

65732-1

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NO. 65732-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

COASTAL COMMUNITY BANK,

Third-Party Defendants/Appellant

v.

MADI GROUP, INC.,

Third-Party Plaintiff/Respondents

BRIEF OF APPELLANT

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I. NATURE OF THE CASE.

The questions in this case center upon application of the mechanic's lien statute RCW 60.04 et seq and underlying common law. This is first a matter of waiver of a mechanic's lien, and second a matter of lien priority between a claimed professional services mechanic's lien and a lender's purchase money deed of trust lien. Alternatively, Madi Group has not met their burden on their motion and there are genuine issues of material fact as to the priority date of Madi Group's claimed lien for professional services and the amount of the lienable services provided by Madi Group. Moreover, an architect's lien does not attach to the real property under Washington law where, as here, there is no building erected because such services do not improve real property. Alternatively, Madi's claim of lien, if any, is on the "improvements" Madi's professional services made, not on the real property.

If this court finds waiver, it need not address the other issues. As a matter of first impression, the potential lien claimant, Madi, waived any right to a mechanic's lien it had as a matter of law by agreeing to and taking a deed of trust and a promissory note on the same property subject to the claimed mechanic's lien. While the taking of the deed of trust is waiver as a matter of law, even the promissory note was for a longer term than the mechanic's lien, and constitutes waiver. RCW 60.04 et seq. has

not abrogated the common law of waiver with respect to mechanic's liens by taking alternate security devices.

If this court finds there is no waiver, then even assuming Madi has an otherwise valid mechanic's lien, Madi's claimed lien is nonetheless subordinate to Coastal's prior recorded deed of trust by operation of RCW 60.04.226 and RCW 60.04.031(5) as a matter of law. Madi failed to record its lien and give the world notice before Coastal's lien attached and was recorded. Any lien for professional services is limited to the "improvement" and not the land. RCW 60.04.021. Madi's failure to strictly comply with the recording requirements of RCW 60.04.031(5) by failing to timely record its notice of professional services subordinates any claim of lien Madi may have to Coastal's lien because it is undisputed that Madi did not record its notice of professional services before Coastal's purchase money deed of trust *and* that the professional services were not visible on the property. Whether or not Coastal, as a lender had actual notice of some preliminary work by Madi Group for Pacific Ventures before Coastal recorded its deed of trust is irrelevant.

If this court determines that Madi Group satisfied the requirements of RCW 60.04.031(5), Madi Group's claim of lien under RCW 60.04 *et seq* is limited and must be determined at trial because Madi Group has not met their burden to prove the amount and scope of their lienable services.

There is also a genuine issue of material fact as to when the contract with Pacific Ventures was entered into. Madi provides an email as evidence of a contract, but does not provide the actual contract between the parties. Indeed, all inferences in favor of the non-moving party (Coastal), there appears to be two different contracts—a preliminary contract for sketches to promote the venture, and a secondary contract for the development of plans to obtain permits. The email relied upon for a priority date actually speaks of entering into a contract in the future. Accordingly, all inferences in favor of the non-moving party, Coastal, there are genuine issue of material fact that preclude summary judgment.

II. ASSIGNMENT OF ERRORS

A. Assignment of Error No. 1. The trial court erred in holding there was no waiver as a matter of law.

B. Assignment of Error No.2. The trial court erred in holding Madi Group's claim to a mechanic's lien was superior to Coastal Community Bank's deed of trust.

C. Assignment of Error No.3. The trial court erred in holding there was no genuine issue of material fact regarding extent and scope of Madi Group's claim to a Mechanic's lien and striking the trial date.

III. STATEMENT OF ISSUES

A. Under Washington common law, does an architect who accepts a deed of trust on the same property it claims a mechanic's lien upon, securing the payment of promissory note given for the debt which gave rise to the claim of lien which is not due until after the statute of limitations on the lien runs, waive its right to claim a mechanic's lien on the property as a matter of law?

B. Under RCW 60.04.031(5) does an architect subordinate its claim to a lien on the property, if any, where the architect fails to record notice of professional services until after a lender's purchase money deed of trust is recorded and the professional services are not visible on the property?

