

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.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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APPELLANT'S REPLY BRIEF

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Christopher I. Brain, WSBA #5055  
cbrain@tousley.com  
Mary B. Reiten, WSBA #33623  
mreiten@tousley.com  
TOUSLEY BRAIN STEPHENS PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
Telephone: 206.682.5600

ORIGINAL

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## I. INTRODUCTION

The central fact of this case is that, in 1980, Radovich and Keyes executed a quitclaim deed (“the Deed”) conveying three strips of land (Parcels 4, 5, and 6) to NYBA. The Deed was recorded in May 1981, leaving no doubt that it was delivered and accepted. Under settled Washington law, once the Deed was delivered, Radovich and Keyes were divested of any interest in Parcels 4, 5, and 6, and the members of NYBA owned those areas in fee simple. The effect of the Deed could not be undone, no matter what happened later—even if all of the parties involved forgot about the Deed or the grantors later attempted to convey the same property to other parties. See Miller v. Miller, 32 Wn.2d 438, 443-44, 202 P.2d 277, 280 (1949) (“It is an invariable rule that a valid deed, if once delivered (sic), cannot be defeated by any subsequent act unless it be by virtue of some condition contained in the deed itself.”) (quoting Jobse v. United States Nat. Bank, 142 Or. 692, 697, 21 P.2d 221 (1933)). The trial court’s conclusion, and Seattle Boat’s contention, that the Deed is unenforceable finds no support in Washington law.

A second key fact exists regarding the intent of the Deed. The trial court held that the intent of the Deed was not intended to convey fee title, but was to make some unknown correction to the earlier grant of

Easements 4, 5, and 6. In doing so, the trial court erred. The language of the Deed clearly and unambiguously conveyed fee title, and extrinsic evidence cannot be used to contradict the plain meaning of a written instrument. Moreover, when considering the extrinsic evidence, it must be kept in mind that NYBA had easements in the same property described in the Deed before the Deed was granted. It defies logic to conclude that the Deed was intended to convey easement rights, because NYBA already had easements. If Seattle Boat and the trial court are correct about the intent of the Deed, it is difficult to imagine what correction could have been intended. No evidence exists to suggest what the intended correction could have been, and no correction actually took place. Seattle Boat's contention as to the grantor's intent falls apart under the slightest scrutiny.

NYBA respectfully submits that the trial court's findings and conclusions under appeal should be vacated, and the Deed enforced.

## **II. REPLY**

### **A. The Effect of the Deed Can Not Be Undone by Subsequent Events.**

Seattle Boat does not dispute that the Deed satisfied the requirements of RCW 64.04.020, satisfied the statute of frauds, and was delivered, accepted, and recorded. A deed that has been recorded is

presumed to have been delivered; clear and convincing evidence is required to prove otherwise. See Hampton v. Gilleland, 61 Wn.2d 537, 545, 379 P.2d 194 (1963). Upon delivery, a deed operates to transfer the grantor's interest in the property. Id. At that point, the legal effect of the deed cannot be undone or revoked by subsequent events, including attempts by the grantor to re-convey the property. See id. at 546-47; Miller, 32 Wn.2d at 443 (upholding deed transferring title to ex-wife over ex-husband's later objections).

In Hampton v. Gilleland, the court held that a deed took effect according to its terms when it was recorded—and thus was presumed to have been delivered—despite the fact that the record was silent as to the circumstances of the deed's making and delivery. 61 Wn.2d at 537. In that case, a father executed a deed naming his seven children as grantees to an 80-acre parcel of property. The deed was recorded in 1921, though there was no evidence in the record regarding its execution or delivery. Id. at 538-39, 544. When the children sued for partition and sale of the property after the father's death in 1955, one daughter opposed it, maintaining that the father had intended, with the deed, to transfer the property only upon his death. Id. at 539-40. The daughter claimed that she owned the land, relying on two written agreements with the father

dating from 1946 and 1950 that promised her the land. Id. at 539. The court held that the deed was effective as a conveyance as of the date of its delivery, and further held that the trial court had properly excluded the two later written agreements from evidence because they were irrelevant:

since the deed became absolute by its terms with its delivery and recordation, evidence attending the execution of the 1946 and 1950 writings was thus immaterial and irrelevant in time and could not be heard to affect the deed's efficacy nor alter the consummation of its expressed purpose.

