

64498-0

64498-0

2017 JUN 13 10:07

No. 64498-0-I

COURT OF APPEALS  
DIVISION I OF THE STATE OF WASHINGTON

---

WHIDBEY ISLAND BANK,

Appellant,

v.

ZERVAS GROUP ARCHITECTS, P.S., BAY VIEW TOWER LLC,  
DAVID HUGHES and MARY HUGHES,

Respondents.

---

APPELLANT'S OPENING BRIEF

---

Gregory L. Ursich, WSBA #18614  
Rosemary A. Larson, WSBA #18084  
Attorneys for Appellant Whidbey  
Island Bank

**Inslee, Best, Doezie & Ryder, P.S.**  
777 - 108th Avenue N.E., Suite 1900  
Bellevue, Washington 98004  
(425) 455-1234

ORIGINAL

TABLE OF CONTENTS

**I. NATURE OF THE CASE..... 1**

**II. ASSIGNMENTS OF ERROR ..... 3**

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 3**

**IV. STATEMENT OF THE CASE..... 4**

**A. Statement of Facts..... 4**

**B. Statement of Procedural History..... 10**

**V. AUTHORITY AND ARGUMENT ..... 11**

**A. The Standard of Review on Appeal is De Novo. .... 11**

**B. As a Matter of Law, Under RCW 60.04.031(5), Zervas's Lien Does Not Have Priority over the Bank's Two Deeds of Trust. .... 13**

**1. In general, under Washington law, an interest in real property that is recorded first has priority over interests that are recorded later. .... 13**

**2. Under RCW 60.04.031(5), if a lien claimant provides "professional services," no physical improvement has been commenced, and the services are not visible from inspection of the property, then the lien claimant must record a statutory notice to preserve its lien priority against subsequent good faith lenders. .... 14**

**3. Case law from Washington and other jurisdictions supports the conclusion that Whidbey Island Bank's Deeds of Trust are prior to Zervas's professional services construction lien..... 30**

**C. At the Very Least, an Issue of Material Fact Exists as to Whether the Bank Had "Notice of the Professional Services" under RCW 60.04.031(5). .... 40**

**D. Whidbey Island Bank Is Entitled to an Award of Attorneys'  
Fees Incurred in this Action..... 42**

**VI. CONCLUSION ..... 44**

## TABLE OF AUTHORITIES

### CASES

<i>Aladdin Heating Corp v. Trustees of the Central States, Southeast &amp; Southwest Pension Fund,</i> 93 Nev 257, 563 P2d 82, 84 (1977).....	36, 39
<i>Applied Ind. v. Mellon,</i> 74 Wn.App. 73, 872 P.2d 87 (1994).....	26
<i>Bellevue Fire Fighters Local 1604 v. City of Bellevue,</i> 100 Wn.2d 748, 675 P.2d 592 (1984).....	22
<i>Bulman v. Safeway, Inc.,</i> 144 Wn.2d 335, 27 P.3d 1172 (2001).....	12, 41
<i>City of Walla Walla v. Topel,</i> 104 Wn.App. 816, 17 P.3d 1244 (2001).....	12, 18
<i>Darling v. Kagan,</i> 133 So.2d 599 (1961).....	37, 38
<i>Davis v. Dept. of Lic.,</i> 137 Wn.2d 957, 963, 977 P.2d 554 (1999).....	26
<i>Dean v. McFarland,</i> 81 Wn.2d 215, 500 P.2d 1244 378 (1972).....	20
<i>Delyria v. Wash. St. School for Blind,</i> 165 Wn.2d 559, 199 P.3d 980 (2009).....	22
<i>D'Orsay Int'l. Partners v. Sup. Ct. of Los Angeles County,</i> 123 Cal.App.4th 836, 20 Cal. Rptr. 3d. 399 (2004).....	33, 34
<i>E.W. Allen &amp; Assoc. v. FDIC,</i> 76 F.Supp. 1504 (1991) .....	37
<i>Emerald City Electric &amp; Lighting, Inc. v. Jensen Electric, Inc.,</i> 68 Wn.App. 734, 846 P.2d 559 (1993).....	43
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles,</i> 148 Wn.2d 224, 59 P.3d 655 (2002).....	28
<i>Gollehon, Schemmer &amp; Assocs., Inc. v. Fairway-Bettendorf Assocs.,</i> 268 N.W.2d 200, 202 (Iowa 1978) .....	36

<i>Griffin v. Thurston County Board of Health,</i> 165 Wn.2d 50, 196 P.3d 141 (2008).....	18, 28
<i>Hash v. Children's Orthopedic Hospital,</i> 110 Wn.2d 912, 757 P.2d 507 (1988).....	12, 41
<i>Hazelwood v. Bremerton Ice Arena,</i> 166 Wn.2d 489, 210 P.3d 308 (2009).....	28
<i>In re Commercial Investments,</i> 92 B.R. 488 (1988).....	37
<i>In re Sehome Park Care Center, Inc.,</i> 127 Wn.2d 774, 903 P.2d 443 (1995).....	21
<i>Ketchum, Konkel, Barrett, Nickel &amp; Austin v. Heritage Mountain Dev. Co.,</i> 784 P.2d 1217, 123 Utah Adv. Rep. 23 (1989).....	34, 35, 36, 37
<i>Kitsap County v. Moore,</i> 144 Wn.2d 292, 26 P.3d 931 (2001).....	23
<i>Lind v. City of Bellingham,</i> 139 Wash. 143, 245 P. 925 (1926).....	14
<i>Lumberman's, Inc. v. Barnhardt,</i> 89 Wn.App. 283, 949 P.2d 382 (1997).....	20, 41
<i>M E Kraft Excavating &amp; Grading Co v Barac Construction Co,</i> 279 Minn 278, 156 NW2d 748, 752 (1968).....	39
<i>McAndrews Group Ltd. v. Ehmke,</i> 121 Wn. App. 759, 90 P.2d 1123 (2004).....	30, 31
<i>Mutual Savings &amp; Loan Ass'n v. Johnson,</i> 153 Wash. 41, 279 P. 108 (1929).....	32
<i>Pacific Gamble Robinson Co. v. Chef-Reddy Food Corp.,</i> 42 Wn.App. 195, 710 P.2d 804 (1985).....	20, 41, 42
<i>Parents Involved v. Seattle Sch. Dist.,</i> 149 Wn.2d 660, 72 P.3d 151 (2003).....	26
<i>Pearson Construction, Inc. v. First Community Bank of Wash.,</i> 111 Wn.App. 174, 43 P.3d 1261 (2002).....	44
<i>Ranger Ins. Co. v. Pierce County,</i> 164 Wn.2d 545, 192 P.3d 886 (2008).....	12

<i>Reuben E. Johnson Co. v. Phelps,</i> 279 Minn. 107, 156 N.W.2d 247, 251-52 (1968) .....	36
<i>Schumacher Painting Co. v. First Union Mgmt. Inc.,</i> 69 Wn.App. 693, 850 P.2d 1361 (1993) .....	20, 41
<i>Seattle Bldg. &amp; Constr. Trade Council v. Apprenticeship &amp; Training Council,</i> 129 Wn.2d 787, 920 P.2d 581 (1996) .....	12
<i>Seven Gables Corp. v. MGM/UA Ent. Co.,</i> 106 Wn.2d 1, 721 P.2d 1 (1986) .....	29
<i>Spokane County v. Bates,</i> 96 Wn.App. 893, 982 P.2d 642 (1999) .....	13
<i>State v. Alvarez,</i> 74 Wn.App. 250, 872 P.2d 1123 (1994) .....	21
<i>State v. Delgado,</i> 148 Wn.2d 723, 63 P.3d 792 (2002) .....	26
<i>State v. Gossage,</i> 165 Wn.2d 1, 195 P.3d 525 (2008) .....	22
<i>State v. Jackson,</i> 91 Wn.App. 488, 957 P.2d 1270 rev. denied 137 Wn.2d 1038 (1999)	13
<i>State v. Posey,</i> 161 Wn.2d 638, 167 P.3d 560 (2007) .....	12, 18
<i>Torkko/Korman/Engineers v. Penland Ventures,</i> 673 P.2d 769, 773 (Alaska 1983) .....	36
<i>Tracy Price Assocs. v. Hebard,</i> 266 Cal. App. 2d 778, 72 Cal. Rptr. 600, 606 (1968) .....	36
<i>Udall v. T.D. Escrow Services, Inc.,</i> 159 Wn.2d 903, 154 P.3d 882 (2007) .....	18
<i>Vaughn v. Chung,</i> 119 Wn.2d 273, 830 P.2d 668 (1992) .....	21
<i>Walker v. Lytton Sav. &amp; Loan Ass'n.,</i> 2 Cal. 3d 152, 465 P.2d 497, 502, 84 Cal. Rptr. 521 (1970) ....	36, 39, 40
<i>Western Mortgage Loan Corp v. Cottonwood Construction Co,</i> 18 Utah 2d 409, 412 .....	39

