

No. 66318-6-I

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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THE NEWPORT YACHT BASIN ASSOCIATION  
OF CONDOMINIUM OWNERS,

Appellant,

v.

SUPREME NORTHWEST, INC., et al.,

Respondents.

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RESPONDENT SEATTLE MARINE'S BRIEF

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**ORIGINAL**

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## I. INTRODUCTION

Newport Yacht Basin Association (“NYBA”) asks this Court for a complex answer to a single question: Should Washington’s courts enforce a quitclaim deed not intended to convey fee title that is forgotten for decades and appears at the eleventh hour after great undertakings occur? The simple answer is “no.” That answer was correctly given by the trial court after a full and thorough review and consideration of the evidence and law in this case. This Court should affirm the trial court’s order dismissing NYBA’s action to quiet title and for declaratory judgment.

## II. STATEMENT OF THE CASE

### A. Seattle Marine’s Acquisition of the Commercial Parcel, Its Redevelopment Plan, and a Quit Claim Deed.

Respondent Supreme Northwest, Inc. d/b/a Seattle Boat Company is a premier, full-service boat dealer offering marina facility services in the Seattle area. Report of Proceedings (RP) at 1518-23. Seattle Marine Management Company, LLC is the holding company for Seattle Boat’s properties. RP at 1523. Both companies are collectively referred to hereinafter as “Seattle Marine.” Alan Bohling is Seattle Marine’s president. RP at 1519-20, 1523.

In March 2007, Seattle Marine bought real property in Bellevue on Lake Washington, together with a boat sales, service and storage business

that Mercer Marine had operated there for over 30 years. Exh. 69; *see* RP at 1439-40. Seattle Marine paid \$4.15 million for the land, intending to re-develop the property, hereinafter the “Commercial Parcel,” into a first-class marina facility that would serve the growing demand for boating access and services on Lake Washington. Exh. 230; *see* RP at 1540-49.

The Newport Yacht Basin Association of Condominium Owners Association (“NYBA”) is an unincorporated condominium association. RP at 376. It manages the Newport Yacht Basin marina with its 418 individually-owned boat slips along six docks that wrap around the Commercial Parcel to the east, north, and west. *See* Exhs. 3, 289. John Radovich is one of the NYBA’s developers, and he owns and rents out 121 of those slips, and holds by far the largest ownership interest in the NYBA at nearly 30 percent. *See* RP at 394-95, 403-05.

In February 2007, before Seattle Marine closed the purchase of the Commercial Parcel, Bohling met with NYBA’s board, led by Kyle Anderson, its president of 18 years. RP at 1540-41; *see* RP at 556, 658. Bohling called the meeting to introduce himself and his companies, to present his vision for redevelopment, and to solicit concerns and issues with redevelopment. RP at 1540-44. After that positive meeting, Seattle Marine proceeded to closing. RP at 997, 1591.

Over the next 14 months, Bohling communicated with Anderson,

he met with the Board several times, and he attended NYBA's 2008 membership meeting to discuss redevelopment plans, to solicit input and concerns, and to address issues raised by NYBA's board. RP at 580, 588-89, 683-85, 1544-49, 1590-95, 1604-05. Simultaneously, Seattle Marine was working through complex permitting processes with the City of Bellevue while addressing the city's concerns and suggestions. *See* Exh. 235; RP at 1597-1603, 1608-09, 1615. Redevelopment plans progressed with Bohling granting many concessions that NYBA would not be able to achieve without mutual cooperation and respect. RP at 689-92; Exh. 255A; *see* Exh. 251.

On April 24, 2008, Bellevue's land use staff issued a detailed Staff Report where they reported on the redevelopment plan and process and issued important permitting approvals and recommendations. RP at 1133-34. This Staff Report was presented at trial as Exhibit 249 and contains important information concerning Seattle Marine's proposed redevelopment of the Commercial Parcel. To get to that point, Seattle Marine incurred over \$500,000 in fees and expenses. RP at 1657-58.

In response to the Staff Report, several NYBA members, including Radovich and Karl Lang – now president of NYBA's board – demanded that NYBA's then-board reverse course and oppose the redevelopment plan. Exhs. 251, 254; RP at 425-27. Radovich wielded his voting power

to fight the redevelopment by beginning the process of a recall vote against board members in an email entitled “board overthrow.” Exh. 257; *see* RP at 434-36. The board eventually capitulated to the demands and made a “significant change” in its position. RP at 852. Thereafter, it challenged the redevelopment. RP at 853.

After an appeal of the Staff Report by the NYBA board, Radovich, and Lang, and with a final decision approving the plan inevitable, they played their last card. *See* Exhs. 272, 274. On July 15, 2008, NYBA and Radovich produced a document entitled “Quit Claim Deed” from NYBA’s safe, whereby Radovich and his developer partner, Russell Keyes, purportedly conveyed three strips of the Commercial Parcel to NYBA in 1980. RP at 440-41; *see* Exh. 12. Because those three strips are in the area that Seattle Marine had purchased and intended to redevelop, the revelation suspended the permitting process until the validity of the Quit Claim Deed could be adjudicated in this court action. RP at 1282-83.

B. Ownership of the Commercial Parcel and Mercer Marine.

The history of the Quit Claim Deed helps explain how the trial court, after examining the evidence, determined it was invalid.

In 1975, Radovich and Keyes acquired the marina, submerged lands and uplands known as the Newport Yacht Basin. *See* RP at 333. They planned to convert the marina to a condominium association under

the Horizontal Property Regime Act. Clerk's Papers (CP) at 2798. The uplands included the Commercial Parcel, which had been used for boat sales, repair, and storage. CP at 2798-99. The Commercial Parcel included the strips of land described in the Quit Claim Deed. Exh. 12.

After Radovich and Keyes acquired the Commercial Parcel, Douglas Burbridge incorporated Mercer Marine, leased the Commercial Parcel, and began operating the boat business on the property. RP at 1439-40. In 1983, Burbridge agreed to the purchase of Keyes' 50-percent undivided interest in the Commercial Parcel, which Keyes conveyed by statutory warranty deed in 1991. RP at 1447-48. In 2004, Burbridge formed Bridges Investment Company LLC ("Bridges"), and conveyed his half-interest to Bridges. In 2004, Bridges also purchased Radovich's half-interest. RP at 1447. Both the deed from Keyes to Burbridge and the deed from Radovich to Bridges included the land described in the Quit Claim Deed. *See* Exh. 58.

In March 2007, the Commercial Parcel and Mercer Marine were sold to Seattle Marine. RP at 996, 1437. The deed from Bridges to Seattle Marine included the land described in the Quit Claim Deed. Exh. 70.

C. The Creation of NYBA and the Easements.

In 1977, Radovich and Keyes converted the marina into condominium property and created the NYBA as an unincorporated

association. RP at 335. They planned to expand the marina, but the first development phase was mostly the existing marina. RP at 333-34. By condominium declaration, they conveyed to NYBA the existing docks and slips, together with some submerged lands and uplands adjacent to the Commercial Parcel. *See* Exh. 3; RP at 336. Later, they created a second phase of the NYBA, expanded the marina's docks and slips, and conveyed additional submerged lands to the NYBA by amending the condominium declaration. RP at 335; *see* Exh. 3 App. C.

In 1977 Radovich and Keyes recorded a declaration of easements, which created ten easements on and around the Commercial Parcel and NYBA's property. Exh. 1. As a group, the easements provide for ingress, egress, parking, utilities, drainage, and other purposes. *Id.* Some of the easements are on only the Commercial Parcel and convey benefit to the NYBA, some are on only the NYBA's property and reserve benefit for the Commercial Parcel, and some straddle both properties and convey and reserve benefit for both NYBA and the Commercial Parcel.<sup>1</sup> Exh. 226.

Easements 4, 5, and 6 are central to this action. *See* Exhs. 1, 2, 5. Easement 4 overlays the west section of the Commercial Parcel as well as

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<sup>1</sup> The geography can be seen in (1) aerial photographs of the Marina, Exhibits 118 and 300; (2) a map of NYBA's docks, Exhibit 289; (3) a diagram of the parking and slips, Exhibit 142; (4) a depiction of the easement area, Exhibit 294; (5) sequences of conveyances, Exhibits 291, 292, and 294; and (6) illustrations of the 10 easements from the declarations, Exhibit 32, Exhibit 78 p. 2, and the best being Exhibits 226 and 279.

the land to the west owned by NYBA, and provides the Commercial Parcel and NYBA with ingress, egress, utilities, and drainage. RP at 312; Exh. 2 p.2; *see* Exh. 226. Easement 5 runs along the north side of the Commercial Parcel, providing NYBA with ingress, egress, utilities, drainage, and parking. RP at 313; Exh. 2 p.2; *see* Exh. 226. Easement 6 runs along the east side, providing NYBA with ingress, egress, utilities, and drainage. RP at 313-14; Exh. 2 p.2; *see* Exh. 226.