Id. at 546-47.

Similarly, in Waldrip v. Olympia Oyster Co., 40 Wn.2d 469, 244 P.2d 273 (1952), the court held that Zora Waldrip owned a parcel of property based on the fact that a deed vesting title in her husband had been recorded 50 years earlier, despite the fact that neither she nor her husband had known they owned the property, and the fact that another company had paid property taxes on the property for more than 40 years. Id. at 470-72. Though Ms. Waldrip did not realize she was the record title holder until nearly 50 years after the deed had been recorded, the court rejected the claim of the company that had been paying property taxes and held that Ms. Waldrip owned the property. Id. at 473-78. See also Estate of Pappuleas, 5 Wn. App. 826, 827-29, 490 P.2d 1340 (1971) (holding that

deed from father to son that was executed in 1946, delivered in 1963 or 1964, and recorded in 1970, was irrevocable and “passed an immediate title” despite the fact that the father executed a will in 1961 purporting to dispose of the same property differently).

Thus, no matter what transpired after the Deed was delivered and recorded, its delivery divested Radovich and Keyes of title and vested it in the members of NYBA. The Deed transferred all of Radovich’s and Keyes’ interest in the property to the members of NYBA when it was delivered, and subsequent events could not affect this transfer.

**B. The Deed Unambiguously Conveyed Fee Simple Title.**

The Deed unambiguously conveyed fee title to Parcels 4, 5, and 6 to the members of NYBA. Exh. 12. The question of whether the Deed is ambiguous is a question of law, subject to de novo review. Carlstrom v. Hanline, 98 Wn. App. 780, 785-86, 990 P.2d 986 (2000) (“Whether a written instrument is ambiguous is a question of law for the court.”) (citing McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983)); Stranberg v. Lasz, 115 Wn. App. 396, 402, 63 P.3d 809 (2003) (citing State v. Nason, 96 Wn. App. 686, 691, 981 P.2d 866 (1999)). Because the Deed is not ambiguous, its construction is also a question of law subject to de novo review. Stranberg, 115 Wn. App. at 402.

Moreover, because the Deed unambiguously conveyed fee title, it was error for the trial court to use extrinsic evidence to contradict the express language of the Deed. See Brogan & Anensen LLC v. Lamphiear, 165 Wn. 2d 773, 775-76, 202 P.3d 960 (2009) (“The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract . . .”).

Even if the Deed were ambiguous as to what was being conveyed, a fair-minded review of all of the evidence would lead to the conclusion that the Deed was intended to convey fee simple title (in accordance with its plain language). The trial court’s finding to the contrary is not supported by substantial evidence. See Estate of Palmer, 145 Wn. App. 249, 265-66, 187 P.3d 758 (2008) (“Substantial evidence exists if a rational, fair-minded person would be convinced by it.”).

1. The Deed Unambiguously Conveyed Fee Title.

The Deed unambiguously conveyed title rather than easements:

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

Exh. 12. In its brief, Seattle Boat offers only one explanation for its contention that the Deed did not unambiguously convey fee title and raised for the first time on appeal: the lack of the phrase “all interest in,” found in RCW 64.04.050, the quitclaim statute. Resp. Br. at 26. RCW 64.04.050 provides that quitclaim deeds “may be in substance in the following form: The grantor (here insert the name or names and place of residence), for and in consideration of (here insert consideration) conveys and quitclaims to (here insert grantee’s name or names) all interest in the following described real estate . . . .” Contrary to Seattle Boat’s assertions, however, RCW 64.04.050 does not require that a quitclaim deed be in exactly this form, but instead states only that it “may” take that form. Indeed, it provides that a deed “in substance” in such form “shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described.”

In addition to conveying all then-existing rights of the grantor, a quitclaim deed may also convey after-acquired title if words are added expressing that intention, as they are here. See RCW 64.04.050. Here, the inclusion of after-acquired title is not at issue because it is undisputed that Radovich and Keyes held full title to the property at the time of the Deed.

