invalidating a deed on that basis, and where compliance with the subdivision requirements was unnecessary because the transaction did not create any new lots? CP 3413 (FOF 1.28); CP 3422-24, 3433-34 (COL 2.5-2.8, 3.2).

4. Did the trial court err by holding that the Deed is unenforceable because NYBA is an unincorporated association, where, assuming an unincorporated association cannot hold title to real property, the legal effect of a deed to such an association is that the individual

members (here, the NYBA slip owners) take title? CP 3421-22, 3424-25, 3433-34 (COL 2.4, 2.9-2.10, 2.12, 3.2).

5. Did the trial court err by holding that the Deed is unenforceable because NYBA did not amend its declaration to reflect the addition of property, where no Washington authority exists for invalidating a deed on that basis, and where NYBA can still amend its declaration to reflect the addition? CP 3421-22, 3424-25, 3433-34 (COL 2.4, 2.11, 3.2).

6. Assuming the Deed is unenforceable, does NYBA have exclusive easement rights to Parcels 4, 5, and 6? CP 3410-11, 3414 (FOF 1.18, 1.20-22, 1.32); CP 3430-31, 3434-35 (COL 2.26-27, 3.3, 3.9).

7. Did the trial court err by holding that NYBA is barred from asserting its rights against Seattle Boat by laches, where NYBA brought the Deed to Seattle Boat's attention three weeks after locating it, and started this lawsuit two months later? CP 3414, 3417-19 (FOF 1.32, 1.45-47, 1.53); CP 3426-27 (COL 2.14, 2.15).

8. Did the trial court err by holding that NYBA is barred by equitable estoppel from asserting its rights against Seattle Boat, where NYBA had only one meeting with Seattle Boat before Seattle Boat purchased the Commercial Parcel, and the parties did not discuss specific

site plans or easements during that meeting? CP 3414, 3417-19 (FOF 1.32, 1.45-47, 1.53); CP 3426-27 (COL 2.14, 2.16).

9. Assuming NYBA has only non-exclusive easement rights, do Seattle Boat's current and proposed activities materially interfere with NYBA's use of the Disputed Areas? CP 3420 (FOF 1.56-57); CP 3430-32, 3434 (COL 2.25, 2.28-30, 3.5, 3.6).

10. Did the trial court err by holding that NYBA does not have an easement allowing it to enter the Commercial Parcel to go around the D1/D2 ramps, which is necessary to access parts of Parcels 5 and 6? CP 3409 (FOF 1.14); CP 3430, 3435 (COL 2.27, 3.9).

11. Did the trial court err by holding that Mercer Marine acquired rights to certain parts of the Disputed Areas by the doctrines of adverse possession or prescriptive easement? CP 3408-09, 3414 (FOF 1.12, 1.13, 1.15, 1.32); CP 3427-29, 3431, 3434-35 (COL 2.17-20, 2.23, 2.28, 3.8).

12. Did the trial court err by enjoining NYBA members from challenging Seattle Boat's proposed plans where those plans have not been finally approved by the City of Bellevue and may change? CP 3388 (Phase I Judgment, ¶ 11).

IV. STATEMENT OF THE CASE

A. The Creation of NYBA and Parcels 4, 5, and 6

Radovich and Keyes (“the Developers”) acquired the Newport Yacht Basin property in 1975 and converted the marina to condominium ownership in 1978. RP 333-35; Exh. 3; Exh. 291. The condominium, which consists of the Marina and the submerged lands underneath, occupies the waters on three sides of a rectangular peninsula. Exh. 32; Exh. 291; Exh. 118. The boat slips are individually owned while the docks, pilings, finger piers, and other areas are common areas. *Id.*; RP 88-89. Radovich and Keyes retained ownership of the bulk of the rectangular peninsula (referred to as the “Commercial Parcel”), as well as other parts of the property.¹ Exh. 3. Radovich and Keyes formally turned the condominium over to NYBA in 1979.² CP 144.

Until approximately 1991, Radovich and Keyes leased the Commercial Parcel to Doug and Margie Burbridge, who ran a boat repair company, Mercer Marine. RP 507-08, 511, 349-53. The Burbridges

¹ Mr. Radovich still owns 121 of the 415 slips in NYBA. RP 394.

² In June 1979, Radovich and Keyes created Phase II of NYBA, a separate condominium with its own declaration. Exh. 143. The two divisions are jointly managed and for all practical purposes they are operated as one condominium.

purchased the Keyes' 50 percent interest in the property in 1991, and the Radoviches' remaining interest in 2004. RP 1447; Exh. 291.

Around the same they created the condominium, Radovich and Keyes created ten easements. Some of the easements were on condominium property, some straddled the property lines, and others were located on the Commercial Parcel. Exh. 2; RP 382-84. It is the ownership of Easements (now Parcels) 4, 5, and 6 that is primarily at issue in this case. Parcels 4, 5, and 6 are strips of land on three edges of the Commercial Parcel, bordering Docks A, B, and D of the marina. Exh. 32; Exh. 121; RP 309-10. Parcel 4, which is on the west edge of the Commercial Parcel, is 24 feet wide. Exh. 2; Exh. 32; RP 111. It extends over the edge of the Commercial Parcel into the water. Exh. 121; RP 321-22. Parcel 4 now has parallel parking spaces, though there were none when it was first created. RP 111-13; Exhs. 97, 99. Parcel 5, which is on the north edge of the Commercial Parcel, is 40 feet wide. Exh. 2; Exh. 32; RP 119-20; Exhibit 290 (pp. 5-6). It also extends over the edge of the Commercial Parcel into the water by approximately five or six feet. Exh. 121; RP 323. Though parking was originally authorized on Parcel 5, it was not practical until NYBA improved it after recording of the Deed. Exh. 2; RP 120-22; Exh. 290 (p. 4). A former Mercer Marine (now Seattle

Boat) building partially encroaches into Parcel 5. RP 117-18. NYBA's restroom and shop facilities are also located on Parcel 5. Exhs. 104, 108; RP 122, 128-29. Parcel 6, which is on the east edge of the Commercial Parcel, is 22 feet wide. Exh. 2; Exh. 32; RP 127, 313-14. Like Parcels 4 and 5, NYBA developed Parcel 6 to allow for parking after recording of the Deed. RP 127-29, 131-32; Exh. 108.

Seattle Boat (and formerly the Burbridges) owns slips D1 and D2, which are located off of Easement 6. RP 998-99, 370-71. Boat-launching ramps in front of those slips prevent driving through Parcel 6. Thus, for more than 30 years, NYBA members have driven around the ramps, through the Commercial Parcel, to access Parcels 4, 5, and 6. It is the only way to access the majority of the parking located on Parcels 5 and 6. RP 133-35, 610-11; Exh. 290 (pp. 9, 11-14).