C. Was it error to grant Madi Group's Motion for Summary Judgment where they merely alleged "there is no evidence that all the requirements for an enforceable lien have not been met" (CP 106) where it is their burden to prove this and the start date and scope of the lien are disputed?

IV. STATEMENT OF FACTS AND PROCEDURE

A. Background: Coastal Community Bank is a local bank in Washington. Madi Group is an architectural services firm based in San Francisco, California. Pacific Ventures Redmond Ridge LLC is a

developer of property, and specifically sought to purchase, design, and build property in Redmond Ridge and, apparently, retained the services of Madi Group through mutual acquaintances to that end. Pacific Ventures bought property from Pacific Realty Associates, L.P. with the financing of the purchase of the real property by Coastal Community Bank, secured by a Deed of Trust.

B. Procedure: Madi Group and Third-Party Defendant Coastal Community Bank brought cross-motions for summary judgment. (Clerk's Papers "CP" 019); (CP 099). Madi moved for summary judgment against Pacific Ventures and Coastal, seeking a declaration that their claim to a mechanic's lien was valid, and superior to Coastal, and a foreclosure of their lien at a sale of the property. (CP 099).

Coastal moved for summary judgment that Madi Group had waived any claim to a mechanic's lien because it took a deed of trust on the property subsequent to the claim for the lien on the property where the deed of trust did not contemplate preserving the mechanic's lien. (CP 019). Pacific Ventures indicated the deed of trust was to be the only lien Madi Group would have on the property (CP 172). Coastal also argued that under *McAndrews* and RCW 60.04.031(5), Madi Group's failure to record a notice of professional services in the real property records

subordinated Madi Group's claim of lien on the land to Coastal's deed of trust, irrespective of actual knowledge by Coastal of some preliminary sketch work by Madi Group for Bill Hegger prior to Pacific Ventures acquiring the property. (CP 027-30).

C. Facts: Coastal lent money to Pacific Ventures to buy real property, and immediately recorded its deed of trust on April 23, 2007. (CP 033-35). When Coastal visited the site, there were no visible professional services improvements by Madi Group in late April and Early May of 2007. (CP 066). No improvements by Pacific Ventures were made to the site. On July 9, 2009 Madi Group admits its drawings were prepared for the building permit process, and not prepared for construction. (CP 167). On March 3, 2009 Madi Group recorded its Notice of Professional Services. (CP 047). On March 6, 2009 Madi Group recorded its claim of lien. (CP 050). On June 30, 2009 Madi took a promissory note and deed of trust. The June 30, 2009 deed of trust does not expressly provide for the continuance of a mechanic's lien. (CP 061). The deed of trust does not mention or contemplate the coexistence of the claim for a mechanic's lien. Paragraph 2 provides that the Grantor covenants and agrees: "To pay before delinquent all liens, deeds of trust, and mortgages on the Property and all taxes and assessments upon the

property; to keep the property free and clear of all other charges, liens or encumbrances impairing the security of this Deed of Trust.” (CP 061). Paragraph 6 provides: “Should Grantor fail to pay when due any taxes, assessments, insurance premiums, liens, encumbrances or other charges against the property herein above described, Beneficiary may pay the same, and the amount so paid, with interest at the rate set forth in the note secured hereby, shall be added to and become part of the debt secured by this Deed of Trust.” (CP 061).

V. LEGAL ARGUMENT

The Court erred in denying Coastal’s motion for summary judgment on waiver and on subordination. The court erred in not finding waiver as a matter of law by the taking of a deed of trust, because the court erroneously concluded a deed of trust is a “promissory note or other evidence of indebtedness.” The court erred in not ordering Madi Group’s lien subordinated because the purported “actual notice” is irrelevant under the law and undisputed facts of this case.

The court erred in granting Madi Group’s motion for summary judgment because genuine issues of material fact exist as to priority date of Madi’s claim of lien for their particular professional services, and whether the claim of lien for their particular professional services may only attach to the improvements under RCW 60.04.021.

A. **Standard of Review.** The standard of review on an issue of law is *de novo*.¹ Likewise, contested conclusions of law are reviewed *de novo*.² Statutory interpretation is reviewed *de novo*. *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009).