However, the inclusion of that phrase here removes any possible question about what was being conveyed: fee simple title.

Seattle Boat also suggests that the fact that the conveyance was accomplished via a quitclaim deed instead of a warranty deed casts doubt on its intent. Resp. Br. at 26. That argument is without merit. It is true, as Seattle Boat states, that a warranty deed creates a presumption that a fee simple estate was transferred in the absence of express words to the contrary, but a quitclaim deed does not. But the reverse is not true—the use of quitclaim deed does not give rise to a presumption that something less than a fee simple estate was transferred. Instead, what a quitclaim does is transfer all of the grantor’s interest in the property identified in the deed. See Roeder Co. v. K & E Moving & Storage Co., 102 Wn. App. 49, 56-57, 4 P.3d 839 (2000) (observing that instead of creating a presumption that a fee simple estate was transferred, a quitclaim deed “conveys all the then existing legal and equitable rights of the grantor”). Here, Radovich and Keyes held fee title to Parcels 4, 5, and 6, and that is what they conveyed to the members of NYBA with the Deed.

2. Extrinsic Evidence Cannot Be Used to Contradict Unambiguous Language in a Deed.

Seattle Boat maintains that the trial court was permitted to examine extrinsic evidence in construing the Deed, whether or not the Deed is ambiguous. Resp. Br. at 26-28. NYBA does not dispute that general principle. But it is well-settled that extrinsic evidence cannot be used to contradict the unambiguous language of a written instrument. Because the Deed unambiguously conveyed fee title, it was error for the trial court to have used extrinsic evidence to arrive at a construction of the Deed that contradicts the express language. See, e.g., Renfro v. Kaur, 156 Wn. App. 655, 662-63, 235 P.3d 800 (2010) (“[E]xtrinsic evidence may not be used (1) to establish a party’s unilateral or subjective intent as to the meaning of a contract word or term; (2) to show an intention independent of the instrument; or (3) to vary, contradict, or modify the written word.”) (citations and quotations omitted); Brogan & Anensen LLC v. Lamphiear, 165 Wn. 2d 773, 775-76, 202 P.3d 960 (2009) (“The parol evidence rule precludes the use of extrinsic evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract; that is, a contract intended as a final expression of the terms of the agreement.”).

This principle applies to deeds, as to any other written contract. See Johnson v. Wheeler, 41 Wn.2d 246, 248-49, 248 P.2d 558 (1952) (finding evidence that grantor did not intend a recorded deed transferring property to take effect until after his death was not admissible to contradict the unambiguous language of the recorded deed); Beebe v. Swerda, 58 Wn. App. 375, 379-80, 793 P.2d 442 (1990) (holding that where parties conceded the language of a deed was not ambiguous, the intention of the parties “must be determined from the language used” and the words “construed in their ordinary and popular sense”).

3. Extrinsic Evidence Indicates That the Deed Was Intended to Convey Fee Title.

As explained above, because the language of the Deed was not ambiguous, its construction is a matter of law. Moreover, the trial court erred by using extrinsic evidence to construe the Deed in a way that conflicts with its unambiguous language. Nonetheless, as explained in NYBA’s opening brief, the extrinsic evidence does not support the trial court’s findings of fact regarding the intent of the deed. A fair-minded person considering all of the evidence before the court would conclude that the Deed was intended to convey fee title. See Estate of Palmer, 145

Wn. App. at 265-66 (“Substantial evidence exists if a rational, fair-minded person would be convinced by it.”).

The extrinsic evidence must be considered in light of the fact that, before the Deed, NYBA already had easements in the property that was the subject of the Deed (Parcels 4, 5, and 6). RP 308, 315-16. Thus, it makes little sense to suggest that the board meeting minutes contemporaneous with the Deed should be understood as discussing a grant of easements. Resp. Br. at 7-8; FOF 1.26 (CP 3412). Exhibits 7 and 8 constitute minutes from meetings of the NYBA board and Radovich and Keyes. During the May 14, 1980 meeting, a board member raised purchasing the easement areas located next to A, B, and D docks (i.e., Parcels 4, 5, and 6). “Larry Hall addressed developers Keyes and Radovich about possibly acquiring through quit claim deeds certain easements.” Exh. 7. The minutes from the October 6, 1980 board meeting reflect further discussion of the acquisition, including discussion of the consideration given by NYBA—the payment of back taxes.