The use of two other Easements, 2 and 7, is also at issue. Easement 2 straddles the property line between condominium property and the Commercial Parcel to the south. RP 382-383. Easement 7 is located directly to the south of docks D, E and F. Exh. 32. Easements 2 and 7 were intended for ingress, egress, utilities, drainage, and vehicle parking. Exh. 2; RP 343, 147.

B. Radovich and Keyes Conveyed Title to Parcels 4, 5, and 6 to NYBA in 1980 Via a Quitclaim Deed.

Parking was an issue at the Marina from its inception. RP 150, 344. The local codes required 208 parking spaces, but the Developers apparently obtained approval for a plan with only 187 spaces. Exh. 28; RP 182-83. Yet they only provided 123. Exh. 7. Some easement areas allocated to NYBA for parking were not suitable for parking without improvement. RP 151-52. NYBA's restroom facilities were located on property it did not own, Parcel 5. RP 153. The Developers did not want to pay for improvements, and NYBA did not want to pay to improve or maintain property it did not own. RP 153-54, 344.

Thus, in early 1980, NYBA began seeking ownership of Parcels 4, 5, and 6 to resolve the dispute with the Developers. RP 154-56, 158. *Id.* The minutes from a May 14, 1980 meeting of the NYBA Board of Directors and Developers reflect that a board member raised purchasing the easement areas located next to A, B, and D docks (i.e., Parcels 4, 5, and 6). Exh. 7. The board also discussed the fact that Mercer Marine was parking in the easement areas dedicated to NYBA. *Id.* (at NYBA 7621).

Accordingly, in July 1980, Radovich and Keyes executed a quit claim deed conveying fee ownership of Parcels 4, 5, and 6 to NYBA.

Exh. 12; RP 344-48. The deed unambiguously conveys fee title to the

Disputed Areas:

The Grantors . . . conveys (*sic*) and quit claims (*sic*) to The Newport Yacht Basin Association of Condominium Owners, as trustee for the benefit of the Apartment Owners of The Newport Yacht Basin. . . the following described real estate, situation in the County of King, State of Washington, together with all after-acquired title of the grantor(s) therein: . . .

Exh. 12. Parcels A, B, and C, described in the Deed, are identical to Easements 4, 5, and 6.³ RP 308, 315-16; Exh. 121. At the same time, to further alleviate the parking problems, Radovich and Keyes also granted NYBA a permit to park in an additional area. Exh. 13.

At trial, the grantor, Mr. Radovich, testified consistently with the unambiguous intent evinced in the Deed.

- Q. And when you signed that deed, was it your intent to convey fee title to the property?
- A. Yes, sir.
- Q. Whatever interest you owned?
- A. All of the interest we had, yes.

³ One exception exists: the Deed includes an easement through Parcel C/Easement 6 for the D1/D2 ramps used by the owner of the Commercial Parcel, though the actual location of the ramps does not exactly match the easement described in the Deed. RP 315-16. NYBA agrees that Mercer Marine acquired a prescriptive easement matching the actual location of the ramps.

RP 345; *see also* RP 393. Similarly, Karl Lang, the president of NYBA from approximately 1980 until 1988, testified that he understood the Deed to be a conveyance of fee title. RP 80-81, 162-63, 148-49. No one else directly involved in the conveyance testified at trial.⁴ The trial court found it significant that no purchase and sale agreement accompanied the Deed, but Mr. Radovich explained that there had been no need for one given the nature of the transaction. RP 480-82.

Though the Deed was signed in July 1980, it may not have been delivered to NYBA until at least October 1980. The minutes from the October 6, 1980 board meeting reflect further discussion of NYBA's acquisition of the Disputed Areas, including discussion of the consideration given by NYBA—the payment of back taxes.

The Association wishes to acquire easements through quit claim deeds from the Developers. . . . Russ Keyes and John Radovich stated they have no quarrel with signing over the deed for the easements providing the Association will pay the back taxes and continue paying future taxes. The Board agreed that the back taxes would be paid by the Association and serve as a consideration for the value of the deed.

Exh. 8.

⁴ Mr. Keyes passed away before the trial. RP 369. Mr. Anderson, NYBA president from 1988 until 2010, did not participate in any discussions regarding the Deed. RP 551.

Though it is unclear when the Deed was delivered, no dispute exists that it was recorded on May 29, 1981 by Larry Hall, an NYBA board member. Exh. 10; Exh. 14; RP 163. The real estate tax affidavit filed by Mr. Hall states that the Deed is a “document in correction of easements.” Exh. 10. Influenced by this language, the trial court found that the Deed was intended to make an unknown correction to Easements 4, 5, and 6, rather than to convey ownership. At trial, however, no one could explain why Mr. Hall wrote that on the affidavit or what the correction was. RP 164.

The Disputed Areas held little value for the Developers because they were already burdened with easements exclusive to NYBA. (In fact, Mr. Radovich later forgot about the Deed. RP 451-54.) Thus, they did not request a large amount of consideration for the property. RP 345-49. The Deed itself mentions “Ten and no/100 (\$10.00) and other good and valuable consideration,” while the tax affidavit identifies \$100 as the sales price. It is unclear which, if any, amount was paid. But, it is undisputed that NYBA paid back taxes on the Disputed Areas for 1978-80 as consideration. Exh. 8; RP 156-57, 159. In addition, NYBA assumed responsibility for maintaining and improving the Disputed Areas. RP 156-57. Note that although NYBA also promised to pay property taxes in the

future, the responsibility for property taxes was never in fact re-allocated. The owner of the Commercial Parcel continued to pay property taxes on the Disputed Areas. Exh. 8; RP 394. (Mr. Lang testified that neither Mr. Radovich nor Mr. Keyes ever requested that NYBA go to the county and cause the property taxes to be re-allocated. RP 160.)

C. After the Deed, NYBA Exerted Ownership and Control Over the Disputed Areas.

For the last 30 years, NYBA has improved, maintained, and controlled the Disputed Areas. Though Mr. Anderson, the NYBA president from approximately 1988 until 2010, was unaware of the Deed, he believed NYBA had exclusive easement rights in those areas and asserted those rights on behalf of NYBA. RP 552-54, 556, 578-79.

After the Deed, NYBA exerted exclusive control over the Disputed Areas. RP 164-65. In 1981, when the Burbridges were negotiating Mercer Marine's lease, Mr. Burbridge wrote that he had "had to forfeit approximately 1,500 square feet of working space to the condominium association now being used as common area." Exh. 9. Mr. Burbridge confirmed in his testimony that he was referring to Parcel 5. RP 509-11.

The September 14, 1982 NYBA board meeting minutes reflect discussion of Mercer Marine parking on NYBA's property. Someone

proposed charging Mercer Marine rent to park on NYBA property behind B dock—part of the area now owned in fee by NYBA. It was also noted that Mercer Marine’s boat lift-out could not be parked on NYBA’s newly acquired property. Exh. 17.