<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	26, 29
<i>Williams &amp; Works, Inc. v. Springfield Corp.</i> , 408 Mich. 732, 293 N.W.2d 304, 311 (1980).....	36, 38, 39, 40

**STATUTES**

Chapter 60.04 RCW.....	14, 16, 17, 19, 20, 22, 24, 43
RCW 60.04.011(13).....	15
RCW 60.04.011(5).....	17
RCW 60.04.011(5)(a) or (b) .....	16, 17
RCW 60.04.021 .....	14, 15, 22
RCW 60.04.031 .....	14, 18, 20, 22, 24, 25, 26, 30, 32, 41
RCW 60.04.031(5).....	1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 17, ..... 18, 19, 21, 27, 28, 29, 30, 31, 33, 34, 40, 42
RCW 60.04.031(6).....	18
RCW 60.04.051 .....	15
RCW 60.04.061 .....	16, 22, 24
RCW 60.04.091 .....	15
RCW 60.04.130 .....	43
RCW 60.04.181 .....	44
RCW 60.04.181(1).....	43
RCW 60.04.181(3).....	43, 44
RCW 60.04.900 .....	20
RCW 65.08.070 .....	13

**RULES**

RAP 18.1 .....	44
RAP 18.1(a) .....	43
RAP 2.3(b)(4) .....	11

**OTHER AUTHORITIES**

8 Thompson, REAL PROPERTY §4291 (1963)..... 14  
Chapter 281, Laws of 1991 ..... 22, 23  
Chapter 281, Laws of 1992..... 24  
Final B. Rep. on Substitute Senate Bill 5497, at p. 222, 52nd Leg., Reg.  
Sess. (Wash. 1991)..... 23  
H. B. Rep. on Engrossed Senate Bill 6441, 52nd Leg., Reg. Sess. (Wash  
1992)(As Passed Legislature) ..... 25

## I. NATURE OF THE CASE

This matter arises out of a development project proposed for real property in Bellingham, Washington. Appellant Whidbey Island Bank loaned a total of \$900,000 to the developer, Bay View Towers, LLC, to fund a portion of the project's costs. Whidbey Island Bank obtained mortgages secured by two Deeds of Trust (for the sums of \$750,000 and \$150,000) to secure the loans, and recorded the Deeds of Trust against the property on April 25, 2006 and August 23, 2006, respectively.

Unknown to Whidbey Island Bank, Bay View Towers had contracted with Respondent Zervas Group Architects for architectural services in connection with the project. Although Zervas allegedly commenced work for Bay View Towers in August 2005, Zervas did not record any Notice of Furnishing Professional Services under RCW 60.04.031(5), and did not record its lien for professional services in the amount of \$269,309.20 until July 31, 2007, fifteen months after Whidbey Island Bank recorded its first Deed of Trust, and eleven months after the Bank recorded its second Deed of Trust. None of Zervas's services involved physical improvements or work on the property; therefore, even though Whidbey Island Bank performed thorough due diligence, including a physical inspection of the site, the Bank did not

have notice of the services performed by Zervas when the Bank loaned Bay View Towers the funds and recorded its two Deeds of Trust.

When Bay View Towers failed to pay Zervas, Zervas commenced this lien foreclosure action and moved for partial summary judgment, arguing that its lien for professional services has priority over Whidbey Island Bank's two Deeds of Trust. The Superior Court agreed; the Superior Court erred in this regard. As a matter of law, under RCW 60.04.031(5), Zervas's failure to record a notice of furnishing professional services precludes Zervas's lien from having priority over Whidbey Island Bank's two Deeds of Trust, which were recorded months before Zervas recorded its lien. At the very least, an issue of material fact exists as to whether the Bank had "notice of the professional services being provided" by Zervas under RCW 60.04.031(5).

Therefore, Whidbey Island Bank requests that this Court reverse the Superior Court's summary judgment order, which ruled that Zervas's lien has priority over Whidbey Island Bank's two Deeds of Trust, and remand this case to the Superior Court for entry of partial summary judgment in favor of Whidbey Island Bank, ruling that the Bank's Deeds



of Trust are prior to any lien of Zervas.

## **II. ASSIGNMENTS OF ERROR**

A. The Superior Court erred in entering the October 23, 2009 Order Granting Zervas Group Architects' Motion for Partial Summary Judgment Against Defendant Whidbey Island Bank.

B. The Superior Court erred by ruling that Zervas's lien for professional services has priority over Whidbey Island Bank's two Deeds of Trust, even though the Bank recorded its Deeds of Trust more than fifteen months and eleven months before Zervas recorded its lien.

C. The Superior Court erred in its interpretation of RCW 60.04.031(5).

D. At the very least, the Superior Court erred by not determining that an issue of fact exists precluding summary judgment as to whether Whidbey Island Bank had "notice of the professional services being provided" by Zervas under RCW 60.04.031(5).

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

A. Whether Zervas's failure to record a notice of furnishing professional services under RCW 60.04.031(5) precludes Zervas's lien from having priority over Whidbey Island Bank's two Deeds of Trust, where the Bank recorded its Deeds of Trust more than fifteen and eleven months before Zervas recorded its lien for professional services?

B. Whether, at the very least, an issue of fact exists as to whether Whidbey Island Bank had "notice of the professional services being provided" by Zervas under RCW 60.04.031(5), precluding summary judgment?

#### IV. STATEMENT OF THE CASE

##### A. Statement of Facts.

Appellant Whidbey Island Bank (the Bank) is a Washington banking corporation, with offices in Whatcom County, Washington.

Bay View Towers LLC is a Washington limited liability company in the business of developing real property. CP 556, 860. In March of 2006, two members of Bay View Towers, Steve Verbarendse and William Honea ("Developers"), initiated a meeting with the Bank in order to request that the Bank provide financing for a high-rise condominium mixed use project in downtown Bellingham, Washington. CP 556, 703.

Thus, in March 2006, the Bank's Regional Manager (Timothy Northrop) and Senior Vice President (James Stewart) met with the Developers to discuss the project. CP 556, 703. Mr. Verbarendse was familiar to the Bank officials because he was an ongoing customer of the Bank. CP 703.

The Developers explained to the Bank officials that they were

developing a condominium high rise mixed use project in downtown Bellingham, and requested that the Bank loan Bay View Towers the sum of \$750,000.00 for the project. CP 556, 703. The Developers informed the Bank officials that the \$750,000 would fund additional "soft costs" to move the condominium project to permitting with the City of Bellingham. *Id.* The Developers told the Bank officials that they had already spent \$953,000 of their own funds on unspecified "soft costs" for the project. *Id.* The Developers indicated that the initial "soft costs" had been paid "out-of-pocket" by the Developers and Bay View Towers, and the requested loan was for future project costs, not to reimburse the Developers for costs already paid. *Id.* The Bank officials understood that the additional soft costs could include undefined engineering studies, architectural work or planning for the project. CP 556, 704-5.

After the March 2006 meeting, the Bank began the loan application process by ordering an appraisal of the property. CP 557, 703. The appraisal, dated April 19, 2006, determined that the land's value was \$1,625,000. CP 557-8, 565, 704. The only information in the appraisal regarding previous studies on the property was a partial

copy of a Geo-Engineers geotechnical report.<sup>1</sup> CP 560, 672-93.