The Association wishes to acquire easements through quit claim deeds from the Developers. . . . Russ Keyes and John Radovich stated they have no quarrel with signing over the deed for the easements providing the Association will pay the back taxes and continue paying future taxes.

Exh. 8. Viewed in light of the fact that NYBA already had easements in the areas being discussed, the only reasonable interpretation of these documents is that NYBA and the Developers were discussing NYBA's acquisition of title to areas that were, at the time, subject to easements. This interpretation accords with the evidence that the Developers had not provided NYBA with enough parking, and NYBA's related concern about investing member funds to improve and maintain property it did not own. RP 144, 182-83, 150-54, 344; Exh. 28; Exh. 7. It also accords with testimony from the grantor and grantee that the Deed was intended to convey fee title. RP 345, 393, 80-81, 162-63.

Seattle Boat refers in its brief to Doug Burbridge's supposed ignorance of the Deed and of the fact that NYBA held title to the areas known as Easements 4, 5, and 5. Respondent's Brief at 13, 29. Despite Mr. Burbridges' testimony to the contrary, two documents—which, like the board meeting minutes, are far closer in time to the Deed than the present day—indicated that Mr. Burbridge did know that NYBA held title to the property. In 1981, Mr. Burbridge wrote to his landlord that he had “had to forfeit approximately 1,500 square feet of working space” to NYBA. Exh. 9. And in 1987, NYBA's attorney notified Mr. Burbridge in writing that the Mercer Marine office building rested “approximately 15

feet across property owned by the Association” (i.e., Easement 5) and granted Mercer Marine permission to leave the building on the property. Exh. 27; RP 195-96. Mr. Burbridge “blew off” the letter. RP 565-66; RP 578-79; CP 2242-44, 2304-05.

The trial court’s finding that the Deed was intended to make an unknown correction to the earlier grant of easements (FOF 1.25, CP 3412) is not supported by substantial evidence. No evidence exists as to what the intended correction could have been, unless it was the addition of an easement accommodating the Commercial Parcel’s haul out by slips D1 and D2, now located in the area quit claimed to NYBA. See Exh. 294.

Seattle Boat now, for the first time, suggests that the “correction” intended by the Deed was to change the wording of the legal description of the easements, but that is pure speculation. But, not only did the Deed convey Easements 4, 5, and 6 to NYBA in fee simple, as pointed out supra it also reserved for the Commercial Parcel an easement over the haul out area. Compare Exh. 294 p. 2 with p. 3 (illustrating sequence of conveyances and easements). No easement for the haul out area would be required if Seattle Boat’s interpretation were correct (and it is not).

Finally, Seattle Boat contends that the ten-month delay between the execution of the Deed and its recording suggests the Deed was not

intended to transfer fee title (Resp. Br. at 14), but does not explain how that delay indicates that the Deed was intended to correct easements rather than grant fee title. Admittedly, the delay surrounding the execution, delivery, and recording of the Deed was not fully explained as those events place 30 years ago. But that uncertainty does not bear on the intent of the grantor. Significantly, there is no uncertainty about the fact that the Deed was recorded in May 1981, leaving no doubt that it was delivered and accepted before that time. Finally, it is common to have a delay in the delivery and recording of deeds to accomplish all escrow requirements.<sup>1</sup> See, e.g., Estate of Pappuleas, 5 Wn. App. at 827 (noting that deed was not recorded until 1970, six years after delivery and after grantor's estate had entered probate). The mere fact of delay is meaningless.

4. If Any Ambiguity Did Exist, It Should Have Been Resolved in Favor of NYBA.

The general rule is that in construing a deed, Washington courts resolve ambiguities in favor of the grantee. Seattle Boat argues that, because NYBA drafted the Deed, ambiguities should be resolved against NYBA. Resp. Br. at 25 (citing Hanson Indus., Inc. v. County of Spokane,

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<sup>1</sup> Indeed, Seattle Boat's deed to a portion of its property purchase remains in escrow and unrecorded pending finalization of agreements relative to an adjacent short plat.