NYBA and Mercer Marine worked together to resolve the parking issues, eventually reaching an arrangement whereby Mercer Marine could use spaces in Parcels 4, 5, and 6 as well as a different portion of NYBA property during normal business hours. In exchange, on weekends and busy times, Mercer Marine consolidated its boats on the Commercial Parcel such that a portion could be used by NYBA. RP 166-70, 192-93.

Meanwhile, NYBA proceeded to convert as much of its new property to usable parking as possible. RP 166, 177-79; Exh. 18; Exh. 21. Through the years, NYBA has paid to grade, pave, install drainage, paint, and stripe the Disputed Areas. RP 566-68. NYBA also improved the restroom facilities located in Parcel 5. RP 568. And, in 1986, NYBA began issuing permits for parking in the Disputed Areas, including to Mercer Marine. RP 190-93; RP 558-59; RP 913-916; Exh. 25; Exh. 31. NYBA currently issues parking permits to Seattle Boat. RP 981-82.

In 1995, NYBA and Mercer Marine each paid for its share to repave the Mercer Marine portion of the parking lot and Parcels 5 and 6.

Exh. 45; RP 518-20; Exh. 51. NYBA has continued to maintain the Disputed Areas and restrooms to the current day without contribution from Mercer Marine or Seattle Boat. RP 893-94, 899-902. Recently, NYBA painted the parking lot to clearly identify which spaces belonged to NYBA. Mercer Marine never challenged NYBA's exclusive control of Parcels 4, 5, and 6. RP 565-66, 578-79. Thus, these measures only became necessary when Seattle Boat began asserting ownership over the Disputed Areas. RP 646-48, 565-66.

NYBA also addressed the fact that the Mercer Marine office building encroached into Parcel 5. RP 165; Exh. 27. Mr. Lang first spoke to Mr. Burbridge about it in person. RP 165. Then, in 1987, NYBA's attorney notified Mr. Burbridge in writing that the building rested "approximately 15 feet across property owned by the Association" and granted Mercer Marine permission to leave the building on the property. Exh. 27; RP 195-96. Mr. Burbridge admitted he did not do anything in response to the letter, but "blew it off." CP 2242-44; *see also* CP 2304-05.

D. Seattle Boat's Acquisition of the Commercial Parcel

In March 2007, the Burbridges sold their business assets and property, including the Commercial Parcel, to Seattle Boat. Exhs. 69, 228-29; RP 1447, 1518. The title company that insured the sale did not

report the Deed, despite its having been recorded. RP 1571-75.

Mr. Anderson, NYBA president at the time, did not learn of the potential sale until February 2007, a month before closing. RP 580. In fact, NYBA and Seattle Boat had only one substantive communication before the sale closed. RP 580-86. In February 2007, Mr. Anderson met with Alan Bohling, the president of Seattle Boat, and others, on Mr. Anderson's boat. *Id.* Seattle Boat outlined its plans in general terms, but did not provide any site plans. No specific easements were discussed. Anderson laid out NYBA's concerns, particularly about parking. *Id.*; RP 1559-1662, 1669-701, 1541-49.

After closing, Seattle Boat sought the City of Bellevue's approval to build a new storage and sales facility. RP 1585-86; Exh. 227. Mr. Anderson kept apprised of the plans through the City while continuing to advise Mr. Bohling of NYBA's concerns, which included access, parking, increased use of the waterways, and the stacking and staging of boats in NYBA common areas. RP 590-93. Mr. Anderson also informed Seattle Boat that NYBA had exclusive use of Parcels 4, 5, and 6. RP 505-06. Though Mr. Anderson and Mr. Bohling discussed potential solutions, no agreements were concluded. RP 592-96.

In February 2008, Mr. Bohling attended the NYBA annual meeting to present Seattle Boat's plans. At that meeting, Mr. Lang informed him that NYBA owned the Disputed Areas. RP 215-18. (Mr. Anderson testified that he mistakenly interpreted Mr. Lang's statement to mean that NYBA had exclusive easements rather than fee ownership. RP 561-564.)

On April 24, 2008, the City of Bellevue issued a Determination of Nonsignificance, indicating that Seattle Boat could proceed with its plans. Exh. 249. After the City's determination, the NYBA members voted to oppose the Seattle Boat project. RP 612-13. Before that time, Seattle Boat never indicated to NYBA that it relied on anything NYBA promised or said. RP 615-16. Indeed, Mr. Bohling threatened to withdraw the tentative concessions it had made to NYBA regarding parking if the Board opposed the plan. RP 632.

At either Mr. Lang's or Mr. Anderson's request, Mr. Lisk went through NYBA's files and located the Deed in a safe in the NYBA office. RP 222, 928-32. About three weeks later, on July 15, 2008, NYBA informed Mr. Bohling of the Deed. RP 773-74, 440-42.

Seattle Boat's plans present a number of problems for NYBA. Exh. 75;⁵ RP 598-605. First, the plans do not recognize NYBA's exclusive right to park in Parcels 4, 5, and 6 and significantly reduce Marina parking in those areas. RP 598-605; 617-18, 1029-31. Second, Seattle Boat's business is quite different than Mercer Marine's. While Mercer Marine was primarily a boat repair business, Seattle Boat also sells boats. RP 506, 363. Mercer Marine was closed in the evenings, on Sundays, and on holidays. RP 508, 1367. Seattle Boat plans to be open on holidays, Sundays, and later in the evening. RP 365-66, 179-81, 554-55, 1048. Moreover, as a significant part of its business, Seattle Boat intends to institute rack storage for as many as 112 boats, and storage for as many as 61 additional boats. RP 1034; Exh. 249. All of these factors will greatly increase the number of customers visiting the Marina, strain the already overloaded parking situation, increase boat launches, and increase congestion in the waterways. RP 361-62, 365-66, 228-31.

Further, Seattle Boat moors and stages boats waiting for retrieval on the bulkhead between docks D and E, Exh. 249 (p. 3), and intends to reconfigure the D1/D2 launching area. RP 606-09, 1026-27. Seattle Boat

⁵ Exhibit 75 represents the most recent Seattle Boat plans, as approved by the City. RP 1028-29; RP 1173-75; RP 1614.

also parks boats and trailers in Easements 2 and 7, completely preventing NYBA's use of those areas. RP 136-47, 905-06, 982-85; Exhs. 87-91, 96.

V. ARGUMENT

A. Standard of Review

The court of appeals reviews a trial court's findings of facts to determine whether substantial evidence supports those factual findings, and, if so, whether those findings support the trial court's conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006). "Substantial evidence" exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 100 P.3d 805 (2004). The court of appeals reviews questions of law and conclusions of law de novo. *Hegwine*, 132 Wn. App. at 556.