The office of summary judgment is to avoid a useless trial when there is no genuine issue of any material fact- that is, when there is no job for the finder of fact. *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). Summary judgment is appropriate only where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963); *A.A.R. Testing Laboratory, Inc. v. New Hope Baptist Church*, 112 Wn. App. 442, 448, fn.1, 50 P.3d 650 (2002). Summary judgment is only properly granted when the pleadings, affidavits, depositions and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct, 2548, 2552-53, 91 L.Ed.2d 65 (1986); *Lauritzen v. Lauritzen*, 74 Wn, App. 432, 437 (1994), citing *Kesinger v. Logan*, 113 Wn.2d 320, 325, 779 P.2d 263 (1989). While the Court must construe conflicting evidence in a light favorable to the non-moving party,

¹ *Higgins v. Intek Recreation*, 123 Wn. App. 821, 99 P.3d 421 (2004).

² *Soltero v. Wimer*, 159 Wn.2d 428, 150 P.3d 552 (2007).

summary judgment is properly granted whenever “reasonable persons could reach but one conclusion.” *Wilson v. Steinbach*, 98 Wn.2d 434,437(1982).

It is well settled that the ultimate burden of establishing the right to a lien lies with the party claiming it. *Northlake Concrete Products, Inc. v. Wylie*, 34 Wn.App. 810, 813, 663 P.2d 1380 (1983). The judicial interpretation of undisputed written agreements (like a deed of trust) and their legal effect is appropriate for summary judgment. *See e.g., Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 9, 937 P.2d 1143 (1997). The lien claimant bears the burden to prove their claim of lien on property is valid and superior to a deed of trust. *McAndrews Group, LTD v. Ehmke*, 121 Wn. App. 759, 90 P.3d 1123 (2004); *DKS Construction Management, Inc. v. Real Estate Improvement Company, LLC*, 124 Wn. App. 532, 536, 201 P.3d 170 (2004).

B. An Architectural Firm That Accepts a Deed of Trust and a Promissory Note With A Due Date Beyond The Time For The Mechanic’s Lien Waives its Right to Claim or Enforce any Mechanic’s Lien on the Same Property for the Same Debt.

1. Mechanics’ Liens in Washington

A mechanic’s lien is simply a statutory security device which provides a contractor with a security interest in the improvement and/or the real property improved by the contractor for the contract value of those

services. RCW 60.04 *et seq.* In general, absent an agreement between the parties or other security taken repugnant to a mechanic's lien constituting waiver, the lien attaches to *the improvement* upon performance under the contract that improves the real property. See RCW 60.04.021; *Llewellyn Iron Works v. Littlefield*, 74 Wash. 86,88,132 P. 867(1913) *overruled on other grounds*, *White v. Million*, 175 Wash. 189, 27 P.2d 320 (1933); see also, *Grant v. Strong*, 85 U.S. 623 (1873). When the improvement is situated on the land, the lien then attaches to the owner's interest in the land. RCW 60.04.021(improvement); RCW 60.04.051(land); RCW 60.04.061(land); *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 502, 210 P.3d 308 (2009) (interpreting RCW 60.04.061), see also, *Alexander, C.J., dissent*. A lien claimant, of course, must attach and perfect its lien by strictly complying with the recorded notice requirements of the statute. RCW 60.04.031; RCW 60.04.091.

2. Common Law Waiver of a Mechanic's lien.

While it is not presumed, waiver is the express and knowing relinquishment of a legal right. Waiver may be express as a matter of law, or waiver may be implied as a matter of law. Waiver may also be a question of fact if the evidence is disputed. Here, because there is an undisputed deed of trust, there is implied waiver as a matter of law.