114 Wn. App. 523, 532, 58 P.3d 910 (2002). But the weight of authority holds that ambiguities should be resolved in favor of the grantee. See, e.g., Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n, 156 Wn.2d 253, 272, 126 P.3d 16 (2006); Kunkel v. Meridian Oil, Inc., 114 Wn. 2d 896, 906-7, 792 P.2d 1254 (1990). Alternatively, at least one court has held that where the grantee drafted the deed, ambiguities should be resolved in favor of neither party. See Harris v. Ski Park Farms, Inc., 62 Wn. App. 371, 375-76, 814 P.2d 684 (1991). In any event, Seattle Boat, a stranger to the deed, cannot benefit from any presumptions.

**C. No Valid Grounds Exist Under Washington Law to Invalidate the Deed.**

The trial court concluded that various grounds exist why the Deed, even if otherwise valid, should not be enforced. As explained in NYBA's opening brief, the trial court's conclusions have no support in Washington law. Seattle Boat's brief fails to identify any such support.

1. The Deed Is Not Void Because of Failure to Comply With Subdivision Requirements.

The trial court held that the Deed was void because Radovich and Keyes did not follow statutory procedures for subdividing property (Bellevue City Code ("BCC") chapter 22C.11 and RCW 58.17). CP 3413

(FOF 1.28); CP 3422-24, 3433-34 (COL 2.5-2.8, 3.2). NYBA's opening brief addressed the numerous problems with this holding.

Radovich and Keyes did not subdivide any property. They conveyed three strips along the edges of the Commercial Parcel to the condominium. Before the Deed, there was the Commercial Parcel and the condominium area; after the Deed there was still only the Commercial parcel and the condominium area, with different boundaries. RCW 58.17.040(6) exempts transactions such as this one, which do not result in the creation of any new lots, from both state and local subdivision regulations. See City of Seattle v. Crispin, 149 Wn.2d 896, 904, 71 P.3d 208 (2003) ("The interpretation of [RCW 58.17.040] we adopted in [Island Cnty.] established that boundary line adjustments which do not result in the creation of any additional lots are exempt from the platting requirements of local planning commissions and are exempt under the specific language of RCW 58.17.040.") (citing Island Cnty. v. Dillingham Devel. Co., 99 Wn.2d 215, 222-23, 662 P.2d 32 (1983)). Seattle Boat argues that this exemption was not enacted until 1981 and thus cannot apply to the Deed, but it has been applied retroactively to land conveyances that took place in 1977. See Island Cnty., 99 Wn.2d at 219-

223. Moreover, the Deed may not have been delivered until 1981, as it was executed in July 1980 but not recorded until May 1981.

More importantly, however, the issue is not whether Radovich and Keyes should have complied with the requirements of RCW 58.17 and BCC chapter 22C.11. The issue is whether any such failure, if it existed, would render the Deed unenforceable. Seattle Boat has not identified any authority supporting that conclusion.

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

The trial court also held that because NYBA was an unincorporated association, it could not take title to the property and that therefore the Deed is void. CP 3421-22, 3424-25, 3433-34 (COL 2.4, 2.9-2.10, 2.12, 3.2). NYBA's opening brief explained that while it is unclear whether Washington follows the common law rule that an unincorporated association cannot hold title to property, the effect, under that rule, of a conveyance of property to an unincorporated association is that the property is owned by the association's members—here, the condominium owners. See 6 Am. Jur. 2d. Associations and Clubs § 12 (“[T]he legal effect of a gift to a voluntary, unincorporated association is a gift to its individual members . . . .”); Edward W. Kuhrau, ed., Real Property

Deskbook, Vol. II at § 32.5(6) (3rd ed. Supp. 2008) (providing that real property held by unincorporated associations is “generally recognized as belonging to the members of the association”); Appeal of Atl. Coast Conference, 434 S.E.2d 865, 867-68 (N.C. Ct. App. 1993) (“[P]roperty titled in the name of an unincorporated association belongs to its members.”) (citing Venus Lodge No. 62 v. Acme Benevolent Ass'n, 231 58 S.E.2d 109 (N.C. 1950)). In its brief, Seattle Boat does not explain why the outcome should not be the same here. Parcels 4, 5, and 6 are owned as tenants-in-common by the condominium members, like the other common areas of the condominium.