Whidbey Island Bank then prepared a loan request and credit package for the proposed loan. CP 557. On April 7, 2006, Mr. Northrop and Mr. Stewart met a second time with the Developers. CP 557, 703. The Developers confirmed that they had already paid \$953,000 for various undefined soft costs and they needed the additional \$750,000 to finance future additional soft costs to take the project through permitting. CP 557. The Bank officials were led to believe that the previous "soft costs" had been fully paid and there were no arrearages. CP 557, 703. The Developers did not specify the identity of any professional service provider. CP 557. In particular, the Developers did not mention that Zervas had performed work on the project, or was going to work on the project in the future. CP 557-8, 703. Further, no architectural drawings or any contracts between Zervas and Bay View Towers were ever disclosed or provided to the Bank. *Id.*

As part of the loan application process, in April 2006, Mr. Northrop personally inspected the property, in part to determine if any work was in progress on the site, to avoid the issue of senior

---

<sup>1</sup> The geotechnical report was not initially attached to the appraisal. Whidbey Island Bank received that report only shortly before the \$750,000 loan

construction liens taking priority over the Bank's loan. CP 559. At the site, Mr. Northrop observed that the land contained an existing parking lot with no visible sign of any construction activity. *Id.* The property did not contain any stakes, holes, trenches, signs or other physical evidence of construction or development studies being conducted. CP 559, 660-62.

On April 11, 2006, Whidbey Island Bank obtained a preliminary commitment for title insurance, to ensure that no recorded liens existed that would prevent the Bank from obtaining a first lien position on the property to secure the potential Bay View Towers loan. CP 559, 664-70. The preliminary commitment indicated only one item of concern, a deed of trust recorded February 21, 2006, by David and Mary Hughes. CP 559-60. When this was reported to the Developers, the Developers obtained a subordination agreement from the Hughes. *Id.*

Importantly, the preliminary commitment for title insurance indicated that there were no construction liens or other notices recorded against the property by persons performing work on or in connection with the property. *Id.*

Whidbey Island Bank also obtained a "review appraisal," that

confirmed that the value of the property was \$1,625,000. CP 704.

Finally, in late April 2006, Whidbey Island Bank received a copy of the partial geotechnical report that was prepared by GeoEngineers referenced in the appraisal. The report contained no reference to Zervas, or to any architectural work being performed on the project. CP 560, 704.

On April 25, 2006, the first \$750,000 loan to Bay View Towers funded and closed, and the Bank recorded its Deed of Trust securing the loan. CP 560. The loan closed only after the Bank's due diligence, including discussions with the Developers, physical inspection of the site, and review of the two appraisals, preliminary commitment for title insurance, and geotechnical report. CP 561.

Subsequently, in July 2006, the Developers approached Whidbey Island Bank and requested a second loan of \$150,000 to fund additional "soft costs." CP 561, 705. The Bank again went through its usual loan application and due diligence process. The Bank obtained a new preliminary commitment for title insurance on the property and again determined that the only item that would affect the priority of the second Bank loan, other than the Bank's first loan, was the Hughes deed of

trust. *Id.* The Hughes signed another subordination agreement, subordinating their interest to the Bank's second loan. *Id.* Again, the Developers never discussed, disclosed or provided any documents regarding any work by or involvement of Zervas on the project. CP 561-2, 705.

On August 23, 2006, the second loan to Bay View Towers in the amount of \$150,000 closed, and Whidbey Island Bank recorded its second Deed of Trust securing this loan on this date. CP 815-6, 863.

Unknown to Whidbey Island Bank, according to Zervas, Zervas commenced work on the Bay View Towers project on August 22, 2005, and performed architectural work on the project until June 14, 2007. CP 557-61, 703-5, 716, 813. On December 29, 2005, Bay View Towers and Zervas entered into a written contract, under which Zervas was to design and engineer the development. CP 716, 718-32.

Zervas alleges that by November 2006, Bay View Towers owed Zervas the sum of \$231,667. CP 716. Incredibly, Zervas never recorded a Notice of Furnishing Professional Services as required under RCW 60.04.031(5). In fact, as acknowledged by Zervas, Bay View Towers requested that Zervas continue work on the project and forbear

from recording a lien or other notice of Zervas's services, while Bay View attempted to obtain additional financing. CP 716. Zervas complied with this request, and did not file a lien. *Id.* Zervas finally recorded its lien for professional services on July 31, 2007, in the amount of \$269,309.20, one year and three months after Whidbey Island Bank recorded its first Deed of Trust, and eleven months after the Bank recorded its second Deed of Trust. *Id.*

**B. Statement of Procedural History.**

Zervas commenced this lien foreclosure action in Whatcom County Superior Court (Cause No. 08-2-00308-2), seeking to foreclose its lien for professional services. CP 860-5. Zervas filed a motion for partial summary judgment on the issue of whether its lien for professional services has priority over the Bank's two Deeds of Trust. CP 812-26. The Bank likewise requested partial summary judgment in its favor, seeking a ruling that the Bank's Deeds of Trust are prior to Zervas's lien. CP 540-54.

The Superior Court granted Zervas's motion and denied the Bank's motion. On October 23, 2009, the Superior Court entered its Order Granting Zervas Group Architects' Motion for Partial Summary

Judgment Against Defendant Whidbey Island Bank ("Decision"). CP 16-19. The Decision determined that Zervas's lien for professional services has priority over Whidbey Island Bank's two Deeds of Trust, even though the Bank recorded its Deeds of Trust more than fifteen months and eleven months, respectively, before Zervas recorded its lien. CP 17-18. In the Decision, the parties stipulated and the Court certified that the Decision:

involves a controlling issue of law as to the interpretation of RCW 60.04.031(5) as to which there is substantial ground for difference of opinion and that an immediate review of this Order may materially advance the ultimate termination of the litigation.

CP 18.

The Bank filed a Notice of Discretionary Review with this Court, seeking review of the Superior Court's Decision. CP 8-15. Pursuant to RAP 2.3(b)(4), this Court granted discretionary review.

## **V. AUTHORITY AND ARGUMENT**

### **A. The Standard of Review on Appeal is De Novo.**

The grant of a motion for summary judgment is reviewed de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192

P.3d 886 (2008). The appropriate standard of review was explained in

*Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 351, 27 P.3d 1172 (2001):

In reviewing a grant of summary judgment, [the appellate court] engage in the same inquiry as the trial court. Summary judgment is appropriate where our review of all evidence shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Facts and all reasonable inferences there from are considered in the light most favorable to the nonmoving party, and summary judgment will be upheld only where, from all the evidence, we find that reasonable minds could have reached but one conclusion. (citations omitted.)

See *Hash v. Children's Orthopedic Hospital*, 110 Wn.2d 912, 915, 757

P.2d 507 (1988) (all reasonable inferences must be resolved against the party seeking summary judgment).

Moreover, this matter involves the proper interpretation of a statute -- RCW 60.04.031(5). Statutory interpretation is a question of law; therefore, the appellate court reviews the interpretation of a statute de novo. *State v. Posey*, 161 Wn.2d 638, 643, 167 P.3d 560 (2007); *City of Walla Walla v. Topel*, 104 Wn.App. 816, 819, 17 P.3d 1244 (2001); *Seattle Bldg. & Constr. Trade Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 799, 920 P.2d 581 (1996) ("Where the interpretation of statutory provisions is at issue, we review de

novo"). Likewise, the application of a statute to a specific set of facts is an issue of law and therefore the appellate court's review is de novo. *Spokane County v. Bates*, 96 Wn.App. 893, 896, 982 P.2d 642 (1999); *State v. Jackson*, 91 Wn.App. 488, 491, 957 P.2d 1270 rev. denied 137 Wn.2d 1038 (1999).