D. Issuance of the Quit Claim Deed.

Parking has been an ongoing issue since the creation of NYBA. *See* Exh. 8. Radovich and Keyes failed to provide NYBA with the number of parking stalls that they promised to the City of Bellevue. *See* Exh. 7 p. 2. As a result, much effort went into increasing the parking available to the NYBA, with the focus on clarifying and conveying easements that would address parking shortages. *See* Exhs. 2, 5.

On May 14, 1980, the minutes of an NYBA board meeting attended by Keyes and Radovich state that board member Larry Hall told them that NYBA wanted to acquire “through Quit Claim Deeds certain easements.” Exh. 7. On July 23, Keyes and Radovich executed the document entitled “Quit Claim Deed,” which described three small parcels of land, Parcels A, B, and C. Exh. 12. The areas covered by those three parcels are the same land areas covered by Easements 4, 5, and 6,

respectively, although the legal descriptions appearing in the two instruments differ significantly. RP at 308; *compare* Exh. 1 *with* Exh. 12.

On October 6, 1980, the NYBA board met again with Radovich and Keyes to continue the discussion about parking. Exh. 8. However, there was no mention of the executed Quit Claim Deed or the conveyance intended thereby. *See* Exh. 9. The focus of the discussion was on NYBA's *prospective* acquisition of "easements through quitclaim deeds." Exh. 8. In that meeting, Radovich and Keyes agreed to permit NYBA parking on land that they owned to the east of the marina. *Id.* On October 9, 1980, Radovich and Keyes signed a Permit for that parking. Exh. 13.

On May 29, 1981, the Deed and Permit were recorded and excise tax was paid for the recordings. Exhs. 10-13. The real estate excise tax affidavit that was signed by Hall under oath listed a gross sale price for the Quit Claim Deed of \$100. Exh. 10. The affidavit also stated that the Quit Claim Deed was a "Document in correction of easements of Auditor's file numbers 7801171011 and 7801171009," the respective recording numbers of the amendments to the condominium declaration and the easement declaration. Exhs. 10, 4, 5.

NYBA did not amend its condominium declaration to incorporate reference to the Quit Claim Deed. *See* RP at 470. References did not appear in the title policies of slip owners. RP at 786. Nor did references

appear on title reports or statutory warranty deeds when Mercer Marine and Seattle Marine purchased the Commercial Parcel. *See* Exhs. 58, 70, 214; RP at 1013, 1449, 1569-73, 1628. In fact, the Quit Claim Deed seemingly disappeared until shortly before July 15, 2008, when it was retrieved from NYBA's safe and presented to Bohling in a meeting at Radovich's office. RP at 1653.

E. Procedural Background.

With the Quit Claim Deed in hand, NYBA sued Seattle Marine for declaratory judgment quieting title to the areas covered by Easements 4, 5, and 6 in its favor. CP at 10-11. It sought an order declaring that the Quit Claim Deed conveyed fee title to the property described therein or granted NYBA exclusive rights in that property. CP at 7-8, 10-11. Seattle Marine counterclaimed based on adverse possession/prescriptive easement, and brought a third-party complaint against Burbridge and Bridges for failure to convey good title to the entire Commercial Parcel. CP at 21-23, 27-28, 37-40. Burbridge then brought a fourth-party complaint against Radovich and Keyes for breach of their agreements to convey good title to the entire Commercial Parcel. CP at 55, 61-62.

After a two-week bench trial, the superior court entered detailed findings of fact and conclusions of law in favor of Seattle Marine. CP at 2796-2824. After entry of judgment consistent with the findings and

conclusions, CP at 3350-59, NYBA appealed. CP at 3378-79.

### III. ISSUES PRESENTED

1. Does substantial evidence support the findings of fact?
2. Did the Quit Claim Deed convey fee title?
3. Is the Quit Claim Deed unenforceable by NYBA?
4. Does NYBA have exclusive easement rights?
5. Does NYBA have rights to cross the Commercial Parcel?
6. Did Mercer Marine adversely possess D-1/D-2 frontage?
7. Would Seattle Marine's use overburden any easement?

### IV. ARGUMENT

NYBA raises numerous arguments on appeal and we address them in order. In summary, there is substantial evidence that supports all of the trial court's factual findings challenged by NYBA. The Quit Claim Deed did not convey fee title to the property described therein because it was not intended to; it was intended to merely clarify easements. If the Quit Claim Deed were intended to convey fee title, it could not be enforced because such conveyance would be illegal and NYBA is barred by equitable considerations from seeking its enforcement. The easements at issue are mutually beneficial and not exclusive to NYBA. The trial court was correct in divesting NYBA of a small, narrow strip of land by application of adverse possession. Finally, arguments by the NYBA to

establish an easement by prescription or by necessity are unsupported.

A. Substantial Evidence Supports the Findings of Fact.

NYBA assigns error to 21 different findings of fact,<sup>2</sup> Appellant's Brief at 5, but presents argument on only four of those findings:

- “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.” *Id.* at 24.
- “[N]o consideration was provided to Radovich and Keyes in exchange for the Quit Claim Deed.” *Id.* at 28 (quoting CP at 2803).
- “[F]indings and conclusions that NYBA has only non-exclusive easement rights are not supported by substantial evidence.” *Id.* at 40.
- Seattle Marine's plans will not overburden or overuse any of the easements. *See id.* at 46.

As NYBA does not support its assignment of error to the other findings, we do not address those or their supporting evidence in this context.

On appeal, review of challenged findings of fact is limited to determining whether substantial evidence supports the findings and whether the findings support the legal conclusions. *Panorama Vill. Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000). “Substantial evidence exists if a rational, fair-minded person would be convinced by it.” *In re Estate of Palmer*, 145 Wn. App. 249, 265-66, 187 P.3d 758 (2008). “Appellate courts do not hear or weigh

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<sup>2</sup> Cited findings of fact include: 1.12-1.15, 1.18, 1.20-1.28, 1.32, 1.45-1.47, 1.53, 1.56, and 1.57. *See* CP at 2799-2805, 2808, 2810-11.

evidence, find facts, or substitute their opinions for those of the trier-of-fact.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

1. Substantial Evidence Supports the Finding That There Was no Intent to Convey Fee Title.

The trial court found that the Quit Claim Deed was not intended to convey fee simple title to the land described but was intended to merely to correct previously recorded instruments. CP at 2803 (FOF 1.24). The trial court called out evidence it considered in making that finding:

- The Real Estate Excise Tax Affidavit that was filed with the Quit Claim Deed, in which NYBA’s then board vice president stated under oath that the Quit Claim Deed was a “Document in correction of easements of Auditor’s file numbers 7801171011 and 7801171009,” CP at 2803 (FOF 1.24); Exh. 10;
- The minutes of meetings of the NYBA board that make reference to the intent of the Quit Claim Deed to convey “easements” without any reference to an intent to convey fee simple title to land, CP at 2803 (FOF 1.25), referring to minutes from the Board’s May 14, 1980 meeting, Exh. 7, and October 6, 1980 meeting, Exh. 8;
- That Radovich, Keyes and subsequent owners of the Commercial Parcel to this day have always paid and continue to pay property taxes on the property referred to in the Quit Claim Deed, CP at 2803 (FOF 1.26(a));
- The fact that NYBA’s condominium declaration was never amended to reflect acquisition or ownership of the land referred to in the Quit Claim Deed, despite the declaration being amended numerous times, including to reflect the addition of other real property to NYBA’s common areas, CP at 2803 (FOF 1.26(b));
- The fact that no consideration was provided to Radovich and Keyes in exchange for the Quit Claim Deed, despite the land referred to therein

having real inherent value, CP at 2803 (FOF 1.26(c));<sup>3</sup>

- The fact that the consideration stated on the Quit Claim Deed and Real Estate Excise Tax Affidavit was merely \$10 and \$100, respectively, CP at 2803 (FOF 1.26(d)); and
- Contrary to Radovich's long-time, consistent practice as a real estate developer when conveying land, there was no purchase and sale agreement or other agreement setting forth the terms of any conveyance purportedly made under the Quit Claim Deed, CP at 2803-04 (FOF 1.26)).