B. NYBA Obtained Title to the Disputed Areas Via a Valid, Recorded Quit Claim Deed.

The Deed met all legal requirements and was accepted and recorded by NYBA. NYBA proved these facts by a preponderance of the evidence. Indeed, most of NYBA's evidence on this issue was undisputed. As such, the burden of proof should have fallen to Seattle Boat to prove that the otherwise-valid Deed should be disregarded for

some reason. Seattle Boat did not, and could not, do so. Instead, the trial court improperly flipped this burden and required NYBA to prove that the valid, recorded Deed should be enforced.

1. The Deed Satisfied All Legal Requirements.

RCW Ch. 64.04 governs the validity of deeds in Washington. To be valid, a deed must (1) be in writing; (2) signed by the grantor(s); and (3) acknowledged by a person authorized to acknowledge deeds. RCW 64.04.020. It is undisputed that the Deed given to NYBA by Radovich and Keyes meets each of these requirements. Exh. 12. In addition, the Deed satisfies the additional requirement, imposed by the statute of frauds, that it contain a legal description of the property. *See Dickson v. Kates*, 132 Wn. App. 724, 733-34, 133 P.3d 498 (2006). The existence and sufficiency of the legal description in the Deed is undisputed.

A deed must also be delivered and accepted. *See William B. Stoebuck and John W. Weaver*, 17 Wash. Prac.: Real Estate: Property Law § 7.11 at 492 (2d ed. 2004). A deed that has been recorded is presumed to have been delivered by the grantor and accepted by the grantee. *See Bjmerland v. Eley*, 15 Wash. 101, 730 (1896). Acceptance is also presumed if “if the conveyance is a benefit to the grantee.” 17 Wash. Prac. § 7.11 at 497. Here, the Deed was recorded by an NYBA member,

and benefited NYBA. Thus, it is presumed to have been delivered and accepted. Moreover, board meeting minutes, correspondence, and other documents demonstrate that the Deed was, in fact, delivered and accepted.

2. The Deed Unambiguously Conveyed Title.

The trial court found that the intent of the Deed was not to convey title, but to make some unknown, unidentified correction to Easements (Parcels) 4, 5, and 6. These findings are not supported by substantial evidence. The Deed unambiguously conveys title rather than easements:

The Grantors . . . conveys (*sic*) and quit claims (*sic*) to The Newport Yacht Basin Association of Condominium Owners, as trustee for the benefit of the Apartment Owners of The Newport Yacht Basin. . . the following described real estate . . . together with all after-acquired title of the grantor(s) therein: . . .

Exh. 12. Testimony from the grantor and grantee confirmed this intent. In contrast, the real estate tax affidavit was the only evidence suggesting that the Deed was intended to correct the earlier grant of easements. But, as explained below, the language of the affidavit is far more ambiguous than that of the Deed and does not support the court's findings.

3. Any Ambiguity Should Have Been Resolved in Favor of NYBA.

A court will not read ambiguity into a deed that is not there. *See Petersen v. Schafer*, 42 Wn. App. 281, 285-86, 709 P.2d 813 (1986) (“[I]f

the language is not ambiguous then parol evidence as to the parties' intent is not necessary.”). Because the Deed is not ambiguous, it was not necessary for the court to resort to extrinsic evidence to determine the intent of the Deed.

When ambiguity does exist, the court will look at evidence of the intent of the parties to the transaction; here, NYBA and Radovich and Keyes. *See Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 156 Wn.2d 253, 271-72, 126 P.3d 16 (2006). Ambiguity in a deed is resolved against the grantor, in favor of the grantee. *Id.* at 272; *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 745, 844 P.2d 1006 (1993). Here, even if there was any ambiguity (which there was not), the court should have resolved it in favor of NYBA. A consideration of all of the evidence before the court indicates that the court, instead, had its thumb on the scale in favor of Seattle Boat.

4. The Extrinsic Evidence Demonstrates That the Intent of the Deed Was to Transfer Title.

At trial, all available testimony from the parties to the transaction, Mr. Radovich and Mr. Lang, indicated that the intent of the Deed was to transfer fee title. Mr. Radovich, the grantor, testified that it was his intent

to convey fee title. RP 345, 393. Mr. Lang, the grantee, also understood the Deed to be a conveyance of fee title. RP 80-81, 162-63.

Much of the other extrinsic evidence presented at trial also shows that the intent of the Deed was to convey title. NYBA presented evidence, much of it undisputed, that it did not have enough parking from the beginning. It could obtain more parking if it improved Parcels 4, 5, and 6, but it did not want to expend member funds on property it did not own. Thus, Radovich and Keyes quitclaimed the Disputed Areas to NYBA. A number of contemporaneous documents also show that the intent of the Deed was to convey title. Exhs. 7-9, 17.

In contrast, no evidence exists that the Deed was intended to correct the earlier grant of easements or of what the correction was. The trial court relied on the real estate tax affidavit filed by NYBA board member Larry Hall, in which Mr. Hall wrote: "Document in correction of easements" Exh. 10. No one at trial could explain what Mr. Hall meant by this language and Mr. Hall did not testify. Nor could any documents shed light on what Mr. Hall meant. One plausible interpretation is that this language reflects the fact that the property was the subject of easements before it was conveyed. Moreover, Parcels A, B, and C as described in Deed are identical to Easements 4, 5, and 6

described in the Declaration, making it unlikely that the Deed was intended to correct the easements. Exh. 2; Exh. 12; RP 308, 315-16. The ambiguous language in the tax affidavit cannot overcome the unambiguous language of the Deed itself, the testimony of the grantee and grantor, and the numerous contemporaneous documents that all indicate that the intent of the Deed was to convey fee title.

NYBA proved that the Deed was valid, recorded, and intended to convey title to the Disputed Areas rather than easements. Once NYBA accepted and recorded the Deed, it owned Parcels 4, 5, and 6 in fee simple and the conveyance could not be undone. *See Miller v. Miller*, 32 Wn.2d 438, 443, 202 P.2d 277, 280 (1949) (“It is an invariable rule that a valid deed, if once delivered (*sic*), cannot be defeated by any subsequent act unless it be by virtue of some condition contained in the deed itself.”).

C. The Trial Court Erred When It Held That Grounds Exist to Invalidate the Deed.

The trial court held that even if the Deed was valid, it “would constitute an illegal and unenforceable conveyance of real property” for four reasons. (COL 2.4) As explained below, the court’s findings and conclusions are not supported by the facts or by Washington law. Indeed, they conflict with Washington’s strong policy in favor of interpreting a

deed to be legal, since the parties presumably intended it to have legal effect. *See* 17 Wash. Prac. § 7.9 at 485.