**B. As a Matter of Law, Under RCW 60.04.031(5), Zervas's Lien Does Not Have Priority over the Bank's Two Deeds of Trust.**

**1. In general, under Washington law, an interest in real property that is recorded first has priority over interests that are recorded later.**

Under Washington statutes governing the recording of interests in real property, Washington is a "race-notice" recording state. Pursuant to RCW 65.08.070, every conveyance of real property that is not recorded with the county recording officer "is void as against any subsequent purchaser or mortgagee in good faith and for valuable consideration from the same vendor ... of the same real property or any portion thereof whose conveyance is first duly recorded." Thus, under Washington's general recording scheme, a bona fide lender takes free and clear of prior encumbrances if they are not recorded. As long recognized by the Washington Supreme Court:

The rule is that a person purchasing real property may rely on the record title to the property, in the absence of

knowledge of title of another, or of facts sufficient to put him on inquiry.

*Lind v. City of Bellingham*, 139 Wash. 143, 147, 245 P. 925 (1926).

The policy underlying the recording statutes supports protection of bona fide lenders against loss from secret liens or conveyances not disclosed by the public record or not ascertainable by due diligence. 8 Thompson, REAL PROPERTY §4291 (1963).

2. **Under RCW 60.04.031(5), if a lien claimant provides "professional services," no physical improvement has been commenced, and the services are not visible from inspection of the property, then the lien claimant must record a statutory notice to preserve its lien priority against subsequent good faith lenders.**

Chapter 60.04 RCW authorizes liens on improvements on real property arising out of the performance of certain work, including professional services, in connection with construction projects:

Except as provided in RCW 60.04.031, **any person furnishing labor, professional services, materials, or equipment for the improvement of real property shall have a lien upon the improvement** for the contract price of labor, professional services, materials, or equipment furnished at the instance of the owner, or the agent or construction agent of the owner.

RCW 60.04.021 (emphasis added).<sup>2</sup> Every person claiming a lien under

---

<sup>2</sup> "Professional services" are "surveying, establishing or marking the boundaries of, preparing maps, plans, or specifications for, or inspecting,

RCW 60.04.021 must file for recording, in the county where the subject property is located, a notice of claim of lien not later than ninety days after the person has ceased to furnish labor, professional services, materials, or equipment. *RCW 60.04.091*. The ninety-day period for filing the claim of lien is a period of limitation, and no action to foreclose the lien may be maintained, unless the lien claimant has filed the claim of lien within that ninety-day period. *Id.*

In addition to the construction lien attaching to the improvement, the real property on which the improvement is located may be subject to the lien:

The lot, tract, or parcel of land which is improved is subject to a lien to the extent of the interest of the owner at whose instance ... the labor, professional services, equipment, or materials were furnished, as the court deems appropriate for satisfaction of the lien. If, for any reason, the title or interest in the land upon which the improvement is situated cannot be subjected to the lien, the court in order to satisfy the lien may order the sale and removal of the improvement from the land which is subject to the lien.

*RCW 60.04.051*.

In some instances, construction liens arising under Chapter 60.04

---

testing, or otherwise performing any other architectural or engineering services for the improvement of real property." *RCW 60.04.011(13)*. The parties do not dispute that in this case, Zervas provided "professional services" under Chapter 60.04 RCW.

RCW are an exception to the general rule regarding priority of real property conveyances. Generally, the claim of lien under Chapter 60.04 on any parcel of land:

... shall be prior to any lien, mortgage, deed of trust or other encumbrance which attached to the land after or was unrecorded at the **time of commencement of labor or professional services** or first delivery of materials or equipment **by the lien claimant**.

*RCW 60.04.061* (emphasis added).

However, consistent with Washington's general laws governing the recording of real property conveyances, in some circumstances Chapter 60.04 RCW requires that a pre-lien notice be filed in order for a claimant to preserve its lien priority back to the commencement of labor or services. If a lien claimant provides "professional services," such as surveying, architectural, or engineering work, no physical improvement has been commenced on the property (as defined in RCW 60.04.011(5)(a) or (b)),<sup>3</sup> and the professional services are not visible from an inspection of the real property, then the lien claimant

---

<sup>3</sup> "Improvement" is defined as "(a) Constructing, altering, repairing, remodeling, demolishing, clearing, grading, or filling in, of, to, or upon any real property or street or road in front of or adjoining the same; (b) planting of trees, vines, shrubs, plants, hedges, or lawns, or providing other landscaping materials on any real property; and (c) providing professional services upon real property or in preparation for or in conjunction with the intended activities

must record a statutory pre-lien "Notice of Furnishing Professional Services" in order to preserve its lien priority as of the first day of work against subsequent lenders who act in good faith and pay valuable consideration. RCW 60.04.031(5) states:

Every potential lien claimant providing professional services where no improvement as defined in RCW 60.04.011(5)(a) or (b) has been commenced, and the professional services provided are not visible from an inspection of the real property, may record in the real property records of the county where the property is located a notice which shall contain the professional service provider's name, address, telephone number, legal description of property, the owner or reputed owner's name, and the general nature of the professional services provided. **If such notice is not recorded, the lien claimed shall be subordinate to the interest of any subsequent mortgagee and invalid as to the interest of any subsequent purchaser if the mortgagee or purchaser acts in good faith and for valuable consideration acquires an interest in the property prior to the commencement of an improvement as defined in RCW 60.04.011(5)(a) or (b) without notice of the professional services being provided. The notice described in this subsection shall be substantially in the following form: ....**

*RCW 60.04.031(5)*(emphasis added).<sup>4</sup> A lien authorized by Chapter 60.04, including a lien for professional services, "shall not be enforced unless the lien claimant has complied with the applicable provisions of

---

in (a) or (b) of this subsection. *RCW 60.04.011(5)*.

<sup>4</sup> RCW 60.04.031(5) then provides a form titled "NOTICE OF FURNISHING PROFESSIONAL SERVICES."

[RCW 60.04.031.]" RCW 60.04.031(6).

Statutory interpretation is a question of law; therefore, the appellate court reviews the interpretation of a statute de novo. *State v. Posey*, 161 Wn.2d 638, 643, 167 P.3d 560 (2007); *City of Walla Walla v. Topel*, 104 Wn.App. 816, 819, 17 P.3d 1244 (2001). The Court's objective in construing a legislative enactment is to determine the legislative intent. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). If the statute's meaning is plain on its face, the Court gives effect to that plain meaning as an expression of legislative intent. *Id.* The plain meaning of a statute:

is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole."

*Udall*, 159 Wn.2d at 909; *Griffin v. Thurston County Board of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008)("We may also discern plain meaning [of a statute] from related provisions and the statutory scheme as a whole").

Here, the phrase "without notice" in the second to last sentence of RCW 60.04.031(5) must refer to the specific statutory written notice of furnishing professional services detailed in the preceding and following

sentences (and even in a preceding clause in the same sentence). The word "notice" is used in at least four other places in RCW 60.04.031(5) to refer to the written "Notice of Furnishing Professional Services." If the legislature intended something other than the statutory written notice, the legislature would have used a different term.

Read in context, and consistent with Washington's "race/notice" recording system and with the Chapter 60.04 construction lien scheme under which most liens do not arise at all until a physical, on-site improvement is commenced, the term "notice" in the second to last sentence must refer to the written "Notice of Furnishing Professional Services." Because Zervas failed to record a statutory pre-lien Notice of Furnishing Professional Services, Zervas's lien does not have priority over a bona fide lender acting in good faith, such as Whidbey Island Bank, that recorded its Deeds of Trust before Zervas recorded its lien.

Even if RCW 60.04.031(5) was deemed ambiguous on this point, rules of statutory interpretation require the conclusion that the word "notice" in the second to last sentence of RCW 60.04.031(5) refers to the statutory written "Notice of Furnishing Professional Services." First, liens created under Chapter 60.04 RCW are creatures of statute, are in

derogation of common law, and must be strictly construed to determine whether the lien attaches. *Lumberman's, Inc. v. Barnhardt*, 89 Wn.App. 283, 286, 949 P.2d 382 (1997)(mechanics' and materialmen's lien under Chapter 60.04); *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 500 P.2d 1244 378 (1972). Moreover, RCW 60.04.900 states that certain lien statutes in Chapter 60.04, including RCW 60.04.031, must be "liberally construed to provide security for all parties intended to be protected by their provisions." Thus, the party claiming the benefit of a lien must show that he has strictly complied with the provisions of the law that created it. *Lumberman's*, 89 Wn.App. at 286; *Schumacher Painting Co. v. First Union Mgmt. Inc.*, 69 Wn.App. 693, 850 P.2d 1361 (1993); *Pacific Gamble Robinson Co. v. Chef-Reddy Food Corp.*, 42 Wn.App. 195, 710 P.2d 804 (1985).