The foregoing constitutes substantial evidence supporting the finding that the Quit Claim Deed was not intended to convey fee simple title to land.

There is additional supporting evidence, including the Quit Claim Deed itself, which does not explicitly state the interest that it purports to convey. Exh. 12. That it is a "correction" of the previously granted easements is demonstrated by the Quit Claim Deed's different wording for descriptions of the same land areas described for Easements 4, 5 and 6 in the Declaration of Easements. *See* RP at 308.

In addition, despite leasing the Commercial Parcel for years and then purchasing it, Burbidge was never once told by Radovich, Keyes or anyone from NYBA about the Quit Claim Deed or any conveyance of the land areas covered by Easements 4, 5 and 6 to NYBA. *See* RP at 1440-49. This is particularly significant given that he continued to pay the property taxes on those areas. RP at 1466-68.

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<sup>3</sup> NYBA assigns error to this finding, but for the reasons stated below, there is substantial evidence that supports it.

There are also peculiarities that no one could explain, but which suggest that the parties did not actually intend to transfer fee title. First, the Quit Claim Deed was signed in July 1980, although in October 1980 the NYBA board was still talking about its “wishes to acquire easements through quit claim deeds.” Exh. 8. Second, there was a ten-month delay in recording the Quit Claim Deed and a complete lack of testimony explaining that delay or even the delivery of the Quit Claim Deed by Radovich and Keyes to NYBA. *See* RP 160-61, 390-91. Third, just five years later in 1986, as NYBA continued to deal with the parking problems created by Radovich and Keyes when they developed the NYBA, the board stated a plan to continue “investigation into what is ours legally in the way of parking.” Exh. 25. These peculiarities support a finding that the Quit Claim Deed was not intended to convey fee title to land.

NYBA does not contend that the foregoing evidence is insubstantial. It just reiterates contrary evidence it presented at trial and asks this Court to re-weigh the conflicting evidence. In particular, NYBA argues that the testimony of Lang and Radovich should be accepted to the exclusion of all other evidence of intent. The function of the appellate court is not to weigh evidence.

Regardless, the evidence presented calls into question Lang and Radovich’s assertion that the Quit Claim Deed was intended to convey fee

title. Lang, who was a board member back in 1980 and 1981, could not remember the board ever approving the Quit Claim Deed, RP at 248-49; and he had no independent recollection of attending the important October 6, 1980 board meeting. RP at 252. Lang could offer no explanation for why the document was executed in July 1980, ten months before recording, or why it was executed three months before the October 1980 board meeting. RP at 159, 161. Nor could Lang explain why his board vice president, Hall, referred to the Quit Claim Deed as a “correction of easements” in the excise tax affidavit. RP 163-64.

Lang further undermined his own credibility at trial by testifying inconsistently with his deposition a few months earlier. During his deposition he could not recall discussions leading up to the Quit Claim Deed, but at trial he was able to recall such discussions. RP at 236-39.

Radovich’s testimony was equally indecisive. He stated he did not prepare the deed. He believed that the Board gave it to him and Keyes and they signed it, RP at 347, although he could recall nothing about delivering the document to anyone. RP at 389. While he proclaimed that he and Keyes intended to convey “all of the interest” they had to the property, RP at 345, Radovich readily admitted that he later conveyed the same property to Bridges. RP at 393; Exh. 292.

Radovich and Lang’s testimony is further undercut by testimony

from Anderson, NYBA's former board president. Although Anderson served as NYBA's president for approximately 20 years until Lang re-assumed that office, RP at 556, 658; Anderson knew nothing about the Quit Claim Deed until he was told about it in July 2008. RP at 441.

Anderson, who was a professional engineer and land-use consultant for 13 years, RP at 546, 632-33, 775; had believed during his entire tenure that NYBA's interests in the land were merely easements. RP at 779-80; *see* RP at 552. Although Lang once commented that NYBA owned the land, Anderson did not take Lang's comment seriously because, in Anderson's land-use experience, people commonly misunderstand the nature of interests in land and refer to "owning" easement areas, RP at 563-64, 639; and Lang never once mentioned the Quit Claim Deed to Anderson. RP at 837-38.

The trial court's finding that the Quit Claim Deed was not intended to convey fee title is supported by substantial evidence.

2. Substantial Evidence Supports the Finding That There Was No Consideration provided to Radovich and Keyes in Exchange for the Deed.

The trial court found that "no consideration was provided to Radovich and Keyes in exchange for the Quit Claim Deed, despite the land described therein having real inherent value." CP at 2803 (FOF 1.26(c)). This finding is supported by substantial evidence in the record.

First, although the Quit Claim Deed recites that it was granted for \$10.00 and the excise tax affidavit states that the Quit Claim Deed was executed for \$100.00, Exhs. 12 & 13, no money ever changed hands. Lang could not remember the NYBA board ever approving any payment for the Quit Claim Deed. RP at 250. And Radovich testified that he never received any form of payment for the Quit Claim Deed. RP at 389-90.

Second, there is no evidence that any other consideration was exchanged. NYBA presented talk about paying past-due property taxes in exchange for the Quit Claim Deed, RP at 156-59, and Lang claimed that back-taxes were paid. RP at 159. However, no proof at all was offered to show that such taxes were ever paid or that taxes were reallocated for the parcels. RP at 160. To the contrary, Burbridge testified that he paid all of the property taxes for the land area in question through 2007 when he conveyed the property to Seattle Marine. RP at 1466-1468. Even at the time of trial, Anderson, with all his years as NYBA's president, had no idea who paid the property taxes. RP at 649-50.

It is telling that the NYBA was able to offer documentation showing that it reimbursed its board vice president who paid the \$9.90 fee for recording the Quit Claim Deed, Exhibit 14, p. 2, but could produce nothing to show that it paid anything for the Quit Claim Deed.

3. Substantial Evidence Supports the Finding That NYBA's Easement Rights Were Non-Exclusive.

The trial court found that the ten easements – including Easements 4, 5 and 6 – mutually benefited the Commercial Parcel as well as NYBA's property and thus were non-exclusive in nature. CP at 2802 (FOF 1.22). In making this finding, the trial court reviewed the Easements Declaration, Exhibit 2, where it found that the easements created thereby were reserved to benefit the Commercial Parcel as much as they were granted to NYBA. CP at 2801 (FOF 1.18). "Indeed, several of the easements cover property exclusively owned by NYBA and are clearly intended to benefit the Commercial Parcel; and other easements straddle the Commercial Parcel and/or East Parcel and property owned by the NYBA." *Id.* Easement 4 is one of the easements which overlays both the Commercial Parcel and land owned by NYBA. *See* Exh. 32. In addition, the Easements Declaration never uses the word "exclusive." *See* Exh. 2.

The trial court's finding of non-exclusivity is also supported by the testimony of Radovich himself as the declarant of those easements. He confirmed that the easements created by the Easements Declaration were intended to be, and are, mutually beneficial and non-exclusive. RP at 381-82. *See also* RP at 382-86.

The trial court's finding of non-exclusivity is reinforced by the

conduct of the parties over the years. An important aspect of the Easement Declaration was its grant of certain easements for parking because Radovich and Keyes needed to establish sufficient parking to satisfy the Bellevue's parking requirements when developing the marina. RP at 341-43. While parking rights were granted to NYBA in the Easement 5 area, the practice by Mercer Marine, and continued by Seattle Marine, was to park its vehicles and allow parking by customers in that area as well. RP at 1445, 1388-1389. Burbridge even testified that he, his employees, and his customers parked in Easement 6. RP at 1470. And Easement 4, by overlaying both the Commercial Parcel and NYBA's property, clearly was non-exclusive. Exh. 32.

The non-exclusivity of Easement 5 is further reinforced by the fact that Mercer Marine installed, and Seattle Marine continues to use and maintain, a large underground vault inside that easement area. The vault contains facilities that serve the fuel lines that run under NYBA's Dock B (by virtue of Easement 10) from Seattle Marine's fuel storage tanks to the fuel dock it owns and operates at the end of Dock B. RP at 1378, 1451.