1. Lack of Consideration Does Not Constitute Grounds to Set Aside the Deed.

The court’s finding that “no consideration was provided to Radovich and Keyes in exchange for the Quit Claim Deed” (FOF 1.26) is not supported by substantial evidence. NYBA presented undisputed evidence that it paid back taxes on the Disputed Areas for 1978-80 as consideration. Exh. 8; RP 156-57, 159. NYBA also promised to pay property taxes in the future and assumed responsibility for maintaining and improving the Disputed Areas. RP 156-57. Moreover, Radovich and Keyes obtained resolution of their dispute with NYBA over the insufficient parking they had provided.⁶

Although the responsibility for future property taxes was never re-allocated and the owner of the Commercial Parcel continued to pay property taxes on the Disputed Areas, Exh. 8, RP 394, a promise of future performance is valid consideration, even if the promise is never

⁶ The fact that the consideration was not specifically identified in the Deed, which referred to \$10 and “other good and valuable consideration,” does not affect its enforceability. *See* 17 Wash. Prac. § 7.7 at 482-83 (providing that consideration need not be identified in a deed); *Wright v. Stewart*, 19 Wash. 179, 184, 52 P. 1020 (1898) (finding parol evidence of consideration correctly admitted where title deed recites “consideration of one dollar and of other considerations.”).

performed. *See Inv. & Sec. Co. v. Adams*, 192 Wash. 41, 50, 72 P.2d 288 (1937). Of course, other consideration also existed: NYBA's payment of back taxes and assumption of full responsibility for maintenance and improvement. NYBA gave ample consideration, particularly in light of the fact that the easements in the Disputed Areas greatly diminished their value to Radovich and Keyes. RP 345-49.

But even if NYBA's consideration were not ample under the circumstances, the court should not have set aside the Deed because of inadequate consideration, given that no fraud was, or could have been, alleged. The court relied on *Downing v. State*, 9 Wn.2d 685, 115 P.2d 972 (1941). But as the *Downing* court recognized, "generally speaking, inadequacy of price is not sufficient, standing by itself, to authorize a court of equity to set aside a deed." *Id.* at 688. In *Downing*, a 75-year-old woman sold a portion of her property to the state for \$600 following several misrepresentations by the state's agent. *Id.* at 686-688. The court refused to enforce the deed, not solely because the consideration was inadequate but also because of the agent's direct and indirect misrepresentations. *Id.* at 690. Thus, *Downing* does not support the result reached by the trial court here, where no fraud or other inequitable conduct was alleged.

This rule—that inadequacy of consideration by itself does not constitute grounds for setting aside a deed—is well-settled. As the Washington Supreme Court has explained elsewhere:

Neither can courts grant relief when there is a mere inadequacy of consideration.... “There must be something else in addition to great inequality in the bargains, viz., fraud, undue influence, coercion, and the like.”

Meyer v. Eschbach, 192 Wash. 310, 316, 73 P.2d 803 (1937) (quoting *Howland v. Day*, 125 Wash. 480, 216 P. 864 (1923)). It is sometimes said that a court may set aside a deed if the consideration is so low that it “shocks the conscience.” See, e.g., *Binder v. Binder*, 50 Wn.2d 142, 150, 309 P.2d 1050 (1957). But in such a case, the inadequacy of consideration constitutes evidence of fraud. As the *Downing* Court explained:

Inadequacy of consideration for a contract or conveyance may, however, be sufficiently gross to be clearly indicative of imposition or undue influence, and where coupled with weakness of mind, from whatever cause produced, or with pecuniary distress, or circumstances of fraud, oppression, or undue influence, affords a proper case for relief in equity.’

Downing, 9 Wn.2d at 689. NYBA is aware of no Washington case in which a court invalidated a deed for inadequate consideration where, as here, no other factors suggested fraud or overreaching.

2. The Deed Is Not Void For Failing to Comply with Subdivision Requirements.

The trial court also held that the Deed was void because Radovich and Keyes did not follow statutory procedures for subdividing property (Bellevue City Code (“BCC”) chapter 22C.11 and RCW Ch. 58.17). A number of problems exist with this holding.

First, both cases relied on by the trial court, *Berg v. Ting*, 125 Wn.2d 544, 551-53, 886 P.2d 564 (1995), and *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006), involve the statute of frauds. That is, in both cases, the court held that a deed was unenforceable because it lacked a property description sufficient to satisfy the statute of frauds. Neither case stands for the proposition that a deed is unenforceable because it fails to comply with some other statutory or local regulatory requirements. NYBA is not aware of any such authority.

In fact, RCW Ch. 58.17 itself contemplates that illegally subdivided property can be bought and sold. RCW 58.17.210 provides that certain permits may not be issued on illegally subdivided property, but it exempts an innocent purchaser from those provisions. It also allows a purchaser to recover damages incurred as a result of a transferee’s failure

to comply, or to rescind the sale. *Id.* Thus, it contemplates that illegally subdivided property can be validly transferred.

The court also relied on *Waring v. Lobdell*, 63 Wn.2d 532, 533, 387 P.2d 979 (1964). But *Waring* has nothing to do with the enforceability of a deed. In *Waring*, the plaintiff and defendant had an agreement to share in the profits of pinball machines owned by the defendant and placed in the plaintiff's tavern. The IRS fined the plaintiff in connection with the machines, and the plaintiff sought to recover half the payment from the defendant based on their agreement. *Id.* at 532. The court of appeals remanded for a determination of whether the machines constituted illegal gaming devices, in which case the agreement was an illegal agreement to engage in a gambling enterprise and would be unenforceable. *Id.* at 533-534. Thus, *Waring* has no bearing on whether a deed issued in violation of local subdivision codes is enforceable.

In any event, the Deed did not violate the subdivision regulations. RCW Ch. 58.17 exempts boundary line adjustments, defined as divisions that do not "create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements . . . for a building site," from its requirements. RCW 58.17.040(6). Consistent with this

provision, courts hold that a property transaction that does not create any new lots is an exempt boundary line adjustment. *See City of Seattle v. Crispin*, 149 Wn.2d 896, 904-05, 71 P.3d 208 (2003) (holding that where a property transfer, regardless of its size, did not result in a change in the number of lots, it was an exempt boundary line adjustment); *Island Cty. v. Dillingham Devel. Co.*, 99 Wn.2d 215, 222-23, 662 P.2d 32 (1983) (holding that combining lots to meet county minimum-width requirements constituted a boundary line adjustment, not a re-subdivision of property, and was exempt from RCW Ch. 58.17).⁷ The Deed falls within this exemption: it adjusted the boundary lines between NYBA and the Commercial Parcel, created no new lots, and did not reduce the Commercial Parcel below the minimum building site size.

But even if the Deed did violate RCW Ch. 58.17 or the local code, no Washington authority holds that the Deed is void as a result. To the contrary, RCW Ch. 58.17 itself contemplates that illegally subdivided property can be transferred. Moreover, a seller who has illegally subdivided his property has the right to bring the illegal subdivision into

⁷ While the trial court “found” that the Deed “was not an attempt to make a boundary line adjustment of any kind,” CP 3413 (FOF 1.28), this was improperly labeled a finding of fact. It is a conclusion of law subject to de novo review. *See Hegwine*, 132 Wn. App. at 556.

compliance with the law. *See Hoggatt v. Flores*, 152 Wn. App. 862, 869, 218 P.3d 244 (2009) (affirming trial court’s injunction requiring the county to accept plat application from owner of illegally subdivided property without the purchaser’s signature). Even if Radovich and Keyes failed to comply with the subdivision requirements identified by the trial court, it does not mean that the Deed is void, and NYBA may still bring the property into conformance with subdivision requirements.