Here, the lien rights created under Chapter 60.04 RCW are in derogation of common law. The requirements in Chapter 60.04 regarding creation and attachment of a construction lien, including the provisions of RCW 60.04.031(5), are strictly construed in the formation and attachment of the lien. Zervas, the lien claimant, has the burden to establish that it strictly complied with RCW 60.04.031(5), including the

notice provision. Pursuant to RCW 60.04.900, the notice provisions of RCW 60.04.031(5) are liberally construed in favor of Whidbey Island Bank, the party intended to be protected by the notice requirement.

Second, similar to the rule cited above for unambiguous statutes, related provisions and related statutes must be construed together and in context. Related statutes must be considered in relation to each other. *St. v. Alvarez*, 74 Wn.App. 250, 259, 872 P.2d 1123 (1994); *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992)(Statutes are read in their entirety, not in a piecemeal fashion). For the reasons discussed above, the word "notice" in the second to the last sentence of RCW 60.04.031(5) must be interpreted to refer to the written, recorded notice described in that statute.

Third, if a statute is ambiguous, legislative history can be considered to discern the intent of the legislative body. *In re Sehome Park Care Center, Inc.*, 127 Wn.2d 774, 778, 903 P.2d 443 (1995)("legislative history of the statute is an important tool to ascertain intent"), citing *Bellevue Fire Fighters Local 1604 v. City of Bellevue*,



100 Wn.2d 748, 751-53, 675 P.2d 592 (1984).<sup>5</sup> Here, the legislative history regarding enactment of RCW 60.04.031 supports the interpretation that if a professional service provider chooses not to record a notice of furnishing professional services, then the professional service provider's lien is subordinate to subsequent good faith purchasers and mortgagees.

RCW 60.04.031 was enacted in 1991 as part of a comprehensive legislative revision to Washington's construction lien statutes, which also included the enactment of RCW 60.04.021, RCW 60.04.061, and many of the other provisions in Chapter 60.04. See Chapter 281, Laws of 1991. As noted above, RCW 60.04.061 provides that construction liens, including a lien for professional services, are prior to any lien, mortgage, or other encumbrance that attaches to the land after or was unrecorded at the time of commencement of labor or professional services or first delivery of materials or equipment by the lien claimant. However, as enacted in 1991, RCW 60.04.031 required a professional

---

<sup>5</sup> See *Delyria v. Wash. St. School for Blind*, 165 Wn.2d 559, 563, 199 P.3d 980 (2009)(if statute is ambiguous, "it is appropriate to resort to aids of statutory construction, including legislative history"); *State v. Gossage*, 165 Wn.2d 1, 7, 195 P.3d 525 (2008)(if statute is ambiguous, "court should not proceed directly to policy reasoning but should first look to the legislative history of the statute to discern and

service provider to record the notice of furnishing professional services, in order to have any lien at all. Chapter 281, Laws of 1991. As explained in the Final Bill Report:

Lien rights are given to persons furnishing labor, professional services, materials or equipment for the improvement of real property. ...

Some services relating to a construction project give rise to lien rights, but do not produce anything visible at the site during the early stages of the project. Examples are architect and engineering services, soil samples, and biologist reports. Those potential lien claimants must record a notice in the real property records of the county which describes their work. This gives subsequent purchasers or lenders the opportunity to discover these possible claims.

Final B. Rep. on Substitute Senate Bill 5497, at p. 222, 52nd Leg., Reg. Sess. (Wash. 1991). Thus, the legislature recognized that because professional services often do not result in any visible, on-site alteration to the real property, potential lenders cannot determine whether such services have been provided by inspecting the property. The only way that lenders can know whether such preparatory work has occurred, is if the service provider takes the simple, inexpensive action of recording a notice. This statutory lien scheme facilitates the flow of financing to the development industry, as lenders can readily identify through a title

---

effectuate legislative intent"); *Kitsap County v. Moore*, 144 Wn.2d 292, 298, 26 P.3d 931 (2001).

search (and site inspection) all prior encumbrances that could affect their potential investment.<sup>6</sup>

In 1992, the legislature amended a number of provisions in Chapter 60.04, including RCW 60.04.031.<sup>7</sup> Chapter 126, Laws of 1992. Although RCW 60.04.031 was amended to make recording the notice of furnishing professional services discretionary on the part of the professional service provider, the legislature did not alter the requirement that the notice be recorded before the professional service provider obtains priority over good faith purchasers and lenders. The legislative history for the 1992 legislation continues to emphasize:

Contents of lien notices

... The contents are specified for the notice made by lien claimants who provide professional services before an improvement has commenced. **If the notice is not recorded, the lien is subordinate to the interest of subsequent mortgagee and invalid as to a subsequent purchaser,** if both the mortgagee and purchaser acted in good faith.

H. B. Rep. on Engrossed Senate Bill 6441, 52nd Leg., Reg. Sess. (Wash

---

<sup>6</sup> This is exactly what Whidbey Island Bank did in this case: order a title report and inspect the property (the Bank also ordered an appraisal and a review appraisal, and reviewed all documents revealed by the appraisal). CP 557-62, 660-62, 664-70, 672-93, 703-5.

<sup>7</sup> RCW 60.04.061 was not amended by the 1992 legislation. See Chapter 126, Laws of 1992.

1992)(As Passed Legislature). Thus, if the professional service provider chooses not to record the statutory notice, the service provider's lien might still be valid as against the then-owner, but the lien will not have priority over subsequent encumbrances or purchasers in good faith. Even after the 1992 amendments to RCW 60.04.031, the statute continues to require that if a professional service provider does not record the notice of furnishing professional services, the professional service provider's lien will be subordinate to a subsequent lender's deed of trust.

This is based on sound policy. As noted in the legislative history, services performed by "professional service providers" are often not apparent from an inspection of the pertinent real property. For example, preparation of plat maps, inspections for environmental studies, and as in this case, preparation of architectural plans all occur before any physical structures are constructed or alterations to the land occur. In the absence of a recorded notice, purchasers and lenders have no way to know that such work has occurred or to ascertain the existence of such professional service liens against the property, and therefore no way to protect their potential investment. On the other hand, professional service providers

are in the best position to protect their interests, by recording the simple statutory form, which informs the world that they are performing services in connection with the property and gives subsequent purchasers and lenders the ability to make informed decisions.

In contrast, the interpretation of RCW 60.04.031 argued by Zervas (and apparently adopted by the Superior Court) violates several principles of statutory construction. Courts interpret statutes in a manner that gives effect to all language used, with no portion rendered meaningless or superfluous. *Davis v. Dept. of Lic.*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999); *Parents Involved v. Seattle Sch. Dist.*, 149 Wn.2d 660, 685, 72 P.3d 151 (2003); *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)(ordinance must be construed so all language used is given effect, with no portion rendered meaningless or superfluous). Courts cannot add words or clauses to a statute when the legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2002); *Applied Ind. v. Mellon*, 74 Wn.App. 73, 79, 872 P.2d 87 (1994)(In construing a statute, it is always safer not to add to, or subtract from, the statute's language unless it is imperatively required to make it a rational

statute).