NYBA does not challenge the foregoing evidence as insubstantial; it again calls for this Court to assume a fact-finding role and weigh contrary evidence. It argues that evidence showing that NYBA paid for paving within easement areas, RP at 128, 131-32, 179; that NYBA cleaned

easement areas, RP at 899-902; and that it painted parking stripes and designated stalls as NYBA stalls within easement areas, RP 646-48, 968-70, should trump the evidence relied upon by the trial court.

However, in advancing its evidence, NYBA tells only part of the story. Its payment of paving work occurred on two separate projects. The first was a partial cost reimbursement that NYBA agreed to pay to Mercer Marine for a major paving project that was *contracted for by Mercer Marine*. RP 517-19, *see* Exh. 51. The second was when NYBA tore up its property along the west bulkhead to install drainage facilities for a new bulkhead. RP at 1416-17. So to say that NYBA's payment of paving was due to an exclusive easement is misleading.

NYBA also offers its grounds-keeping in easement areas. Again, such evidence just highlights the factual dispute between the parties – because there is ample evidence that Mercer Marine and Seattle Marine also maintained the grounds in easement areas. For example, the grass lawn within Easement 5 has always been mowed by the owner of the Commercial Parcel. RP at 939-40, 1419.

NYBA tries to make much out of its painting of parking stripes and identifying them as NYBA stalls, but it does not explain that such painting did not occur until the summer of 2009, RP at 968-70, nearly a year after this case was filed. It never marked parking spaces prior to the filing of

this case. RP at 646-48. Despite all of its claims of exclusivity, no Mercer Marine or Seattle Marine employee or customer ever had his or her car towed from any easement area, RP at 945-46, a strong indication that NYBA itself never viewed the easements as exclusive.

Substantial evidence supports the trial court's finding that Easements 4, 5 and 6 are mutual and non-exclusive.

4. Substantial Evidence Supports the Finding That Seattle Marine's Use Will Not Overburden Any Easements.

The trial court found that "Seattle Marine's proposed redevelopment plan will preserve NYBA's rights of ingress and egress over the areas covered by Easements 4, 5 and 6" and "will also preserve NYBA's right to park in the area covered by Easement 5." CP at 2811 (FOF 1.57). As a result, the trial court found that "Seattle Marine's proposed plan does not interfere with the rights NYBA has in the areas covered by Easements 4, 5 and 6." *Id.*

NYBA's challenge of these factual findings is easily rebuked by a variety of evidence presented at trial, not the least of which is the detailed, independent Staff Report issued by Bellevue after extensive review of Seattle Marine's proposed redevelopment plan, its impact on NYBA and the easements, and input from NYBA and others. *See* Exh. 249. That report details the parking study that Seattle Marine commissioned by an

independent consultant, RP at 1604-09; along with all the steps that Seattle Marine took to address the parking burden on the property adjacent to the marina. Seattle Marine addressed parking concerns by adding 121 parking stalls on its own property *outside the easement areas*, such that Seattle Marine's parking plan met the expected parking demand for its proposed use as well as Bellevue's stringent parking requirements. Exh. 249 pp. 11-12, 15, 20, 22. Based on this plan, the City of Bellevue staff were satisfied with Seattle Marine's proposed parking plan, RP at 12-12-13; *see* RP at 1249-56, 1261-63, 1271-73; and that Seattle Marine's proposed use would not burden the easements. RP at 417-18.

Lang and Radovich's lack of credibility is best shown by their testimony on Seattle Marine's redevelopment. While they oppose redevelopment purportedly for fear of impacts it will have on parking, they both readily conceded their ignorance as to Seattle Marine's plan for addressing parking concerns. On the stand, Lang reluctantly admitted that he had *never* reviewed Seattle Marine's redevelopment plan (available for public review at City Hall) or the City's detailed Staff Report. RP at 838-40. In his ignorance, Lang erroneously believed that the redevelopment would use the easement areas to meet parking requirements. RP at 228-32. Likewise, Radovich, who claimed that he had reviewed the plan at City Hall, misunderstood Seattle Marine's redevelopment plan. He was

ignorant to the fact that the plan added parking on Seattle Marine's land outside the easement areas. RP at 359-62; *see also* Exh. 240.

This Court can now see why NYBA's president at the time, Anderson, was so frustrated by Lang and Radovich that he wrote in a May 7, 2008 email to Lang:

Please take some time to read the PUBLIC documents . . . they have been available to the public for about 15 months. . . . I'm afraid that a few grossly misinformed people will be responsible for screwing up what are some very valuable concessions from [Seattle Marine] that we would not be able to get through the City codes or requirements. . . . Before you accuse the board of being "naïve" please spend some time gathering facts rather than false rumors.

Exh. 253. In a second email to Radovich, Anderson wrote:

Feel free to do what you feel is necessary to "protect your rights". I am disappointed in all the 11th hour rushing around by intelligent people, almost all of whom have not bothered to study the FACTS of the [Seattle Marine] proposal as it has been a public record for over 15 months. In my 13 years of representing developers I have rarely observed more misinformation and faulty rumors surrounding a project. . . . I have read the staff report, the DNS, the recommended/required mitigations. I would recommend any interested/concerned owner to do the same, then arrive at an informed opinion of whether or not an appeal of the DNS is in order. The issues you raise below have all been hashed over thoroughly, read the staff report, and see for your self.

Exh. 254.

There is more than substantial evidence supporting the trial court's finding that Seattle Marine's proposed redevelopment and use of the

Commercial Parcel will not overburden or deprive NYBA of its easement rights. The expert Bellevue land use staff said it best: “On balance, this plan will provide for additional parking beyond what is currently available on this site and within the larger marina uses, and will not impact the right that the various easement holders have to park in the parking easement areas.” Exh. 249 pp. 15-16.

B. The Trial Court Correctly Entered a Conclusion of Law that the Quit Claim Deed Was Not Intended to Convey Fee Title.

The trial court concluded that “the Quit Claim Deed did not convey fee simple title to the property described therein to NYBA” and that title is held by Seattle Marine as part of its acquisition and ownership of the greater Commercial Parcel. CP at 2812 (COL 2.3).

NYBA challenges this conclusion, urging this Court to review the trial court’s conclusion de novo as a pure question of law. However, there are important nuances to the standard of review when it comes to real property deeds and conveyances. Where the facts are not in dispute, “[c]onstruction of deeds is a matter of law for the court.” *Thomas v. Nelson*, 35 Wn. App. 868, 871, 670 P.2d 682 (1983). But “where the identity of the subject-matter of a document, or its construction, depends upon collateral facts or extrinsic circumstances, the inferences from such facts, when they are proven, should be drawn by the [trier of fact].”

*Durand v. Heney*, 33 Wash. 38, 41, 73 P. 775 (1903). Here, the proper standard of review is on the question-of-fact side of the spectrum.

1. As Drafter, Ambiguities and Presumptions Run Against NYBA.

NYBA correctly notes that Washington courts usually resolve ambiguities against the grantor and in favor of the grantee, Appellant's Brief at 25, but there is more to the analysis. "Ambiguity in a deed is resolved against the grantor. But, the grantor also generally drafts the deed," and when the grantor does not draft the agreement, "an ambiguous agreement is construed against the drafter." *Hanson Indus., Inc. v. County of Spokane*, 114 Wn. App. 523, 531, 58 P.3d 910 (2002). NYBA drafted the Quit Claim Deed, RP at 347; Exh. 8; thus, it should be construed against NYBA.

2. The Quit Claim Deed is Ambiguous as to the Estate Being Granted.

NYBA relies on old authority that focused on the face of a deed to determine its validity, Appellant's Brief at 23-25, but even that focus had its exceptions. Long before *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), extrinsic evidence was admissible to resolve an ambiguity in a deed. In *Brown v. City of Bremerton*, 69 Wash. 474, 476-77, 125 P. 785 (1912), our Supreme Court stated, "It is familiar law that parol testimony is admissible to show the circumstances under which a deed was made, to

define technical terms, or to explain latent ambiguities.”

Quitclaim deeds are viewed fundamentally different than other statutory forms of deed. “[A] quitclaim deed can convey as much interest in real property as a warranty deed” but “has its lineage as a form of release.” *Carlson v. Stair*, 3 Wn. App. 27, 29, 472 P.2d 598 (1970).

“Unlike deeds that follow the warranty or bargain and sale deed form, a quitclaim deed does not create a presumption that a fee simple estate was transferred absent express words to the contrary.” *Roeder Co. v. K & E Moving & Storage Co., Inc.*, 102 Wn. App. 49, 56, 4 P.3d 839 (2000).