The right to a statutory mechanic's lien may be waived. *Ward v.*

Thorndyke, 65 Wash. 11, 15, 17 Pac 593 (1911). The party asserting waiver of a mechanic's lien has the burden to prove waiver, and before words or conduct of a party will be taken to constitute waiver by implication, the inference of waiver must be clear. *Emrich v. Gardner & Hitchings, Inc.* 51 Wn.2d 528, 320 P.3d 288 (1959). Coastal, a third party, may assert waiver of the claim of lien as a defense, because a mechanic's lien is a right *in rem* and not *in personam*. *Adel v. Blattman*, 57 Wn.2d 337, 341, 357 P.2d 159 (1960). Therefore "a waiver may be used as a defense not only by the party in whose favor it was executed, but also by any other person who has or acquires rights in the property interest which would have been subject to the lien." *Brian A. Blum*, *Mechanics' and Construction Liens in Alaska, Oregon, and Washington* §4.3 p.132 (Issue 4 1994)(citing same).

Implied waiver may be worked by agreement of the parties, or by taking alternate security repugnant to a claim for a Mechanic's lien. *McMurray v. Brown*, 91 U.S. 257, 265, 23 L. Ed. 321 (1875)(holding that mortgages and deeds of trust are contracts by an owner and mechanic that are "repugnant" to statutory mechanic's liens).

Statutory mechanics' liens are in derogation of the common law. *Better Fin. Solutions, Inc. v. Caicos Corp.*, 117 Wn. App. 899, 904, 73 P.3d 424 (2003). Accordingly, the common law rule is that where a

statutory mechanic's lien on certain real property exists, and the creditor takes a deed of trust on the same property securing a promissory note for the same debt evidenced by the mechanic's lien, the mechanic's lien is waived. *Gorman v. Sagner*, 22 Mo. 137(1855); *Phoenix Mfg. Co. v. McCormick Harvesting Mach. Co.*, 111 Wis. 570, 87 N.W. 458 (1901)(citing *Bailey v. Hull*, 11 Wis. 289, 78 Am. Dec. 706; *Schmidt v. Gilson*, 14 Wis. 514; *De Forest v. Holum*, 38 Wis. 516,524; Kneel. Mech. Liens, § 138 *et seq*; Jones, Liens, §§ 1013, 1519, *et seq*; Phil. Mech. Liens, §§ 273,280); *Spaulding Logging v. Ryckman*, 139 Or. 230, 242, 6 P.2d 25 (1932)(taking of a mortgage works a waiver).

“The question of whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding circumstances. . . [as determined from] the written agreements.” *Grant v. Strong*, 85 U.S. 623, 624 (1873). In other words, accepting a deed of trust per se is express intent to waive the mechanic's lien by operation of law because it is “substituting another mode of satisfaction in its stead.” *Gorman v. Sagner*, 22 Mo. 137 (1855); *Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 6 P.2d 25 (1931); *Willison v. Douglass*, 6 A. 530, 531-532 (Md. 1886).

In Maryland, a statute provided: “that a mechanic's lien shall not be considered as waived ‘by granting a credit, or receiving notes or other

securities, unless the same be received as payment, or the lien be expressly waived[.]” *Willison v. Douglass*, 6 A. 530, 531-532 (Md. 1886). The Maryland court held that “it is manifest that, if an express contract under seal be entered into inconsistent with the operation of a lien, the lien is expressly waived by the legal effect of such express contract. This seems to be a general principle applicable to all liens created by operation of law.” *Willison v. Douglass*, 6 A. 530, 531 -532 (Md. 1886).

Similarly, taking a promissory note with a maturity term longer than the statutory period for enforcing a mechanic’s lien is a waiver of the right to the lien at common law as it is inconsistent with the mechanic’s lien. *See e.g., Phoenix*, 111 Wis. 570 (citations omitted).

In *Spaulding Logging Co. v. Ryckman*, 139 Or. 230, 6 P.2d 25 (1931), the Oregon Supreme Court reaffirmed the common law rule “that, where a lien claimant takes a mortgage upon the same or other property as security for his debt, he thereby waives his right to a lien.” *Ryckman*, 139 Or. at 239-240. The Oregon court in *Ryckman* cited *Barrows v. Baughman*, 9 Mich. 213 (1861), reasoning that “a mortgage is ‘species of security entirely inconsistent with the idea of a mechanic’s lien upon the same land as security for the same debt.’” *Ryckman*, 139 Or. at 240. *Barrows*, 9 Mich. at 215 reasons that a lien authorized by mechanic’s lien statutes is intended as security for the *payment* of the debt, and can only be

enforced as a means of compelling *payment*. And because “the statute does not give the lien for the purposes of compelling the debtor to give other *collateral security* for the debt, nor does it provide any mode for enforcing it for such a purpose,” the *Barrows* court concluded, “we are satisfied that the statute creates no lien where the parties, by their contract, provide for a different security upon the same land for the same debt which the lien would otherwise secure.” *Id.*