3. The Deed Is Not Void Because NYBA Did Not Amend Its Declaration.

Finally, the court held that the Deed was void because NYBA never amended its declaration to include the addition of Parcels 4, 5, and 6. CP 3421-22, 3424-25, 3433-34 (COL 2.4, 2.11, 3.2). As explained in NYBA’s opening brief, no support exists in Washington law for this conclusion, and NYBA can still amend its declaration.

Seattle Boat blames the “morass” that has arisen in this case on the fact that NYBA did not amend its declaration. Resp. Br. at 37-38. In doing so, Seattle Boat overlooks the fact that NYBA recorded the Deed

shortly after receiving it, in May 1981, thereby putting the world, including Seattle Boat, on notice of its members' ownership. See, e.g., Alby v. Banc One Financial, 156 Wn.2d 367, 371, 128 P.3d 81 (2006) (observing that subsequent purchaser of land was on notice of restrictions in earlier deed, because the deed had been recorded); Maier v. Giske, 154 Wn.App. 6, 16, 223 P.3d 1265 (2010) (observing that purchaser had notice of easement because the deed granting the easement had been recorded). Perhaps it is true, as Seattle Boat suggests, if NYBA had amended its declaration, this case could have been avoided. It could also have been avoided if the title company that provided a title report to Seattle Boat in connection with the purchase of the Commercial Parcel had not failed to discover the recorded Deed, RP 1571-75, or if Seattle Boat had itself investigated the records and discovered the Deed.

4. The Deed Is Not Void Because of Lack of Consideration.

Seattle Boat urges that the trial court's findings and conclusions regarding the lack of consideration for the Deed should be upheld. Resp. Br. at 39-40. In doing so, Seattle Boat focuses on the supposed high value of the land, overlooking the key point that the areas in question were already burdened with easements belonging to NYBA. As such, the areas

held far less value to the Developers than they would have otherwise. RP 345-49. In addition, when the Developers created the condominium they provided less parking than they had promised and than was required by law, leaving them with an obligation to remedy the situation. Exh. 28; Exh. 7; RP 182-83, 151-52, 156. The Deed was one attempt to remedy the situation.<sup>2</sup> RP 156-57, 344-46.

5. No Basis Exists for Laches.

Contrary to Seattle Boat's assertions, NYBA's dealings with Mr. Burbridge can not support the application of laches. Laches requires knowledge or reasonable opportunity to discover that potential plaintiff has a cause of action against a defendant. Valley View Indus. Park v. City of Redmond, 107 Wn.2d 621, 635, 733 P.2d 182 (1987). As explained in NYBA's opening brief, NYBA and Mercer Marine generally co-existed in peace. RP 166-70, 192-93, 565-66, 578-79. NYBA asserted its property rights when necessary, as when it wrote Mercer Marine in 1987 to inform it that the Mercer Marine building encroached on NYBA's property. Exh. 27. That Mr. Burbridge knew of NYBA's rights to Parcels 4, 5, and 6 is

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<sup>2</sup> Seattle Boat suggests that NYBA raised this argument for the first time on appeal (Resp. Br. at 40), but that is incorrect. See, e.g., RP 1099, 1102.

also evidenced by the 1981 letter in which he stated that he had “had to forfeit” 1,500 square feet to NYBA. Exh. 9.

As evidence of laches, Seattle Boat contends that NYBA never raised a claim of fee title ownership in 2004 when Burbridge proposed a redevelopment project. Resp. Br. at 41-42. At this time, the president of NYBA was Kyle Anderson, who did not know about the Deed and believed NYBA had only exclusive easements. RP 552-54, 556, 578-79. As Mr. Anderson testified, he was willing to discuss redevelopment with Mr. Burbridge, including a possible reconfiguration of easements, because he believed that with better organization NYBA might be able to increase its number of parking spaces. RP 570-73, 798-99. NYBA never agreed to any redevelopment plans or reconfiguration of easements, however, and Mr. Burbridge never proceeded with development plans. RP 576-579. Thus, these events are hardly evidence of NYBA sleeping on its rights.