Since its passage in 1886, the quitclaim deed statute, RCW 64.05.050, has called for expression of the key phrase, “all interest in the following described real estate,” to provide the necessary confirmation that a quitclaim deed is in fact conveying all rights of ownership over fee simple title. NYBA excluded the key reference to “all interest,” Exhibit 12, and thereby created a facial ambiguity. That ambiguity, in turn, created a question about what estate was conveyed, which is a question of fact for the trial court to resolve through parol and extrinsic evidence.

*Hanson Indus.*, 114 Wn. App. at 527, 534-35.

3. Washington’s Courts Look Beyond the Language of a Deed to Understand Its Context, Even When the Deed is Unambiguous.

Even where a deed appears to be otherwise untainted, parol

evidence is “admissible to show the entire agreement between the parties,” which is a question of fact. *Pederson v. Peters*, 6 Wn. App. 908, 911, 496 P.2d 970 (1972). “When construing deeds, [the] principal aim is to effect and enforce the intent of the parties.” *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass’n*, 156 Wn.2d 253, 262, 126 P.3d 16 (2006).

While language in the deed can of course be looked at to determine intent, *Kershaw*, 156 Wn.2d at 269, interpretation of intent is not limited to the deed. “[W]here the intent of the parties is not clearly expressed in the deed, courts may consider parol evidence,” including extrinsic evidence “as to the entire circumstances” to comprehend the document’s context. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 742-43, 844 P.2d 1006 (1993) (citing *Berg*, 115 Wn.2d 657). A total lack of ambiguity in a deed does not prohibit exploration of parol and extrinsic evidence: “Even absent ambiguity, [the Washington Supreme Court], unlike in statutory or contract construction cases, has consistently examined the circumstances surrounding the transfer and subsequent conduct of the parties, regardless of ambiguity, if helpful in ascertaining the parties’ intent, which is ‘of paramount importance.’” *Kershaw*, 156 Wn.2d at 272 n.15 (quoting *Brown v. State*, 130 Wn.2d 430, 437-38, 924 P.2d 908 (1996)).

A variety of evidence is useful to understanding the context of and intent behind a document. The Washington Supreme Court made it

abundantly clear in *Berg* that, “[i]n discerning the parties’ intent, subsequent conduct of the contracting parties may be of aid.” *Berg*, 115 Wn.2d at 668. For example, whether consideration is substantial can aid a court’s determination of whether an easement or fee title was conveyed. *Kershaw*, 156 Wn.2d at 268. A court may also look at other documents, such as a purchase and sale agreement, “as some evidence of the circumstances of the parties at the time of the grant.” *Harris*, 120 Wn.2d at 743. And “to assist in ascertaining intent,” a court may consider whether a subsequent sale of property is “consistent with its intent to convey only an easement.” *Harris*, 120 Wn.2d at 746.

As discussed earlier, substantial evidence supports the trial court’s finding that the Quit Claim Deed was not intended to convey fee simple title. *Supra* Section IV.A.1. The parol and extrinsic evidence relevant to this analysis is much greater because it also includes:

- The trial court’s finding of fact that there was no consideration, *supra* Section IV.A.2;
- The various uses of the land by NYBA and the owners and users of the Commercial Parcel, *supra* Section IV.A.4;
- NYBA’s legal status as an unincorporated association and its failure to amend its Declarations, *infra* Sections IV.C.2 & IV.C.3;
- The illegal subdivision of the Commercial Parcel by the Deed, *infra* Sections IV.C.1;
- The stated consideration that would shock the conscience, *infra*

Section IV.D.1; and

- The inaction by NYBA and its agents who did not disclose the Quit Claim Deed to Burbridge and Bohling, *infra* Sections IV.D.2.

Thus, the voluminous record developed below supports the trial court's conclusion that the Quit Claim Deed was not intended to convey fee title.

C. The Quit Claim Deed, if Intended to Convey Fee Title, Would Be Illegal and thus Unenforceable by NYBA.

The trial court concluded that, even if the Quit Claim Deed were intended to convey fee title, there are numerous reasons that NYBA may not now enforce it. It recognized that the conveyance of a deed cannot be enforced when such conveyance would be illegal. CP at 2812-17 (COL 2.4-2.13). A court may properly hold the grant of a deed to be void on its face for failing to comply with statutory requirements. *Berg v. Ting*, 125 Wn.2d 544, 551-53, 886 P.2d 564 (1995). *See also Dickson v. Kates*, 132 Wn. App. 724, 734-35, 133 P.3d 498 (2006) (voiding a covenant in a deed recorded 19 years earlier for non-compliance with the statute of frauds).

The trial court concluded that the Quit Claim Deed, if intended to convey fee title, was an illegal and, thus, unenforceable conveyance for the following alternative reasons: (1) it purports to convey less than a full legal parcel of property without necessary municipal approval; (2) it purports to convey real property to an unincorporated association, which is unable legally to hold title to real property; and (3) NYBA failed to amend

its condominium declaration to expressly include land covered by the Quit Claim Deed within NYBA's common areas. CP 2812-16 (COL 2.6-2.12). This Court should affirm each of these conclusions.

1. The Purported Creation of Three Separate Parcels Under the Quit Claim Deed Is Illegal and thus Unenforceable.

The trial court concluded that it could not construe the Quit Claim Deed as intending to convey fee title because such construction would lead to violation of RCW chapter 58.17 and former Bellevue City Code chapter 22C.11. CP at 2814-15 (COL 2.8). Such a conveyance would have been a crime under RCW 58.17.300 and former BCC 22C.11.120 for the reasons explained below, and the trial court concluded that enforcement of the Quit Claim Deed would have condoned criminal conduct. CP at 2814-15 (COL 2.8) (citing *Waring v. Lobdell*, 63 Wn.2d 532, 533, 387 P.2d 979 (1964) (“[W]here the contract grows immediately out of, and is connected with, an illegal act, a court of justice will not lend its aid to enforce it . . . . A contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.” (quoting *Hederman v. George*, 35 Wn.2d 357, 361-62, 212 P.2d 841 (1949) (citations and alterations omitted))).

At the time of the Quit Claim Deed, RCW 58.17.060 provided that “[t]he legislative body of a city . . . shall adopt regulations and procedures

. . . for the summary approval of short plat and subdivisions, or revisions thereof.” The applicable Bellevue City Code in place at the time of the Quit Claim Deed was Bellevue City Code chapter 22C.11. CP at 3835-44.

BCC 22C.11.030 required: “Every short subdivision shall comply with applicable provisions of RCW Chapters 58.09, 58.17. . . . No short plat shall be accepted for recording which violates these provisions or requirements.” BCC 22C.11.070 set forth multiple requirements on short subdivision applicants including a requirement that “[a]ll short plats shall be recorded surveys consistent with RCW 58.09.” BCC 22C.11.070(A). Radovich admitted that no survey was conducted in relation to the Quit Claim Deed. RP at 391-92. In addition to the requirement for a recorded survey, BCC 22C.11.070 required numerous other application elements, none of which were met by Radovich or NYBA in conjunction with the Quit Claim Deed. RP at 248-49, 391-92.

Failure to comply with any one provision of BCC 22C.11 amounted to a crime: “In addition to the penalties provided for and civil actions authorized by RCW Chapter 58.17, the violation or failure to comply with any of the provisions of this chapter or any amendment thereto is a misdemeanor. . . .” BCC 22C.11.120. Likewise, RCW 58.17.300 makes any violation of RCW 58.17 or local ordinances a gross misdemeanor. The trial court recognized that the Commercial Parcel is the

legal parcel, and no effort was made to short plat Parcels A, B and C to separate them from the Commercial Parcel. Nor were efforts made to otherwise satisfy the requirements of the Bellevue City Code. CP at 2814-15 (COL 2.8).

The trial court was well within its discretion in holding that Quit Claim Deed, if it was intended to convey fee title, is void. There is a difference between invalidating an instrument that is illegal in itself and an instrument intended to achieve an illegal purpose. *See Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970). Contrary to NYBA's view of the law, the need to show fraud goes to the presumption that the law will leave two equally guilty parties in the position where they are found when either the transaction itself is illegal but not yet complete or a party seeks rescission. *See Golberg v. Sanglier*, 96 Wn.2d 874, 887-88, 639 P.2d 1347, 647 P.2d 489 (1982). But the calculus for resolution changes when the illegal transaction affects a third-party such as Seattle Marine. *McDonald v. Lund*, 13 Wash. 412, 419, 43 P. 348 (1896).