Gorman v. Sanger, 22 Mo. 137 (1855) is legally and factually on all fours with the current case as well. In *Gorman*, the plaintiff had the right to a mechanic’s lien on certain property, and then accepted from the owner a promissory note and a deed of trust to the same property as the mechanic’s lien at the same time. *Gorman*, 22 Mo. 137. The Supreme Court of Missouri held that a deed of trust was legally repugnant to the idea of a mechanic’s lien and therefore the intendment of the parties was to waive the mechanic’s lien as a matter of law. *Gorman*, 22 Mo. 137. In short, the court stated:

“When a mechanics' lien exists for a debt, if the giving of a deed of trust to secure the payment at a future day of notes executed for that debt, when that deed covers the identical property covered by the lien, is not a waiver of the lien, it would be difficult to say what act by implication of law would constitute such a waiver. The notes being for the debt secured by the mechanics' lien, and

payable at a future day, that lien could not be enforced during the time the notes had to run; and, on their becoming due, there being a power in the trustees to sell the premises for their payment, no end would be attained by holding on to the mechanics' lien. Why this should be done but for the purpose of discharging the lien and substituting another mode of satisfaction in its stead, it is difficult to imagine.”

Coastal could find no case in Washington where a potential lien claimant took a deed of trust on the same property and securing the same total debt as a mechanic’s lien at the same time.³ However, the underlying rationale of *Gorman*- that a deed of trust is repugnant to a mechanic’s lien- is well recognized in Washington. See e.g., *DKS Const, Management, Inc. v. Real Estate Improvement Co., L.L.C*, 124 Wn. App. 532, 537, 102 P.3d 170 (2004)(“Unlike mortgages and deeds of trust, a mechanic’s lien is an involuntary encumbrance on the real property itself.”)

Besides one being voluntary and the other involuntary security, the differences between mechanic’s liens and deeds of trust are broad and fundamental. The deed of trust at issue here, like many deeds of trust, contains additional covenants that if breached, allow the trustee to foreclose. (CP 060-61). Mechanic’s lien holders have no such additional

³ *Davis v. Bartz*, 65 Wash. 395, 118 P. 334 (1911) is distinguishable because the mortgage was not for the same total debt and waiver was not addressed in the case, however, the assigned mortgage was ruled superior to the claimed mechanic’s lien regardless.

privileges and their single method of collection on the lien is through the mechanic's lien statute. Likewise, a deed of trust gives the trustee the power of sale and power to elect to foreclose rapidly non-judicially. RCW 61.24.100. A mechanic's lien must be judicially foreclosed and limited to the remedies available while being required to follow the strictures of RCW 60.04 *et seq*, and a mere promissory note must be judicially adjudicated. Also, a mechanic's lien may be only upon the improvement, and not attached to the land in many circumstances. RCW 60.04.021; RCW 60.04.061. A deed of trust is inherently attached to the land. RCW 61.24 *et seq*.

The beneficiary under a deed of trust enjoys a broader spectrum of rights relating to protection of the property and events of default. Under a deed of trust, the grantor is prohibited from committing waste, must pay taxes timely, and keep the property insured against loss, for example. An owner of property encumbered by a mere mechanic's lien owes no such duty to a claimant.

Here, there is no dispute that subsequent to the recording of the notice and the claim of lien in early March of 2009, Madi clearly and unequivocally took at least one deed of trust from Pacific Ventures as collateral covering the same real property and debt as the mechanic's lien.

(CP 031-35). Madi admits the promissory note was not received as payment, but was merely to “liquidate” the debt. Madi asserts the Note is the debt, a proxy for the contract debt necessary to claim a Mechanic’s lien. By the terms of the two documents, the deed of trust secures the debt as represented by the Note. Therefore, Madi’s acceptance of at least one deed of trust on property to secure payment of the same debt for which Madi provided a certain amount of professional services, clearly constitutes waiver of the mechanic’s lien as a matter of law. Such undisputed acts, as a matter of law, constitute that the mechanic’s lien is “expressly waived by the legal effect of such express contract.” *Willison v. Douglas*, 66 Md. 99, 6 Atl. 530, 531-32 (1886).