3. The Deed Is Not Void Because NYBA Is an Unincorporated Association.

The court also held that because NYBA was an unincorporated association,⁸ it could not take title to the property and that therefore the Deed is void. Relatedly, it held that the Deed was ‘an illegal and unenforceable conveyance of real property to an unauthorized ‘trustee’ of a non-existent trust.”

In so holding, the court relied only on one out-of-state case, *Winchell v. Montana Dep’t of State Lands*, 865 P.2d 249 (Mont. 1994). But that case did not address the issue of whether an unincorporated

⁸ Because NYBA was formed pre-1990, it is governed by the Horizontal Property Regimes Act (“HPRA”), RCW Ch. 64.32, under which it is permissible for condominium associations to be unincorporated. In contrast, under the Washington Condominium Act (“WCA”), RCW Ch. 64.34, post-1990 condominium associations must be incorporated. RCW 64.34.300.

condominium association could be the grantee on a deed. Instead, it dealt with the very different issue of whether, under Montana statute § 77-6-108 MCA, an unincorporated association could lease state lands. *Id.* at 252. The court concluded that the answer was “no,” out of concern that there “be some legal, identifiable party holding the interest who is responsible for liability arising out of that ownership interest.” *Id.* at 252-53.

Whether Washington follows the common law rule that unincorporated associations cannot hold title in their own names is unclear. But even under the common law rule, the effect of a conveyance to an unincorporated association is that the property is actually owned by the members of the association.

[T]he general rule is that unincorporated associations have no such legal existence as will permit them to acquire and hold property in the associate name either by purchase or gift. Property titled in the name of an unincorporated association belongs to its members. Thus, the legal effect of a gift to a voluntary, unincorporated association is a gift to its individual members

6 Am. Jur. 2d. Associations and Clubs § 12. *See also* Edward W. Kuhrau, ed., Real Property Deskbook, Vol. II at § 32.5(6) (3rd ed. Supp. 2008) (providing that real property held by unincorporated associations is “generally recognized as belonging to the members of the association”); *Appeal of Atl. Coast Conference*, 434 S.E.2d 865, 867-68 (N.C. Ct. App.

1993) (“[P]roperty titled in the name of an unincorporated association belongs to its members.”) (citing *Venus Lodge No. 62 v. Acme Benevolent Ass’n*, 231 58 S.E.2d 109 (N.C. 1950)).

The wording of the Deed, which uses the word “trustee” when referring to NYBA, simply reflects this reality. The case relied on by the trial court, *Laughlin v. March*, 19 Wn.2d 874, 879, 145 P.2d 549 (1944), is inapposite and in fact applies California, not Washington, law to the issue of whether a valid trust was created. That case concerned a father’s attempt to create a trust between himself and his daughter consisting of title to a parcel of land in California, and the specific issue was whether the subject matter of the trust, the land, was described with reasonable certainty. *Laughlin*, 19 Wn.2d at 876-77.

4. The Deed Is Not Void Because NYBA’s Declaration Was Not Amended to Reflect It.

Finally, the court held that the Deed was void because NYBA never amended its declaration to include the Disputed Areas. Again, no support exists in Washington law for this conclusion. Even if NYBA was obligated to amend its declaration to reflect the addition, the proper remedy would be for NYBA to do so now rather than to void the Deed.

Under both the HPRA (RCA Ch. 64.32) and WCA (RCW Ch. 64.43), a condominium declaration must describe the condominium's real property. *See* RCW 64.34.216; RCW 64.32.090. But the WCA provides that an "insignificant failure" of the declaration to comply with that requirement, or any other in the chapter, does not affect title to units or common elements. RCW 64.34.208. This provision is applicable to pre-1990 condominiums. RCW 64.34.010. Thus, NYBA's failure to amend the declaration to reflect that it no longer had easements in the Disputed Areas but owned them in fee simple does not affect the members' title to the property. This statute is irreconcilable with the court's holding that NYBA's failure to amend its declaration voids the Deed. Finally, NYBA's declaration can still be amended, curing any omission.

In sum, though Seattle Boat and the trial court strained to find reasons to invalidate the Deed, no valid basis exists under Washington law for doing so. Moreover, Seattle Boat should have had the burden of proving its affirmative defenses to enforcement of the Deed. Instead, the trial court required NYBA to prove that the Deed should be enforced despite the fact that it met all of the legal requirements for validity, unambiguously granted title rather than easements, and was recorded.

D. Even if NYBA Did Not Have Fee Simple Title to the Disputed Areas, It Had Exclusive Easement Rights.

A party has an exclusive easement when it has exclusive rights to the use of the property encompassed in the easement, so that even the servient owner cannot make the same use of that property without a license from the easement's owner. *See Hayward v. Mason*, 54 Wash. 649, 651-652, 104 P. 139 (1909). Courts interpret easement grants to give effect to the parties' original intent. *Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009) (citing *Brown v. Voss*, 105 Wd.2d 366, 371, 715 P.2d 514 (1986)). Even if the Deed is determined to be invalid, substantial evidence indicates that the Developers intended Easements 4, 5, and 6 to be for the exclusive use of NYBA.

Nothing demonstrates this intent more than the Deed itself. In executing and delivering the Deed to NYBA, Mr. Radovich and Mr. Keyes intended for NYBA to have exclusive rights to the Disputed Areas. Mr. Radovich's testimony indicated that the Deed did not much change the status quo. RP 345-49. In fact, he forgot about the Deed altogether, which would be surprising if he believed he was conveying something of value. RP 451-54. The conveyance was not that significant because NYBA already had the exclusive right to use those areas. Mr. Radovich's

testimony was consistent with that of Kyle Anderson, president of NYBA from 1988 until 2010, who always had the understanding that NYBA had exclusive easement rights to Parcels 4, 5, and 6. RP 552-54, 556, 578-79.

Indeed, for 30 years, NYBA has exerted exclusive control over the Disputed Areas. NYBA improved and maintained the Disputed Areas, and allowed Mercer Marine to park in the Disputed Areas in exchange for use of Mercer Marine's property at busy times.

Documents presented at trial also indicate that NYBA had exclusive easements, and acted consistently. In 1981, Mr. Burbridge wrote that he had "had to forfeit approximately 1,500 square feet of working space" to NYBA. Exh. 9. The September 14, 1982 NYBA board meeting minutes reflect discussion of charging Mercer Marine rent to park in the Disputed Areas. At that meeting, it was also noted that Mercer Marine could not park its boat lift-out in the Disputed Areas. Exh. 17. Finally, in 1987, NYBA notified Mr. Burbridge in writing that the Mercer Marine office building encroached onto Parcel 5 and granted Mercer Marine permission to leave the building where it was. Exh. 27; RP 195-96. Mr. Burbridge "blew off" the letter and never challenged NYBA's assertion of ownership. RP 565-66; RP 578-79; CP 2242-44, 2304-05.