NYBA argues that the Quit Claim Deed was really a boundary line adjustment to which RCW 58.17 is inapplicable, Appellant's Brief at 32, but this argument fails for several reasons. First, the subsection on which NYBA relies in making this argument, RCW 58.17.040(6), was not enacted until the 1981 legislative session and thus did not take effect until

after the Quit Claim Deed was issued and recorded. *See* former RCW 58.17.040 (1980). Second, BCC chapter 22C.11 contains no exception for boundary line adjustments to enforcement of its misdemeanor provisions. *See* CP at 3836-44. Third, Radovich himself said the Quit Claim Deed had nothing to do with adjusting boundary lines. RP at 391.

Fourth, Parcels A, B, and C as described in the Quit Claim Deed are separate, distinct rectangular parcels of land with defined boundaries, RP at 322-26; the Quit Claim Deed does not define a boundary adjustment or otherwise adjust an existing boundary. *See* Exh. 12. If applied, RCW 58.17.040(6) specifically defines “boundary line adjustment” to exclude the creation of “any additional lot, tract, parcel or division.” RCW 58.17.040(6). The Quit Claim Deed cannot meet this definition because it would create three separate parcels, Parcels A, B and C.

NYBA notes that RCW 58.17.210 “exempts an innocent purchaser,” Appellant’s Brief at 31, but NYBA is not an “innocent purchaser.” According to Radovich, “they [the NYBA board] offered a deed, a quitclaim deed; we signed it . . . and gave it to them.” RP at 347. NYBA’s board minutes supports Radovich’s testimony: “Larry Hall and Larry Canaan [two board members at the time] will complete the paperwork, including a letter of agreement for Russ Keyes and John Radovich.” Exh. 8. RCW 58.17.210 should not protect NYBA because

NYBA's board drafted an instrument that, if enforced, would achieve an illegal purpose and NYBA's illegal acts caused harm. *See Crown Cascade, Inc. v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983).

Here, law and equity favor invalidation of the Quit Claim Deed because (1) if NYBA's arguments succeeded, enforcement would achieve an illegal purpose and (2) Seattle Marine was not *in pari delicto* because it was not a party to the transaction that created the Quit Claim Deed.

2. The Purported Conveyance of Land to an Unincorporated Association under the Quit Claim Deed is Illegal and thus Unenforceable.

Finding that NYBA is an unincorporated association, CP at 2797, the trial court concluded that a conveyance of fee title by the Quit Claim Deed would constitute an illegal and unenforceable conveyance of real property to an unincorporated association unable to legally hold title to real property. CP at 2815 (COL 2.9) (citing *Winchell v. Mont. Dept. of State Lands*, 262 Mont. 328, 865 P.2d 249, 252-53 (1993); *Real Property Deskbook* § 32.5(6), pp. 32-37 (3d ed. 1996)). NYBA's appeal of this conclusion is without merit.

Under common law, unincorporated associations could not legally hold title to real property. *Winchell*, 865 P.2d at 252-53 (1993); *Real Property Deskbook* § 32.5(6), pp. 32-37 (3d ed. 1996) ("Generally it has been held that unincorporated associations . . . cannot hold title to real

property because they are not legal entities.”). Furthermore, “in the absence of a statute empowering it to do so, an unincorporated association, having no legal existence independent of the members who compose it, is incapable, as an organization, of taking or holding either real or personal property in its association name, such acquisition by the association arising either by way of gift or purchase, or by devise or bequest.” 7 C.J.S. Associations § 78 (2009); *see also Future Fed. Sav. & Loan Ass’n v. Daunhauer*, 687 S.W.2d 871, 873 (1985) (“[A]n unincorporated association, could not hold title to the real property in the absence of some statute providing for such title.”).

Without any statute or other authority empowering NYBA to hold title to property purportedly conveyed by the Quit Claim Deed, enforcement would uphold an illegal conveyance of real property.

3. NYBA’s Failure to Amend Its Condominium Declarations to Include the Land Covered by the Quit Claim Deed Limits Enforceability.

The trial court found that although NYBA’s “condominium declaration was amended numerous times, including at times to confirm the addition of real property to NYBA’s common areas, NYBA’s condominium declaration was never amended to specifically describe the real property referred to in the Quit Claim Deed as common area.” CP at 2803 (FOF 1.26(b)). This finding is significant for reasons beyond the intent of the Quit Claim Deed; it goes to the heart of enforceability of the

purported conveyance thereunder. A condominium association cannot assert rights in land against others until it has spelled out that interest in its condominium declaration. Because the land in the Quit Claim Deed was never spelled out in NYBA's condominium declaration, NYBA may not assert rights in such land against Seattle Marine, which took title to the same land before any amendment to NYBA's declarations.

Generally, "a deed is void if the named grantee is not a legal entity," *John Davis & Company v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 220, 450 P.2d 166 (1969); but a grant to a not-yet-existent entity can go into effect if the entity comes into existence before another takes superior title. *Id.* Under the Horizontal Property Regime Act, RCW chapter 64.32, NYBA can hold land only under its grant of authority by that Act, which provides a rigorous scheme for allowing a condominium association to own real property.

Under that scheme, a recorded condominium declaration by the condominium association is essential because it is "the instrument by which the property is submitted to provisions of [the Act]." RCW 64.32.010(9). As the Act specifically states, "This chapter shall be applicable only to property, the sole owner or all of the owners, lessees or possessors of which submit the same to the provisions hereof by duly executing and recording a declaration as hereinafter provided." RCW

64.32.020. Amendment of the declaration by at least sixty-percent of the owners is the other key statutory requirement. RCW 64.32.090(13).

RCW 64.32.140 emphasizes that the recording of a condominium declaration and any amendment thereof is a prerequisite to the validity of such instrument: “The declaration, any amendment thereto, any instrument by which the property may be removed from this chapter and every instrument affecting the property or any apartment shall be entitled to be recorded . . . . Neither the declaration nor any amendment thereof shall be valid unless duly recorded.” With the recording of the declaration, there must also be filed a “in the office of the county auditor of the county in which the property is located a survey map of the surface of the land submitted to the provisions of this chapter showing the location or proposed location of the building.” RCW 64.32.100.

The value of the Horizontal Property Regime Act’s strict regime is apparent from the morass that has developed in this case. At no time did NYBA amend its declarations after 1981. *See* RP at 248-49, 255-57, 261-63, 265, 305, 318-19, 787; Exh. 294. Burbridge and Mercer Marine purchased the disputed land and later conveyed it to Seattle Marine. RP at 996, 1437. Mercer Marine and then both Seattle Marine and Bellevue looked to NYBA’s declarations to evaluate whether and how to redevelop the land Seattle Marine thought it owned. RP at 1138-40, 1553-54, 1571-

72, 1576; *see* RP at 1628-29. Had NYBA amended its declaration again to include an ownership interest or exclusive rights under the Quit Claim Deed, the effect of the Quit Claim Deed would have been clear. Seattle Marine could then have acted according to NYBA's purported interest before investing time and money in the property and its development.

Thus the declarations speak not only to NYBA's authority under law to hold the land, but also to putting the world on notice to its understanding of land ownership. The dispersed control and discontinuity of knowledge of organizations like NYBA demands the amendment of the declarations to prevent this exact situation. The legislature wisely required amendment of declarations to subject land to an association's control under the Act. NYBA chose not to declare its property rights and invoke its authority to control land under the Horizontal Property Regime Act. As a result, Mercer Marine and Seattle Marine took a superior interest in the land, regardless of what the Quit Claim Deed conveyed.

The trial court's decision not to enforce the purported conveyance of the Quit Claim Deed was wholly consistent with, and supported by, the Horizontal Property Regime Act.

D. Equitable Principles Bar Enforcement of the Quit Claim Deed.

The trial court invoked its broad powers in equity to decline enforcement of the Quit Claim Deed as a conveyance of fee title for two

additional reasons. First, the consideration, if any, provided in exchange for the Quit Claim Deed was so grossly inadequate as to shock the conscience. CP at 2816-17 (COL 2.13). Second, the doctrine of laches bars any attempt by NYBA to enforce the Quit Claim Deed. CP at 2817-17 (COL 2.15). This Court should reject NYBA's argument against these conclusions and affirm the trial court.