To defend its actions, Madi argues that the note allowed them to collect by means of initiating foreclosure on the mechanic’s lien, so long as they simply delayed judgment until after the maturity of the Note. (CP 153-154). This is false. The terms of the Note actually state that the “Holder agrees to forebear other means of collection, including delaying judgment on any ongoing litigation, provided all payments are made as provided herein.” (CP 153-154). It is undisputed that when the Note was made, there was no “ongoing litigation” between the Maker and the Holder. It is indisputable that initiating foreclosure on a mechanic’s lien is

a method of collection, and Madi had agreed in the Note to “forbear other means of collection.” (CP 153-154).

3. “Discharge” of a Mechanic’s Lien by “payment”-- RCW 60.04.191

Madi may argue that RCW 60.04.191 controls and is dispositive of waiver by deed of trust, arguing that the terms of the promissory note and the terms of the deed of trust must include express language signifying waiver. RCW 60.04.191 does not control and it is not dispositive because that statute is regarding “discharge” by payment, not waiver by substituted security. RCW 60.04.191 does not use the terms “waiver” “security” “encumbrance” or “deed of trust.” If the legislature wanted to have waiver by taking repugnant security covered in RCW 60.04 *et seq*, it plainly could have done so. Other states have done so. The Washington legislature did not, therefore, RCW 60.04.191 does not apply to prevent the waiver by taking a deed of trust. That being said, the Due Date and the promise to refrain from other methods of collection in the Promissory Note are express terms inconsistent with the right to claim a lien. (CP 258, 259).

RCW 60.04.191 provides:

“The taking of a *promissory note or other evidence of indebtedness* for any . . . professional services . . . for which a lien is

created by this chapter does not discharge the lien therefore, unless expressly received as payment and so specified therein.” (emphasis added).

A statute is interpreted according to its plain language, and statutory construction is unnecessary and improper when the wording of a statute is unambiguous. *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 210 P.3d 308 (2009); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007) (determining legislative intent from dictionary definitions of statutory language, and prior case law).

The key interpretation of this statute is the language “The taking of a promissory note or other evidence of indebtedness...” The doctrine of *in pari materia*, even under a liberal construction of “promissory note or other evidence of indebtedness” indicates that such instruments are instruments of *payment*, not instruments of collateral or security. Instruments of payment are not encumbrances, like mortgages and deeds of trust.

There is no legislative language indicating a deed of trust or additional security must expressly include language of waiver in it to constitute “waiver.” The plain text of the legislature simply did not use the term “deed of trust” or “additional security” when discussing what instruments per se should not constitute *discharge* of the mechanic’s lien

under the statute when taken by a potential lien claimant. RCW 60.04.191.

However, RCW 60.04.226 defines a deed of trust as an “encumbrance.” RCW 60.04.226 provides in pertinent part: “[A]ny mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust to the extent of all sums secured by the mortgage or deed of trust...” The mechanic’s lien statute refers to deeds of trust as encumbrances, yet the legislature did not include the term “deed of trust” within RCW 60.04.091 as being within a “promissory note or other evidence of indebtedness.”

Under its plain meaning, a deed of trust is not “a promissory note or other evidence of indebtedness.” A deed of trust is a conveyance of title that serves as collateral to secure a loan as a mortgage substitute. *See Black’s Law Dictionary* 445 (8th dx. ed. 2004); *Nelson & Whitman*, Real Estate Finance Law, §7.19 (Fifth Ed. 2007).