Here, even assuming that the term "notice" in the pertinent sentence of RCW 60.04.031(5) does not mean the written, recorded notice, as in every other sentence of RCW 60.04.031(5), Zervas's interpretation of the statute violates these principles of statutory construction. In RCW 60.04.031(5), the legislature used the phrase "without notice of **the professional services being provided.**"

In essence, Zervas urges an interpretation that the phrase means "notice that **any** professional services may have been provided." Zervas's position (and the Superior Court's decision) ignores the word "the" and substitutes "any," and ignores the phrase "being provided."<sup>8</sup> The actual language used by the legislature requires that the "notice" be of the particular professional services being provided, by the particular service provider. Based on the precise words in the statute, it is **not enough** that the lender had "notice" that **any** professional services would occur, or even that a particular type of services would occur (such as

---

<sup>8</sup> It was unclear from Zervas's motion for summary judgment whether Zervas argues the necessary notice must be actual or constructive. See CP 812-27. Either position fails, because even if notice under RCW 60.04.031(5) could be actual or constructive (and not the written, recorded notice), the notice still must be of "**the professional services being provided.**"

surveying or soils testing).<sup>9</sup>

Zervas argues that because the Bank knew that funds had been spent on undefined "soft costs" for the Bay View Towers project, and that every development approaching the issuance of permits must have received professional services, this satisfies the requirement in RCW 60.04.031(5) that the Bank have "notice of the professional services being provided." This interpretation is simply contrary to the language used in the statute. See RCW 60.04.031(5)(requiring notice of "the" professional services "being provided"). Zervas also argues that because the Bank had knowledge of a geotechnical report prepared by an unrelated firm, this requires the conclusion that the Bank had "notice of the professional services being provided," with respect to Zervas's lien. Again, this interpretation is contrary to the language actually used in the

---

<sup>9</sup> If a term is not defined in the statute, then it is appropriate to review dictionary definitions to discern the "plain meaning" of the term. *Hazelwood v. Bremerton Ice Arena*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009) ("To determine the plain meaning of an undefined term, we may look to the dictionary"); *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002); *Griffin v. Thurston County Board of Health*, 165 Wn.2d 50, 57, 196 P.3d 141 (2008) (Relies on dictionary to determine unambiguous meaning of ordinance, stating: "In the absence of a given definition, we turn to a standard dictionary to ascertain the plain and ordinary meaning of a term"). Dictionaries define "the" as "the definitive article, functioning as an adjective. It is used : 1. Before singular or plural nouns or noun phrases that denote particular specified persons or things. ..." American Heritage Dictionary of the English Language, New College Edition (1981). This

statute. Knowledge that an unrelated report has been prepared, by an entirely different firm, is not notice of "the professional services being provided." Finally, Zervas argues that one small drawing in Coldwell Banker promotional materials that depicted the proposed project with a caption in tiny print stating "Rendering courtesy of Zervas Group Architects," constitutes "notice of the professional services being provided."<sup>10</sup> Even under Zervas's interpretation, this vague reference to Zervas is not notice of "the professional services being provided" by Zervas, in a manner that is sufficient to give lien priority to Zervas over all other good faith purchasers and lenders under RCW 60.04.031(5).

Courts do not interpret statutes in a manner that leads to absurd or illogical results. *Whatcom County v. City of Bellingham*, 128 Wn.2d at 547; *Seven Gables Corp. v. MGM/UA Ent. Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986) ("statutory interpretation that renders an unreasonable or illogical consequence should be avoided"). Here, Zervas's position is that the term "notice" in the second to last sentence of RCW

---

definition is appropriate, particularly given that "professional services" is further modified by the phrase "being provided."

<sup>10</sup> This material containing the small drawing was buried in the property's appraisal report, together with a number of newspaper articles and similar promotional materials on the general topic of development in Bellingham. CP 626.

60.04.031(5) means "notice that **any** professional services may have been provided," and that its lien has priority over the Bank's Deeds of Trust based on the facts described above, even though there were no visible signs of work on the property, and the Bank had no knowledge of the purpose of the Developers' expenditures, or the lien claimant's identity or work. This interpretation of RCW 60.04.031 leads to an unreasonable, illogical result that a lender or subsequent purchaser would be deemed to have "notice of **the professional services being provided**" in virtually every case, because some "professional services" are used in virtually every development. This is directly contrary to the policy behind Washington's statutory "race/notice" recording scheme, and renders the "notice" requirement in RCW 60.04.031(5) meaningless.

**3. Case law from Washington and other jurisdictions supports the conclusion that Whidbey Island Bank's Deeds of Trust are prior to Zervas's professional services construction lien.**

Only one Washington court has addressed the pre-lien notice provisions of RCW 60.04.031(5). *McAndrews Group Ltd. v. Ehmke*, 121 Wn. App. 759, 90 P.2d 1123 (2004). In *McAndrews*, surveying stakes were placed on the property before the lender recorded its deed of trust, but the surveyor (a professional service provider) did not record a

Notice of Furnishing Professional Services under RCW 60.04.031(5). The trial court found that the surveyor's services were not readily visible from a cursory inspection of the property, and granted the lender's motion for summary judgment subordinating the surveyor's lien to the lender's deed of trust. The Court of Appeals reversed, concluding an issue of fact existed as to whether inspection would have revealed evidence of **the surveyor's services**, given the surveying stakes on the property.<sup>11</sup> Thus, *McAndrews* emphasizes the need for on-site evidence of the specific professional's services, absent the recorded notice.

Here, undisputed evidence shows that a Whidbey Island Bank employee inspected the property and found no evidence of any trenching, signs, holes, surveyor stakes, or any other construction activity. CP 559, 660-2. Under *McAndrews*, based on the complete absence of physical evidence of Zervas's work on the property and Zervas's failure to record the statutory Notice of Furnishing Professional Services under RCW 60.04.031(5), as a matter of law Zervas's lien does not have

---

<sup>11</sup> The *McAndrews* court focused on the issue of whether RCW 60.04.031(5) even applied to the facts of that case, or whether the surveyor lien claimant fell under RCW 60.04.021. Because a question of fact existed as to whether a site inspection would have revealed the surveyor's services (meaning that RCW 60.04.031(5) would not apply), the Court of Appeals reversed the grant of summary judgment. *McAndrews*, 121 Wn.App. at 764-5.

priority over the Bank's two deeds of trust. Even if an exception is made for actual (or even constructive) notice, according to *McAndrews* at the very least that would require on-site physical evidence of the specific services for which the lien is claimed, that would be revealed based on inspection of the property.

The only significant case cited by Zervas in its Motion for Partial Summary Judgment regarding notice to the Bank of Zervas' work was *Mutual Savings & Loan Ass'n v. Johnson*, 153 Wash. 41, 279 P. 108 (1929). However, in that case, the lender inspected the subject property before approving a mortgage, and witnessed teams performing street grading and excavating. The Court held that because the lender had ascertained that work was in progress, it was the only entity that could have prevented a loss, and having failed to do so, its deed of trust did not take priority over the lien claimant. *Mutual Savings & Loan*, 153 Wash. at 47.

Here, *Mutual Savings & Loan Ass'n. v. Johnson* is distinguishable from the case at hand. First, *Mutual Savings & Loan Ass'n v. Johnson* long pre-dates the enactment of RCW 60.04.031 in 1991, and therefore does not directly control professional service liens

arising under that statute. Furthermore, like *McAndrews*, *Mutual Savings & Loan* emphasizes the need for actual on-site work to defeat the priority of a recorded mortgage or deed of trust. In contrast to *Mutual Savings & Loan*, *Whidbey Island Bank* had no actual notice of any construction activity, studies or other work (and in particular no notice of Zervas's services) based on physical inspection of the property, and review of the preliminary commitment for title insurance, two separate appraisals, and a geotechnical report. Moreover, although the Developers represented on several occasions that they had paid "out-of-pocket" for prior project costs, they never mentioned the identity of the service providers or the nature of any work performed, other than the geotechnical report. CP 556-8, 561-2, 703, 705.