NYBA’s property rights were not threatened until Seattle Boat purchased the Commercial Parcel and began to assert ownership over Parcels 4, 5, and 6. It was not until then that NYBA’s cause of action to quiet title arose. A single meeting took place between Mr. Anderson and Seattle Boat’s president Alan Bohling before Seattle Boat closed on the property. At this time, Mr. Anderson was still unaware of the Deed, and,

in any event, no specific plans were discussed. RP 580-86, 1559-1662, 1669-70, 1541-49, 553-54. In its brief, Seattle Boat reports that at this meeting, Mr. Bohling “discussed demolishing a structure on the land covered by Easement 5.” Resp. Br. at 42. But Seattle Boat mischaracterizes this testimony. In fact, Mr. Bohling testified that the parties discussed the possibility of moving the NYBA offices into a new building to be constructed on the Commercial Parcel, with restrooms to be located there. RP 1672-73. That is, Seattle Boat proposed a benefit for NYBA, not simply the demolition of a structure on NYBA’s property.

Mr. Anderson kept apprised of Seattle Boat’s plans to some extent through the City beginning in June of 2007, but Mr. Bohling did not present his plans to NYBA until February 2008. RP 590-92, 215-218. During this time, Mr. Anderson informed Seattle Boat that NYBA had exclusive use of Parcels 4, 5, and 6, RP 505-06, and at the February board meeting, Mr. Lang informed Mr. Bohling that NYBA owned Parcels 4, 5, and 6. RP 215-18. NYBA located the Deed in June 2008, and brought it to Seattle Boat’s attention within weeks, leading to this lawsuit just a few months later. RP 773-74, 440-42, 222, 928-32, CP 1-11. These facts do not support the application of laches. See Waldrip, 40 Wn.2d at 470, 472, 477-78 (holding that laches did not bar plaintiff from enforcing deed

recorded 50 years earlier where she was unaware of deed for 47 years and brought lawsuit to enforce it one year after learning of it).

**D. Overburdening of Easements.**

NYBA is appealing the trial court's findings and conclusions that, assuming NYBA has only non-exclusive easements, Seattle Boat's proposed plans do not interfere with NYBA's rights. CP 3420 (FOF 1.56-57); CP 3430-32, 3434 (COL 2.25, 2.28-30, 3.5, 3.6). As explained in NYBA's opening brief, the trial court's findings are based in part on the erroneous conclusion that the owner of the Commercial Parcel, Seattle Boat, is the dominant estate holder. CP 3430-31. In fact, because Parcels 4, 5, and 6 are located primarily on the Commercial Parcel, the Commercial Parcel is the servient estate and NYBA is the dominant estate holder. See William B. Stoebuck and John W. Weaver, 17 Wash. Prac.: Real Estate: Property Law § 2.2 at 84 (2d ed. 2004). Thus, the trial court applied the wrong standard to the question of whether Seattle Boat's proposed uses will overburden the easements (assuming NYBA only has easement rights). Seattle Boat continues to miss the correct standard, and cites cases that are inapposite. Resp. Br. at 49. Lee v. Lozier, 88 Wn. App. 176, 945 P.2d 214 (1997) addresses the scope of permissible uses of a prescriptive easement, while Snyder v. Haynes, 152 Wn. App. 774, 217

P.3d 787 (2009) addresses the permissibility of use by a dominant estate holder. As explained in the opening brief, the correct standard is whether Seattle Boat's use of the easements is inconsistent with the easements or will materially interfere with NYBA's use of the easements. See Veach v. Culp, 92 Wn.2d 570, 575, 599 P.2d 526 (1979).