There is a broad and fundamental distinction between giving payment that would discharge a debt, and giving security that would secure a debt. Nowhere in RCW 60.04.191 does the statute mention “security” or “additional security.” Some states have limited the common law rule of waiver of a mechanic’s lien by taking security on the same property as the lien. *Willison v. Douglass*, 66 Md. 99, 6 Atl. 530, 531-

532 (Md. 1886). Washington has not. If the legislature wanted to make it so that mechanic's liens could only be waived by express agreement of the parties as expressed by terms within the deed of trust it could have done so. It has not done so in RCW 60.04 *et seq.*

Boise Cascade v. Distinctive Homes, 67 Wn.2d 289, 292, 407 P.2d 452 (1965) made it clear that RCW 60.04.140 recodified at RCW 60.04.191 only limited common law waiver or discharge with respect to *payment* by promissory notes or other forms of *payment*. In *Boise Cascade*, the issue was whether a mechanic waived its lien rights on two newly constructed residences merely by taking two promissory notes. *Boise Cascade*, 67 Wn.2d 289 (1965). Therefore, *Boise Cascade* does not address the legal effect of securing a liquidated debt with a deed of trust, as here. In deed, the express language in the note in question expressly stated the note would not waive the mechanic's lien. *Id.* at 293.

Unlike in *Boise Cascade*, the deed of trust here is the clear certain unequivocal act inconsistent with the mode of satisfaction of a mechanic's lien and satisfies the "something more" test in *Boise Cascade*. *Id.* at 292-293. Here, the language in the promissory note promising that the maturity date for the note was December 17, 2009, six months after its execution is also express language in the Note evidencing the intent to waive the mechanic's lien which satisfies the "something more" test in

Boise Cascade. (CP 258, 259). This is true, because it is undisputed that Madi Group's claim to a mechanic's lien would have expired on November 6, 2009 (March 6, 2009 plus eight months), 41 days prior to the maturity of the note. (CP 137); RCW 60.04.141 ("No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim of lien has been recorded unless an action is filed by the lien claimant within that time..."). The note also promised to forebear any means of collection and not take a judgment on any ongoing litigation. (CP 258, 259). While it is undisputed there was no "ongoing" litigation between the Maker and Holder when the Note was signed, Madi broke its promise in the Note and started a collection action on the Mechanic's lien prior to the "Due Date" of the note. (CP 001, 003). Madi has waived its claim to a mechanic's lien by taking the deed of trust and promissory note with terms that do not specifically provide for the continuation of Madi's claim to a Mechanic's lien. It is undisputed that the owner expressed shock and dismay at the continued assertion of the mechanic's lien after he signed the note and granted the deed of trust. (CP 172).

Here, the deed of trust (CP 059-63) (which does not mention the continuation of the mechanic's lien) and the promissory note (CP 258-259) (which does not mention the continuation of the mechanic's lien)

with a term to maturity longer than the mechanic's lien statute of limitations for Madi's previously claimed lien is "something more tangible than an assertion that such a lien was waived by the acceptance of a note or notes" *Boise Cascade*, 67 Wn.2d at 292. The deed of trust has no express language evidencing an intent to continue the mechanic's lien. The deed of trust in paragraph 2 and paragraph 6 describes only liens that the Grantor should pay to people other than the Beneficiary (CP 061) and allows that the Beneficiary may pay those liens, therefore, the liens mentioned in the deed of trust cannot be Mechanic's liens also held by the Beneficiary. Madi has waived it's claim to a Mechanic's lien and is not entitled to assert it now against Coastal Community Bank.

c. If the legislature wanted to include "waiver" or "security" language in RCW 60.04.191 (or any other section) it plainly could have done so.

If the legislature wanted to make it impossible to waive a mechanic's lien unless the documents themselves internally expressed the intent to waive, they could have done so. The legislature did not. Other statutes in other states do that, but even those did not abrogate implied waiver.

In Maryland, a statute provided: "that a mechanic's lien shall not be considered as waived 'by granting a credit, or receiving notes or other securities, unless the same be received as payment, or the lien be expressly

waived[.]” *Willison v. Douglass*, 6 A. 530, 531 -532 (Md. 1886). The Maryland court held that “it is manifest that, if an express contract under seal be entered into inconsistent with the operation of a lien, the lien is expressly waived by the legal effect of such express contract. This seems to be a general principle applicable to all liens created by operation of law.” *Willison v. Douglass*, 6 A. 530, 531 -532 (Md. 1886).