Case law from other jurisdictions supports the conclusion that visible on-site improvements (or under a few statutes, like Washington's RCW 60.04.031(5), a recorded pre-lien notice), are necessary for a professional service lien to have priority over other lenders or purchasers. For example, in *D'Orsay Int'l. Partners v. Sup. Ct. of Los Angeles County*, 123 Cal.App.4th 836, 20 Cal. Rptr. 3d. 399 (2004), beginning in 2001, Summit provided engineering design services for a

proposed development. No actual visible construction or other work was ever performed at the project site. In May 2003, Summit recorded a mechanic's lien against the real property, and filed suit to foreclose the lien. The Court held that because Summit filed a mechanic's lien, not a design professional's lien, Summit could not avail itself of the design professional lien statute.<sup>12</sup> *D'Orsay*, 123 Cal.App.4th at 841. Under the pertinent statute, for a mechanic's lien to attach, there must be actual, visible work on the land, or the delivery of construction materials thereto. Because this had not occurred, Summit was not entitled to assert a mechanic's lien. *D'Orsay*, 123 Cal.App.4th at 844.

In *Ketchum, Konkell, Barrett, Nickel & Austin v. Heritage Mountain Dev. Co.*, 784 P.2d 1217, 123 Utah Adv. Rep. 23 (1989), in 1981 and 1982, Ketchum performed architectural, engineering and surveying services for a proposed development. In 1983, another engineering firm staked boundaries on the property. Thereafter, the owner obtained a predevelopment loan from Guaranty, and Guaranty

---

<sup>12</sup> California's design professional lien statute, enacted in 1990, stated that a design professional shall "from the date of recordation" have a lien on the real property for which the work of improvement is planned to be constructed, notwithstanding the absence of commencement of construction. *D'Orsay*, 123 Cal.App.4th at 840. Thus, similar to RCW 60.04.031(5), under California's statutory scheme a design

recorded a deed of trust against the property. Guaranty was aware that Ketchum had performed extensive design work on the project. After the loan, Ketchum resumed design work. When the owner abandoned the project, Ketchum filed suit to foreclose its lien, and Guaranty claimed that its deed of trust had priority. The Court agreed with Guaranty. The Court noted that case law discussing the Utah architects' lien statute emphasized visible work performed on the site, or presence of materials, giving notice that work commenced on the property. *Id.* at 1221.<sup>13</sup> Further, the majority of other jurisdictions to consider the issue had held that off-site architectural services do not constitute "commencement of work" under a variety of lien statutes:

Michigan, like Utah, has expanded mechanics' lien protection to engineers and architects. Nevertheless, the Michigan court expressly rejected the argument that by amending the statute to include architectural services the legislature intended to overturn the former common law requirement of visible, on-site commencement of construction for priority. The court concluded:

---

professional lien arises upon recording the claim of lien, even if actual on-site construction has not yet commenced.

<sup>13</sup> Under Utah's construction lien statutes, architects' liens "relate back to, and take effect as of, the time of the commencement to do work ... on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, ... ." *Ketchum*, 784 P.2d at 1220.

We think it unreasonable to believe the Legislature intended to indirectly change [the section of the mechanics' lien statute], containing the traditional and well-established rule requiring a visible, on-site commencement of construction in order to establish priority, by the simple expansion of the lienable services outlined in a different section . . . .

*Williams & Works, Inc. v. Springfield Corp.*, 408 Mich. 732, 293 N.W.2d 304, 311 (1980).

The majority of other jurisdictions which have considered the issue of whether off-site services of architects and engineers constitute the commencement of work for purposes of the priority of mechanics' liens have answered in the negative. *Walker v. Lytton Sav. & Loan Ass'n.*, 2 Cal. 3d 152, 465 P.2d 497, 502, 84 Cal. Rptr. 521 (1970)(architectural services); *Williams & Works*, 293 N.W.2d at 312 (engineering services); *Reuben E. Johnson Co. v. Phelps*, 279 Minn. 107, 156 N.W.2d 247, 251-52 (1968) (architectural services); *Aladdin Heating*, 563 P.2d at 84 (architectural services).

Although each statutory scheme is unique, the decisions are in harmony that physical notice of work on the property must be present before mechanics' liens have priority over other third parties, especially lenders. See *Torkko/Korman/Engineers v. Penland Ventures*, 673 P.2d 769, 773 (Alaska 1983); *Walker*, 465 P.2d at 501-02; *Tracy Price Assocs. v. Hebard*, 266 Cal. App. 2d 778, 72 Cal. Rptr. 600, 606 (1968); *Gollehon, Schemmer & Assocs., Inc. v. Fairway-Bettendorf Assocs.*, 268 N.W.2d 200, 202 (Iowa 1978); *Williams & Works*, 293 N.W.2d at 312-13; *Aladdin Heating*, 563 P.2d at 84.

*Ketchum*, 784 P.2d at 1222-3. The Court was "persuaded that the policy of giving third parties notice of possible mechanics' liens requires

visible, on-site construction to qualify for 'commencement of work,' notwithstanding actual notice by the lender of one architectural firm's services. *Id.* at 1224; see *E.W. Allen & Assoc. v. FDIC*, 76 F.Supp. 1504 (1991)(under same Utah lien statute, engineering subcontractors' recorded notice of lien did not constitute "commencement of work," so the architectural firm general contractor's lien did not have priority over a recorded deed of trust).

In *In re Commercial Investments*, 92 B.R. 488 (1988), an architect performed work on a project before a deed of trust was recorded against the property. No architects' lien was filed. Again, the Court held that the construction lien could not arise until some physical work commenced on the site.<sup>14</sup> Since that had not occurred, the architect's and other mechanics' liens did not have priority over the recorded deed of trust. *In re Commercial Investments*, 92 B.R. at 491.<sup>15</sup>

---

<sup>14</sup> The pertinent New Mexico statute contained the customary language that mechanics' liens have priority over any encumbrance that "attached subsequent to the time when the building, improvement or structure was commenced, work done or materials were commenced to be furnished." *In re Comm. Inv.*, 92 B.R. at 491.

<sup>15</sup> Similarly, in *Darling v. Kagan*, 133 So.2d 599 (1961), Darling, an engineer, prepared a subdivision plat for a proposed development. Kagan acquired a mortgage in the property, and Kagan's attorneys knew that Darling had been hired to prepare the plat. Florida's mechanics' lien statute provided in part that such liens "shall relate to and take effect from the time of visible commencement of operations." 133 So.2d at 601. Because Darling "performed no work on the premises from which a person

In *Williams & Works, Inc. v. Springfield Corp.*, 408 Mich. 732, 293 N.W.2d 304, 311 (1980)(cited by the *Ketchum* Court), the Court addressed the question of "whether off-site engineering services rendered before the beginning of actual, on-site construction qualify [as 'commencement' of improvements] so as to give priority to mechanics' liens over a mortgage recorded after the provision of such services but prior to the beginning of any visible, on-site construction." *Williams*, 293 N.W.2d at 305.<sup>16</sup> The Court held that "in view of the overwhelming weight of historical precedent, whose rationale and policy underpinnings remain vital today, we find that such nonvisible, off-site engineering services as those rendered in the instant case, although lienable under Michigan law, do not signal the 'commencement' of a building, erection, structure, or improvement for purpose of fixing priority under

---

interested in buying or financing the purchase of such property would know that work had commenced, etc., which would put him on notice that a lien might be claimed," Darlings' lien was not prior to Kagan's interest in the property. *Id.* at 602. Further, the record did not disclose sufficient knowledge of Darling's operations to estop Kagan from claiming priority of the mortgage over Darling's lien. *Id.*

<sup>16</sup> Similar to other states, Michigan's mechanics' lien statute provided that such liens are preferred to all other encumbrances that may attach to the improvement or land, that shall be "given or recorded subsequent to the commencement of said building or buildings, erection, structure or improvement. *Williams*, 293 N.W.2d at 305.