1. NYBA Cannot Assert Its Rights Because the Deed's Consideration Is Inequitable.

While inadequacy of consideration is not usually enough to preclude enforcement of a deed, *Downing v. State*, 9 Wn.2d 685, 688, 115 P.2d 972 (1941), “[t]here are some cases that hold [consideration] may be so grossly inadequate as to shock the conscience of an equity court, and, if that appears, then inadequacy of consideration may be sufficient to avoid a conveyance,” even when there is no undue influence or fraud. *Id.*; see also *Binder v. Binder*, 50 Wn.2d 142, 150-51, 309 P.2d 1050 (1957).

Here, there is substantial evidence to support the trial court's finding that no consideration was ever given or received in exchange for the Quit Claim Deed, see *supra* Section IV.A.2; see also Exhs. 12 & 13; RP at 156-60, 389-90, 649-50, 1466-1468; although the land has “real inherent value.” CP at 2803 (FOF 1.26(c)). That value is clear when considering the Commercial Parcel and its historic use. It has long been

used for commercial marina operations and is one of just a few properties in use for commercial, full-service marina operations on Lake Washington. RP at 372, 1532-34. It was for this reason that Seattle Marine acquired the property for \$4.15 million. Exh. 230; RP at 1536-37, 1574-76; *see* RP at 997-98. There can be little doubt that the three strips of property described in the Quit Claim Deed, two of which front the Lake on two sides of the Commercial Parcel, is indeed of real inherent value. That little or no consideration passed in exchange for fee title of those three strips of property would shock even the most jaded conscience.

For the first time on appeal, NYBA argues that forbearance of a lawsuit constitutes consideration, but there is absolutely no evidence that there was any agreement by NYBA to forbear on a lawsuit against Radovich and Keyes, let alone one issued in exchange for the Quit Claim Deed. To the contrary, several years after the Quit Claim Deed, when NYBA was still trying to sort out its legal rights concerning parking, it sued Radovich and Keyes. RP at 203-04; Exh. 29 ¶ 7.

2. The Doctrine of Laches Bars NYBA's Assertion of Fee Simple Title Under the Quit Claim Deed.

The trial court concluded that NYBA is barred by the doctrine of laches from seeking enforcement of the Quit Claim Deed as a conveyance of fee title. CP at 2817-18 (COL 2.15). The trial court reasoned that

NYBA has known for years that Mercer Marine and then Seattle Marine claimed ownership over the entire Commercial Parcel, but stayed silent and did nothing to assert any claim under the Quit Claim Deed. *Id.* The trial court found that NYBA's delay in bringing this action was unreasonable and that Seattle Marine has been unfairly harmed and prejudiced by such delay both financially and through the loss of important evidence. *Id.*

The trial court's application of laches should be affirmed. "To constitute laches there must not only be a delay in the assertion of a claim but also some change of condition must have occurred which would make it inequitable to enforce it." *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 477, 244 P.2d 273 (1952). Laches is shown when a party performs "some act in reliance upon nonaction by the other party or there had been long delay on the part of the latter in the assertion of his claim." *Waldrip*, 40 Wn.2d at 477.

Burbridge relied on NYBA's inaction. He believed and acted as though he had fee ownership of the entire Commercial Parcel, subject to NYBA's right to use portions of it under the easements. RP at 1440-49. It is undisputed that NYBA never raised a claim of fee title ownership of Easements 4, 5, and 6 when Burbridge proposed his own redevelopment project, RP at 808-09, 1490-91, even one proposing reconfiguration of the

easements. RP at 1491-92; Exh 422a. To the contrary, NYBA was open to reconfiguring the easements to accommodate the project. RP at 1494, 1496; *see* Exh. 216 pp. 2-5; Exh. 217 pp. 2-5.

Seattle Marine also relied on NYBA's inaction. It knew about Burbridge's redevelopment plans when it contemplated purchasing and redeveloping the Commercial Parcel. RP at 1536-39. Before closing, Bohling met with the NYBA board and discussed demolishing a structure on the land covered by Easement 5. *See* RP at 1672-73. NYBA's board said nothing to him about the Quit Claim Deed, nor did it otherwise assert any ownership interest in or to that land. *Id.* When Bohling discussed later redevelopment plans, no one mentioned the Quit Claim Deed or ownership of the areas covered by Easements 4, 5, or 6. RP at 1552-53.

Seattle Marine's initial plans showed changes that would affect the areas covered by Easements 4, 5, and 6, and, to a limited extent, the way NYBA used those areas, as did its redevelopment application on public file with the City of Bellevue. RP at 1584-85; Exh. 221; Exh. 227. In April 2007, Bohling showed the full set of plans to Anderson and the rest of NYBA's board. RP at 1589-90. No one at NYBA raised any concern about ownership of the land covered by Easements 4, 5, and 6. RP at 1589-92; *see* Exh. 232. Not until July 15, 2008 – over fifteen months after Bohling first met with the NYBA board and was very near the end of an

expensive permitting process – did anyone from NYBA first mention the Quit Claim Deed. RP at 1653. In the meantime, Seattle Marine had spent over \$500,000 on its redevelopment plan and another \$300,000 in equipment and pre-ordered materials. RP at 1657-58. Important evidence was lost through the recent deaths of Keyes and a former NYBA manager. RP at 369, 634-35.

Even Lang and Radovich stayed silent about the Quit Claim Deed while Seattle Marine moved forward with the city and state permitting processes. Lang learned of Seattle Marine’s redevelopment plans in February 2007, RP at 212; and attended NYBA’s annual meeting in February 2008 where Bohling and Bellevue land use specialist, David Pyle, presented details of the redevelopment, RP at 214-15; but Lang was silent about the Quit Claim Deed. RP at 214-15. In an informal discussion that followed that 2008 annual meeting Lang made a passing remark to the effect NYBA owned the land covered by Easements 4, 5, and 6, RP at 639-40; but Lang did nothing more to make his belief known. As a result, Anderson dismissed Lang’s passing comment as nothing more than a misunderstanding of what easement rights are. RP at 639-40.

Radovich also did nothing to make anyone aware of the Quit Claim Deed when he learned some of the details about Seattle Marine’s redevelopment plan. Radovich resorted to the Quit Claim Deed only when

he saw that he could no longer control or stop the redevelopment. *See* Exhs. 257, 272, 274. Even then, Anderson thought that Radovich, Lang, and the several others opposing the redevelopment “were engaging in a witch-hunt and mudslinging.” RP at 740-41. In fact, Anderson conceded that the goal of Radovich and Lang was to stop Seattle Marine’s project, regardless of any concessions or mitigation that Seattle Marine might agree to. RP at 749-50; *see, e.g.*, RP at 1635-45.

Based on the foregoing evidence, Seattle Marine established by clear and convincing evidence<sup>4</sup> that (1) NYBA slept on its rights; (2) Seattle Marine relied on NYBA’s inaction and decision to sleep on its rights; and (3) NYBA’s inaction injured Seattle Marine because it purchased property and expended considerable sums of money based on that reliance. Laches should bar any claim by NYBA because it took no steps to enforce the Quit Claim Deed or treat it as conveying fee title.<sup>5</sup>

E. NYBA Does Not Have An Exclusive Easement.

NYBA contends that it somehow acquired an exclusive easement by prescription. Such contention is apparently an effort to get around the

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<sup>4</sup> The clear and convincing evidence standard only applies here because laches, “when asserted in opposition to the interest of a landowner, must be proved by clear and convincing evidence.” *Arnold v. Melani*, 75 Wn.2d 143, 449 P.2d 800 (1968).

<sup>5</sup> The trial court further concluded that the doctrine of equitable estoppel bars any attempt by NYBA to enforce the Quit Claim Deed. CP at 2818 (COL 2.16). Many of the operative facts that apply to laches also apply to the analysis of the trial court’s application of equitable estoppel.

trial court's sound conclusions that (1) the easement declaration reserved rights in the easements for the Commercial Parcel, CP at 2821 (COL 2.25); and (2) the easements granted to NYBA under the easements declaration are non-exclusive. CP at 2821 (COL 2.26).

NYBA's claim for a prescriptive, exclusive easement is without factual support. As the trial court found, and as the substantial evidence outlined above confirms, *see supra* Section IV.A.3; both NYBA and Mercer Marine/Seattle Marine have used and accessed the land covered by Easements 4, 5, and 6 for decades believing they owned it. Nothing supports NYBA's contention that it "exclusively" used the easement areas, a necessary prerequisite to establishing its claim. *See Hoffman v. Skewis*, 35 Wn. App. 673, 676-77, 668 P.2d 1311 (1983).