The Deed should be upheld and enforced. But even if the court concludes that the Deed is unenforceable, the trial court's findings and conclusions that NYBA has only non-exclusive easement rights are not supported by substantial evidence. Instead, the weight of the evidence indicates that Parcels 4, 5, and 6 are exclusive to NYBA.

E. The Trial Court Erred When It Held That NYBA Is Barred From Asserting Its Property Rights by Laches and Equitable Estoppel.

The trial court also held that NYBA lost the right to enforce the Deed by operation of laches and equitable estoppel, but the facts do not support these conclusions. Equitable estoppel is not favored, and must be proved by clear, cogent, and convincing evidence. *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992). "In other words, 'the facts relied upon to establish an equitable estoppel must be clear, positive, and unequivocal in their implication....'" *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734-35, 853 P.2d 913 (1993) (citing 28 Am. Jur. 2d *Estoppel and Waiver* § 148, at 831 (1966)). Seattle Boat did not, and could not, meet this burden.

The elements of equitable estoppel are: (1) an act or omission by the first party; (2) an act by another party in reliance on the first party's act; (3) an injury that would result to the relying party if the first party

were not estopped from repudiating the original act. *Kramarevsky v. Dep't of Spc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). Seattle Boat did not prove any of these elements.

Critically, NYBA had only one contact with Seattle Boat before Seattle Boat purchased the property. That one contact—the initial meeting between Mr. Bohling and Mr. Anderson in February 2007—cannot give rise to estoppel. The parties agree that they discussed Seattle Boat's plans only in general terms; that no site plans or drawings were shown to NYBA; and that no discussion of any specific easement areas took place. RP 580-86, 1559-1662, 1669-70, RP 1541-49.

Thus, NYBA committed no act nor made any omission that could give rise to a reasonable belief by Seattle Boat that NYBA agreed Seattle Boat would own the Disputed Areas in fee simple after the sale closed. The topic simply did not arise. Nor did Mr. Anderson indicate that NYBA would support whatever Seattle Boat chose to do with the property; instead, he expressed NYBA's concerns, particularly about parking. Seattle Boat could not have suffered injury from any other acts or omissions by NYBA, because all other communications occurred after Seattle Boat closed on the property. But even assuming that Seattle Boat could have sustained injury after closing, there is no basis for estoppel in

its later communications with NYBA. Mr. Anderson informed Seattle Boat that NYBA had exclusive rights to Parcels 4, 5, and 6, and consistently expressed his concerns about the negative impact to NYBA of Seattle Boat's plans. RP 590-93, 505-06.

Nor should laches bar NYBA from asserting its rights. The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action; (2) unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to the defendant resulting from unreasonable delay. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 635, 733 P.2d 182 (1987). Here, NYBA had no reason to bring a quiet title action against Mercer Marine; the two neighbors coexisted cooperatively. It only became necessary for NYBA to assert its rights in court when Seattle Boat began asserting ownership over the Disputed Areas.

NYBA did not become aware of its potential cause of action against Seattle Boat until it located the Deed in June 2008. RP 222, 928-32. NYBA informed Seattle Boat of the Deed just three weeks later, on July 15, and initiated this litigation less than two months after that, on September 9. RP 773-74; RP 440-42; CP 1-11. Two to three months is not an unreasonable delay. In *Valley View*, the case relied on by the court,

the court held there was *no laches* because a three month delay was not unreasonable. 107 Wn.2d at 635-36. In contrast, in *Davidson v. State*, 116 Wn.2d 13, 27, 802 P.2d 1374 (1991), the case relied on by the trial court in which laches was applied, the delay in question was 60 years. Moreover, Seattle Boat was not damaged by the delay: it did not present evidence of any costs or expenses it incurred during the short time between NYBA locating the Deed and bringing it to Seattle Boat's attention. To the contrary, Mr. Bohling testified that "there's nothing that's been conducted with the City since the quitclaim deed was exposed." RP 1027.

F. Even if NYBA Did Not Originally Have Exclusive Easement Rights to the Disputed Areas, It Acquired Such Rights By Prescriptive Easement.

A party may acquire an exclusive easement, or transform the scope of an existing easement, by prescriptive use. *See Hoffman v. Skewis*, 35 Wn. App. 673, 676-77 & n.1, 668 P.2d 1311 (1983). To acquire an exclusive easement by prescription, "possession must be open and notorious, actual and uninterrupted, hostile, exclusive and under a claim made in good faith," for ten years. *Id.* at 676; RCW 4.16.020.

All of these elements are met here. In October 1980, more than 27 years before Seattle Boat claims to have received title, NYBA received the

Deed. From then on, under that claim of right, NYBA conducted itself as if it had the exclusive right to use the Disputed Areas. Mercer Marine's only use of the property was with NYBA's permission, which is consistent with NYBA's use being exclusive. *See Hoffman*, 35 Wn. App. at 677 ("exclusive" use does not preclude allowing others to use property that is the subject of the easement with permission).

G. NYBA Has the Right to Cross the Commercial Parcel to Access Parcels 5 and 6.

As long as the condominium has existed, it has been necessary for slip owners to drive around the ramps located in front of slips D1 and D2, entering and exiting the Commercial Parcel, to access the majority of the parking located on Parcels 5 and 6. RP 133-35, 610-11, 387-88. The trial court held that NYBA had not acquired a prescriptive easement in this area because Mercer Marine permitted this use. However, NYBA has an easement implied from prior use or by necessity.

Both types of easements arise when a landowner conveys part of his or her land and retains part. An implied easement arises when, before the conveyance, there was an apparent existing usage between the two parcels that would have been an easement had there been separate owners, and when that usage is reasonably necessary. *Hellberg v. Coffin Sheep*

Co., 66 Wn. 2d 664, 668, 404 P.2d 770 (1965). An easement by necessity arises when the claimed easement is necessary to access a public road from the conveyed parcel. *Id.* at 667. Only reasonable necessity, not absolute necessity, is required. *Evich v. Kovacevich*, 33 Wn. 2d 151, 157, 204 P.2d 839 (1949).

Here, an easement allowing NYBA to pass the D1/D2 ramps by crossing the Commercial Parcel exists under both doctrines. Originally, the Developers owned all of the property. When they conveyed a portion to NYBA, they also created Easements 5 and 6 for NYBA's use. The ramp already existed at this time, and it was, and still is, necessary to cross into what would become the Commercial Parcel to access parts of Parcels 5 and 6. Thus, NYBA has an implied easement to enter the Commercial Parcel to circumvent the D1/D2 ramps.