**E. NYBA Is Entitled to an Implied Easement.**

NYBA is entitled to an easement, implied either by necessity or from prior use, allowing continued access to Parcels 5 and 6. Seattle Boat contends that this claim must be rejected because it was not raised below. Resp. Br. at 46. But the rule is not "inexorable"; exceptions exist. See Maynard Inv. Co. v. McCann, 77 Wn. 2d 616, 621, 465 P.2d 657 (1970) (remanding for judgment in favor of plaintiff based on theory not raised in the trial court).

Seattle Boat also contends that NYBA's claim is not ripe because Seattle Boat's proposed development plans preserve NYBA's access to Parcels 5 and 6. Resp. Br. at 46. But no guarantee exists that Seattle Boat's proposed development will proceed as planned. As things currently stand, NYBA must enter the Commercial Parcel to access parking located on Parcels 5 and 6. RP 133-35, 610-11, 387-88. All of the elements of both an easement implied from prior use and an easement

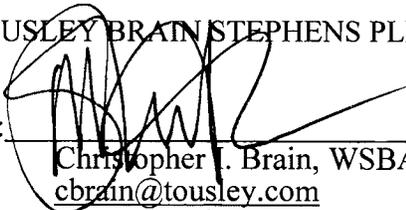
by necessity are present. Humphrey v. Krutz, 77 Wash. 152, 137 P. 806 (1913), cited by Seattle Boat, has no bearing on these issues. It did not involve an easement implied by prior use or by necessity. Instead, the plaintiffs sought to enjoin a threatened obstruction of what was alleged to be a public alley. The trial court dismissed the action on the grounds that no actual or threatened obstruction of the alley existed, id. at 155, but the court of appeals reversed. Id. at 156-57.

### III. CONCLUSION

Paragraphs 1.9, 1.12-1.15, 1.18, 1.20-1.29, 1.32, 1.41, 1.45-1.47, 1.53, 1.55-1.57, 2.1-2.20, 2.23, 2.25-2.30, 2.35, and 3.1-3.10 of the trial court's Findings of Fact and Conclusions of Law should be vacated, and its Order Granting Defendants' Motion for Entry of Judgment and Taxation of Costs, dated November 5, 2010, should be reversed.

DATED this 1st day of July, 2011.

TOUSLEY BRAIN STEPHENS PLLC

By: 

Christopher J. Brain, WSBA #5055  
[cbrain@tousley.com](mailto:cbrain@tousley.com)

Mary B. Reiten, WSBA #33623  
[mreiten@tousley.com](mailto:mreiten@tousley.com)

1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
Telephone: 206.682.5600

**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 1st day of July, 2011, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

---

Gary D. Huff, WSBA #6185  
KARR TUTTLE CAMPBELL  
1201 Third Avenue, Suite 2900  
Seattle, WA 98101

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

AND

Scott E. Collins, WSBA #18399  
HELSELL FETTERMAN, LLP  
1001 Fourth Avenue, Suite 4200  
Seattle, WA 98154-1154

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Defendants and Third Party Plaintiffs*

---

Wendy E. Lyon, WSBA #34461  
Paul J. Kundtz, WSBA #13548  
RIDDELL WILLIAMS P.S.  
1001 Fourth Avenue, Suite 4500  
Seattle, WA 98154-1192

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Third-Party Defendants*

---

Thomas R. Dreiling, WSBA #4794  
Attorney at Law  
1000 Second Avenue, Suite 1700  
Seattle, WA 98104

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Fourth-Party Defendants Keyes*

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J. Richard Aramburu, WSBA #466  
ARAMBURU & EUSTIS, LLP  
720 Third Avenue, Suite 2112  
Seattle, WA 98104-1860

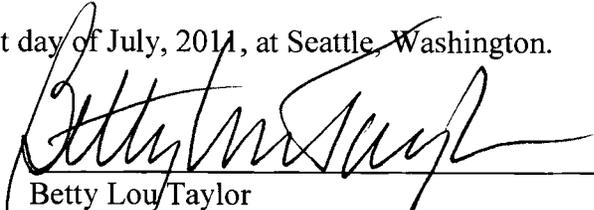
- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Courier
- Facsimile
- Electronic Mail

*Attorneys for Fourth-Party Defendants Radovich*

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

EXECUTED this 1st day of July, 2011, at Seattle, Washington.



Betty Lou Taylor