F. NYBA's Claim for a Prescriptive Easement Is Not Ripe.

NYBA sought a ruling at trial that it had a prescriptive easement to cross part of the Commercial Parcel unencumbered by easements to access areas covered by Easements 5 and 6. The trial court rejected this claim on the basis that ingress and egress by NYBA across the Commercial Parcel was not "hostile," but was with permission. CP at 2821-22 (COL 2.27); *see RP at 610* ("And so we, for all the years I've owned a boat, 30 years there, we drive through here and then this way. So we have permissively – and Mercer Marine has kept this open even though it's their property,

they've kept it open for us to go through here.”).

On appeal, NYBA presses its position by now contending, for the first time, that it is entitled to an easement “by necessity.” Appellant’s Brief at 43-44. Its claim for an easement by necessity must be rejected because, first, it was not raised below, *see* RP at 1683; and, second, because it is not ripe for review. Seattle Marine’s redevelopment plan, as currently proposed, preserves access by the NYBA to Easements 5 and 6 through Easement 6 – in fact that access will be better than its current access. Exhs. 75, 227. Therefore, once the redevelopment plan is implemented, there will be no necessity for an access easement across any currently unencumbered portion of the Commercial Parcel. In the meantime, as Mercer Marine did before it, Seattle Marine has kept, and will continue to keep, clear the portion of its unencumbered Commercial Parcel over which NYBA has been permitted to pass to access Easements 5 and 6. Where, as here, there is no threatened interference in the use of land, an action cannot be maintained for theoretical exclusion. *See Humphrey v. Krutz*, 77 Wash. 152, 155-56, 137 P. 806 (1913).

G. The D-1/D-2 Frontage Was Adversely Possessed.

The trial court held that Seattle Marine acquired a very narrow strip of land and bulkhead in the launch area between the Commercial Parcel and the water in Slips D1 and D2 (the “D1/D2 Frontage”) through

adverse possession. CP at 2818-19 (COL 2.17-2.19); CP at 3355 (Judgment). NYBA presents no real argument beyond conclusory statements for why this decision was not supported by substantial evidence or by the law of adverse possession. The trial court's factual findings on adverse possession, CP at 2799-2800, 2811-12 (FOF 1.9-1.14, 1.58-1.59); are supported by substantial evidence and the trial court's conclusion, CP at 2818-19 (COL 2.17-2.19), is well reasoned and legally supported.

To adversely possess land, the user of the property need not be the holder of fee title interest; the user need only use the land "as the owner himself would[,] entirely disregarding the claims of others, asking permission from no one, and using the property under a claim of right." *Drake v. Smersh*, 122 Wn. App. 147, 155, 89 P.3d 726 (2004) (quoting *Lingvall v. Bartmess*, 97 Wn. App. 245, 250, 982 P.2d 690 (1999)) (editorial and quotation marks omitted). "Hostility . . . 'does not import enmity or ill-will, but rather imports that the claimant is in possession as owner, in contradistinction to holding in recognition of or subordination to the true owner.'" *Chaplin v. Sanders*, 100 Wn.2d 853, 857-58, 676 P.2d 431 (1984) (quoting *King v. Bassindale*, 127 Wash. 189, 192, 220 P. 777 (1923)). Instead, it is key that the "claimant believed the land to be his own and treated it as such," making "his possession . . . hostile as to the rest of the world." *Chaplin*, 100 Wn.2d at 858.

The use and possession of the D1/D2 Frontage first by Mercer Marine and then continuing by Seattle Marine is no doubt “adverse” and “hostile.” There is no evidence that NYBA ever consented to the use of the D-1/D-2 frontage area. And NYBA was vocal about impingements on its use of other areas but never vocalized any concerns about the D-1/D-2 Frontage. Indeed, NYBA assigns no error to findings of fact 1.58 or 1.59, both of which underlie the conclusion that Mercer Marine adversely possessed the land. CP at 2811-12. Seattle Marine, and Mercer Marine before it, had stored equipment, keel blocks, and other items in front of the D-2 slip. RP at 961, 1397-98, 1401, 1451; *see* Exhs. 267, 278, 285. The travel lift was used and parked in front of Slip D1 on the permanent concrete ramps leading up to the bulkhead and finger-pier defining that slip. RP at 1398-1401, 1451; *see* Exhs. 286, 295. In the late-1990s, Mercer Marine replaced the ramps leading up to D-1, repaired the pavement underneath the area around D-1 and D-2, and repaired parts of those docks and bulkheads. RP at 1396-97, 1451, 1501.

Given Mercer Marine’s “hostile” use of the D-1/D-2 frontage area, as continued by Seattle Marine, the trial court’s decision should stand.

H. Development Plans Do Not Overburden Any Easement.

NYBA maintains that Seattle Marine’s proposed use will overburden the easements in numerous ways, Appellant’s Brief at 46-49,

but for the reasons stated above, *supra* Section IV.A.4, the finding that no such overburdening will occur is supported by substantial evidence.

The use of an easement is not a static thing – a court must look to past activities, the purpose of the easement, acquiescence by the dominant estate, and proposed activities. *Lee v. Lozier*, 88 Wn. App. 176, 187-88, 945 P.2d 214 (1997). A change in the scope of the use is far different than a mere increase in intensity or degree of use. *Snyder v. Haynes*, 152 Wn. App. 774, 781, 217 P.3d 787 (2009); *Lee*, 88 Wn. App. at 188.

The scope of how the Commercial Parcel has been used predates the easement declaration, and that use has not materially changed in over 30 years. *See* RP at 376-77. As shown above, Seattle Marine's planned development will not overburden or misuse any parking easement. Its use of the D-1/D-2 Frontage Area also will not overuse or misuse any easements. *See* Appellant's Brief at 48. Mercer Marine used D-1 for haul-out and D-2 for servicing boats and staging boats for pickup and drop-off, including from Burbridge's personal dry-land storage business. RP at 1390, 1454-57, 1465. Lang admitted that, in his view, Seattle Marine had a prescriptive right to reach the D-dock. RP at 234-35. And he admitted that Slips D-1 and D-2 are outside NYBA's fenced-off premises, as if not part of the association. RP at 282-83; *see* RP at 1385. Radovich agreed that he never intended to affect the commercial use of D-

1 and D-2 when he created the Association. RP at 376-77. Nor did the various easements affect D-1 or D-2 and the haul-out area. RP at 387-88.

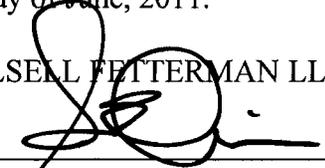
There is also substantial evidence in the record that the use of Easements 2 and 7 will be no different than existed. *See* Appellant's Brief at 48-49. Customers parked in Easement 2 and Mercer Marine parked boats in Easement 2. RP at 1394, 1412, 1451. If boats were left briefly and not overnight, NYBA did not prohibit Mercer Marine's temporary boat parking in Easement 2; though, NYBA has curtailed boat parking after Seattle Marine assumed ownership. RP at 1413, 1422-24, 1451. Mercer Marine also used the bulkhead area between D and E docks, covered by Easement 7, for hauling out engines or equipment from boats and for staging boats for haul-out, pickup, and servicing. RP at 1391, 1478; Exhs. 111, 112, & 118. NYBA never complained about these uses. RP at 1480. NYBA's plans do not change the scope of these uses or overburden any easement.

V. CONCLUSION

The trial court's findings and conclusions should be affirmed.

DATED this 1st day of June, 2011.

HELSELL FETTERMAN LLP

By 

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**Certificate of Service**

I, Joanne Burt, hereby certify that on the 1<sup>st</sup> day of June, 2011, I caused to be served true and correct copies of the following documents; RESPONDENT SEATTLE MARINE'S BRIEF; and this DECLARATION OF SERVICE, to the following persons in the manner indicated below:

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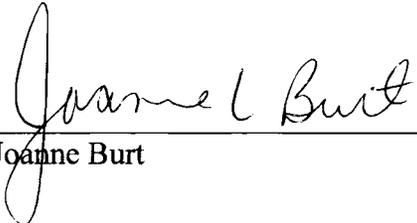
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I certify under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

EXECUTED this 1<sup>st</sup> day of June, 2011, at Seattle, Washington.

  
\_\_\_\_\_  
Joanne Burt