H. Mercer Marine Did Not Acquire Any Rights to the D1/D2 Frontage Area by Adverse Possession.

The trial court further held that Mercer Marine acquired rights (title and/or prescriptive easement) to the area adjacent to the D1/D2 frontage area, and to a vault on Parcel 5, by adverse possession.

The party claiming adverse possession must possess the land in question in a manner that is 1) exclusive; 2) actual and uninterrupted; 3)

open and notorious; 4) hostile; and 5) continuous for 10 years. *ITT Rayonier v. Bell*, 112 Wn.2d 754, 757, 774 P.2d 6 (1989); RCW 4.16.020. A party claiming a prescriptive easement must prove the same elements and have a good faith claim to the property. *See Hoffman*, 35 Wn. App. at 676. Here, numerous witnesses testified that Mercer Marine and NYBA had a good working relationship, and that NYBA allowed Mercer Marine to use the easement areas permissively. Mercer Marine's use of these areas was not hostile, and therefore cannot give rise to adverse possession or a prescriptive easement. In addition, assuming the Deed is invalid, Radovich retained a 50 percent interest in the Disputed Areas until 2004. Mercer Marine could not, therefore, have possessed any portion of the Disputed Areas under a claim of good faith for 10 years.

I. Seattle Boat's Proposed Uses Overburden and/or Constitute Misuse of the Easements.

The trial court acknowledged that NYBA has at a minimum non-exclusive easement rights in the Disputed Areas, but found that Seattle Boat's proposed plans do not interfere with those rights. The trial court's findings are not supported by substantial evidence, and appear to be based, at least in part, on the erroneous conclusion that the owner of the Commercial Parcel is the dominant estate holder. CP 3430-31. Actually,

because Parcels 4, 5, and 6 are located primarily on the Commercial Parcel, the Commercial Parcel is the servient estate and NYBA is the dominant estate holder. *See* 17 Wash. Prac. § 2.2 at 84. Assuming the Deed is invalid, Seattle Boat's proposed use of the easements is unreasonable and would interfere with NYBA's easement rights.

In determining the permissible scope of an easement, the court looks to "the intention of the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied." *Logan v. Brodrick*, 29 Wn. App. 796, 799, 631 P.2d 429 (1981). The owner of the property upon which the easements are located cannot make use of the easements that are inconsistent with the easements or would prevent their use. *See Veach v. Culp*, 92 Wn.2d 570, 575, 599 P.2d 526 (1979) (holding that the servient owner retains use of the easement so long as that use does not materially interfere with the use by the holder of the easement); *Mahon v. Haas*, 2 Wn. App. 560, 564, 468 P.2d 713 (1970) (holding that property owner was required to move newly-constructed greenhouse blocking easement).

Here, the Commercial Property is the servient estate. NYBA improved Parcels 4, 5, and 6, and has been the primary user of those areas

for parking for 30 years. Seattle Boat cannot make use of the easements in a way that would materially interfere with NYBA's use. Seattle Boat's plans would significantly reduce the number of parking spaces on Parcels 5 and 6 while increasing the number of non-NYBA users of those spaces, including Seattle Boat customers and employees, materially interfering with NYBA's use of the easements. As such, Seattle Boat's proposed use is impermissible even if the Deed is invalid.

Seattle Boat's use of the D1/D2 frontage area likewise interferes with NYBA's use of the easements. Seattle Boat's anticipated use is quite different than that of Mercer Marine. Whereas Mercer Marine used the slips to launch boats for repair purposes, Seattle Boat intends to use them for near-constant launching in connection with boat storage and sales.⁹

Seattle Boat's parking of boats in Easements 2 and 7 is also an impermissibly expanded use of its easement rights. Easements 2 and 7 were intended for ingress, egress, and, vehicle parking, not boat parking. Exh. 2; RP 343:15-17, 147. *See Richardson v. Cox*, 108 Wn. App. 881, 26 P.3d 970 (2001) (holding that an easement for ingress and egress to

⁹ If the Deed is ultimately held to be valid, which means that Seattle Boat has an express easement for the ramps, its proposed use is still impermissible. While increased use of an easement may be permissible, a change in use is not. *See Snyder*, 152 Wn. App. at 781.

residential properties could not be used by commercial trucks); *Green v. Lupo*, 32 Wn. App. 318, 324, 647 P.2d 51 (1982) (holding that a dominant estate owner could not ride motorcycles for recreation on an easement granted for ingress, egress, and utilities); *Snyder*, 152 Wn. App. at 781 (holding that a dominant estate holder could not use recreational all-terrain vehicles on an easement for ingress and egress).

Finally, Seattle Boat's proposed and current activities violate NYBA's declaration. Seattle Boat moors boats in the condominium common areas located along the bulkhead between piers D and E, adjacent to the D1/D2 launch site. Seattle Boat also intends to use this area as staging area for its dry storage customers as they load their boats and return. Such use converts common area to apartment area and is not permitted under the NYBA declaration. Moreover, any reconfiguration of the D1/D2 slips, which are part of the condominium, must be accomplished in compliance with the declaration. RP 229.

VI. CONCLUSION

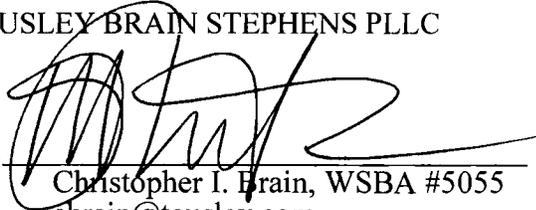
For all of the foregoing reasons, paragraphs 1.9, 1.12-1.15, 1.18, 1.20-1.29, 1.32, 1.41, 1.45-1.47, 1.53, 1.55-1.57, 2.1-2.20, 2.23, 2.25-2.30,

Mercer Marine used the ramps for its boat repair and servicing operations, whereas Seattle Boat intends to use them for boat storage and sales.

2.35, and 3.1-3.10 of the trial court's Findings of Fact and Conclusions of Law should be vacated, and its Order Granting Defendants' Motion for Entry of Judgment and Taxation of Costs, dated November 5, 2010, should be reversed.

DATED this 2nd day of May, 2011.

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CERTIFICATE OF SERVICE

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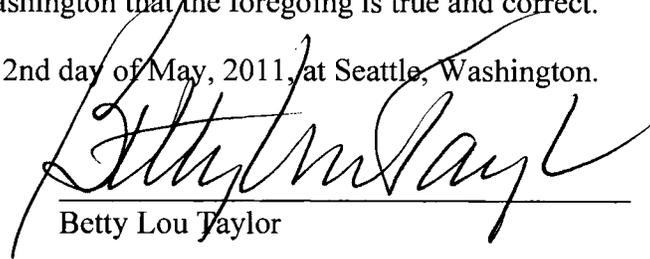
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 2nd day of May, 2011, at Seattle, Washington.



Betty Lou Taylor