Michigan's mechanics' lien law." *Id.* at 306-7.<sup>17</sup> Regarding the argument that the lender's "actual notice" of the identity of and services furnished by the engineer precluded the lender from asserting the "visible and actual commencement" rule, the Court held that regardless of whether the argument rested on theories of estoppel or waiver, actual notice was not relevant:

To hold that such knowledge constitutes waiver or estoppel would expose lenders to so many unpredictable hazards that construction financing would become extremely difficult. Although mechanic's lien laws should be liberally construed to protect those who have contributed skills, services or materials, towards the improvement of property, it has been recognized that lien laws are for the protection of owners as well as mechanic's lien claimants. \* \* \* It may be said with equal validity that section 1188.1 \* \* \* prescribing a rule for determining priorities was designed for the protection of

---

<sup>17</sup> The court explained:

"Thus the general rule is that such a lien does not attach unless and until *construction* has been undertaken by the doing of actual visible work on the land or the delivery of construction materials thereto." *Walker, supra*, 156-157 (emphasis in original). See also *Aladdin Heating Corp v. Trustees of the Central States, Southeast & Southwest Pension Fund*, 93 Nev 257, 260; 563 P2d 82, 84 (1977); *Western Mortgage Loan Corp v. Cottonwood Construction Co*, 18 Utah 2d 409, 412; *M E Kraft Excavating & Grading Co v Barac Construction Co*, 279 Minn 278, 284; 156 NW2d 748, 752 (1968).

We also believe that our decision, in continuing to key "commencement" into the concept of constructive notice, is based on sound public policy. Were we to adopt appellees' position and rule that the "commencement" of a building, erection, structure or improvement could be triggered by the rendering of off-site, non-visible engineering plans, mechanics' liens could relate back to a long time before any visible signs of construction existed to inform prospective lenders inspecting the premises that liens had attached. Under such circumstances, construction financing would become exceedingly difficult. It was just such a concern that compelled the California Supreme Court in *Walker, supra*, to reach the same result we do today." *Williams*, 293 N.W.2d at 313.

those who take security interests in land as well as for the protection of mechanic's lien claimants.

*Id.* at 314, citing *Walker v. Lytton Savings & Loan Ass'n of No. Cal.*, 2 Cal.3d 152, 158, 84 Cal.Rptr. 521, 465 P.2d 497 (1970).

RCW 60.04.031(5) is clear: "notice" required under that statute is the recorded pre-lien Notice of Furnishing Professional Services by the particular firm providing the professional services. In other words, generalized information that a developer spent funds on a project and conducted one study on the property is insufficient to put a lender on "notice" of potential lien rights of undefined and undisclosed professional service providers. As a matter of law, Zervas's lien cannot have priority over Whidbey Island Bank's two Deeds of Trust. This Court should reverse the Superior Court's grant of summary judgment in favor of Zervas, and remand to the Superior Court for entry of summary judgment in favor of Whidbey Island Bank on the issue of priority.

**C. At the Very Least, an Issue of Material Fact Exists as to Whether the Bank Had "Notice of the Professional Services" under RCW 60.04.031(5).**

At the very least, an issue of material fact exists as to whether the Bank had "notice of the professional services being provided" under RCW 60.04.031(5), precluding entry of partial summary judgment in

favor of Zervas. The facts and all reasonable inferences from the facts must be considered in the light most favorable to Whidbey Island Bank (the non-moving party with respect to Zervas's summary judgment motion). *Bulman v. Safeway, Inc.*, 144 Wn.2d 335, 351, 27 P.3d 1172 (2001); *Hash v. Children's Orthopedic Hospital*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988)(all reasonable inferences must be resolved against the party seeking summary judgment). Zervas, as the party claiming the lien, has the burden to prove that it strictly complied with the provisions of RCW 60.04.031. *Lumberman's*, 89 Wn.App. at 286; *Schumacher Painting Co. v. First Union Mgmt. Inc.*, 69 Wn.App. 693, 850 P.2d 1361 (1993); *Pacific Gamble Robinson Co. v. Chef-Reddy Food Corp.*, 42 Wn.App. 195, 710 P.2d 804 (1985).

Here, the facts establish that the Bank had no "actual" notice of Zervas's services. CP 555-62, 702-5. It is undisputed that Zervas did not record a notice of furnishing professional services. Zervas relies on evidence that the Bank officials knew that in general, "soft costs" had been incurred. But the Developers specifically misled the Bank officials, telling the Bank at the time of the loans that all previously incurred "soft costs" had been paid by the Developers from their own funds. CP 556-

62, 703-5. The Developers never mentioned the identity of the persons providing the services behind the "soft costs." *Id.* While the Bank obtained a partial copy of a geotechnical report (which was identified in the appraisal), the geotechnical report did not mention Zervas or the services provided by Zervas. CP 557, 560, 672-93, 704. Likewise, Zervas has pointed to a single, small drawing of a building, included in a promotional article in a Coldwell Banker publication, which was buried in a series of such promotional articles and other general materials attached to the appraisal. CP 627. This single mention of the name "Zervas" underneath the drawing cannot possibly be construed to provide "notice of the professional services being provided" by Zervas under RCW 60.04.031(5), such that Zervas's lien of more than \$250,000 takes priority over the Banks' Deeds of Trust. At the very least, there is an issue of fact as to whether the Bank had "notice of the professional services being provided" by Zervas, requiring reversal of the Superior Court's order granting summary judgment to Zervas.

**D. Whidbey Island Bank Is Entitled to an Award of Attorneys' Fees Incurred in this Action.**

The Bank, as Defendant in this lien foreclosure action, has incurred expenses, including reasonable attorneys' fees, to protect its lien

rights and priority under Washington law. RAP 18.1(a) authorizes an award of fees if "applicable law grants to a party the right to recover reasonable attorney fees."

In any action to foreclose a construction lien under Chapter 60.04 RCW, the Court:

may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys' fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by [RCW 60.04.181(1)].

RCW 60.04.181(3). Here, Zervas has brought an action to foreclose its lien under Chapter 60.04 RCW. Assuming that Whidbey Island Bank prevails in this appeal, the Bank is entitled to an award of its reasonable attorneys' fees and costs incurred in this appeal (and before the Superior Court). *Emerald City Electric & Lighting, Inc. v. Jensen Electric, Inc.*, 68 Wn.App. 734, 741, 846 P.2d 559 (1993)(In an action determining priority between a construction lender's deed of trust and mechanics' and materialmen's liens, court awards attorneys' fees to construction lender under former RCW 60.04.130); *Pearson Construction, Inc. v. First*

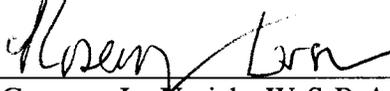
*Community Bank of Wash.*, 111 Wn.App. 174, 43 P.3d 1261 (2002)(After holding that construction lien was not valid as against deeds of trust where lenders were not served within statutory time limit, court awards attorneys' fees to lenders under RCW 60.04.181).

## VI. CONCLUSION

Whidbey Island Bank requests that the Court reverse the Decision of the Superior Court, and remand for entry of an order granting summary judgment to the Bank on the issue of priority. Pursuant to RAP 18.1 and RCW 60.04.181(3), the Bank also requests an award of its attorneys' fees and costs incurred in this appeal (and before the Superior Court).

DATED this 3rd day of June, 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By   
\_\_\_\_\_  
Gregory L. Orsich, W.S.B.A. #18614  
Rosemary A. Larson, W.S.B.A. #18084  
Attorneys for Appellant Whidbey Island Bank

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of June, 2010 I caused to be served true and correct copies of the foregoing Appellant's Opening Brief on the court and counsel as follows:

Steven P. Adelstein  
Adelstein, Sharpe & Serka LLP  
400 North Commercial Street  
PO Box 5158  
Bellingham, WA 98227-5158  
*Attorneys for Plaintiff*

- Personal Service (ABC Legal Messenger)
- U.S. Mail
- Certified Mail
- Overnight Mail
- Fax #

Bay View Tower, LLC  
c/o Will Honea  
28022 Buchanan Road  
Sedro Woolley, WA 98284  
*Pro Se*

- Personal Service (ABC Legal Messenger)
- U.S. Mail
- Certified Mail
- Overnight Mail
- Fax #

David and Mary Hughes  
10896 Madrona Drive  
North Saanich, BC V8L 5N9  
CANADA  
*Pro Se*

- Personal Service (ABC Legal Messenger)
- Federal Express
- Certified Mail
- Overnight Mail
- Fax #

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

DATED THIS 3<sup>rd</sup> day of June, 2010.

Carol Cotto  
Carol Cotto

2010 JUN -3 PM 3:58