Washington does not have a mechanic’s lien statute that speaks of waiver or additional security like the old Maryland statute, and nonetheless, the *Willison* court still found waiver of a mechanic’s lien when a mortgage was taken to secure the debt under the common law.

- d. **Materially identical statutes as RCW 60.04.191 do not alter the common law rule that taking a deed of trust or a promissory note with a term beyond the period to enforce a mechanic’s lien is waiver of the statutory mechanic’s lien.**

The Supreme Court of Wisconsin in *Phoenix* held that the statute regarding the effect of taking promissory notes and other evidence of indebtedness “does not change the common law rule as to the effect of taking independent security.” *Phoenix*, 11 Wis. at 570 (holding that taking security independent of a mechanic’s lien for the same debt on the same property sets up a strong inference of the “intent to waive in the absence of other satisfactory evidence”). The statute at issue in *Phoenix* is materially

identical to Washington's historical and modern statute, and uses the precise language "promissory note or other evidence of indebtedness." See *Roseliop v. Herro*, 206 Wis. 256, 239 N.W. 413, 415 (1931)("taking of a promissory note or other evidence of indebtedness for any such work, labor or materials done or furnished shall not discharge the lien therefore hereby given unless expressly received as payment therefore and so specified therein.")(citing *Phoenix*, 111 Wis. at 570.)

Here, there is no documentary evidence of the parties' mutual intent to maintain the mechanic's lien after the express deed of trust was granted and accepted in those documents, and therefore Madi waived its lien as a matter of law by the taking of the deed of trust and promissory note with a due date beyond the date to enforce the mechanic's lien. In fact, the term of the note and the promise to refrain from other methods of collection are further evidence the intent to abandon the mechanic's lien. Madi has waived any claims to a mechanic's lien under RCW 64.04 *et seq.*

4. Madi Group's proffered excuse is without merit and the claimed Mechanic's lien attached only to the improvement and not the property.

By Madi Group's own admission, they took the deed of trust because of conceded infirmities in their claims to a mechanic's lien, to "cover bets" under *McAndrews* and RCW 60.04.031(5). (CP 221). Madi

Group asserts that the deed of trust was merely “additional security” and not waiver.

However, in fairness to Madi Group’s assertion that the deed of trust is merely additional security, RCW 60.04 et seq does recognize liens upon the improvements (RCW 60.04.021), and liens upon the land (RCW 60.04.061). Therefore, conceivably if Madi Group’s lien is only upon the improvements under RCW 64.04 et seq, the deed of trust *would* be “additional security.” As discussed in section C below, under RCW 60.04.226 deeds of trust recorded are superior to any other liens, unless those liens are RCW 60.04.061 liens, not RCW 60.04.021 liens. Under RCW 60.04.226 a deeds of trust recorded prior to any other liens, unless those liens are RCW 60.04.061 liens. RCW 60.04.226 provides:

“Except as otherwise provided in RCW 60.04.061 or 60.04.221, any mortgage or deed of trust shall be prior to all liens, mortgages, deeds of trust, and other encumbrances which have not been recorded prior to the recording of the mortgage or deed of trust...”

RCW 60.04.221 does not apply here. Priority is only given to liens that attach to the “lot or parcel” over subsequently recorded deeds of trust. RCW 60.04.061. RCW 60.04.061 provides: “The claim of lien created by this chapter *upon any lot or 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.” See *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 316, 210 P.3d 308 (Chief Justice Alexander’s dissent, discussing legislative history and purposes of the different language in RCW 60.04.021 versus RCW 60.04.061).

Because Madi is entitled only to an RCW 60.04.021 claim of lien (there were no visible professional services on the real property and nothing in the real property records), Madi’s lien (if any) is against only the “improvement” under RCW 60.04.021 and is subordinate to Coastal’s deed of trust. RCW 60.04.226.

Therefore, by taking a deed of trust on the real property, Madi has waived any claim that it’s Mechanic’s lien has attached to the real property and is prior. Coastal’s deed of trust is superior to any claim of lien on the improvements.

In short, no matter how Madi spins or attempts to justify their actions now, the deed of trust was substitution security for the right to claim a mechanic’s lien on real property, even if they could so claim. *Willison v. Douglass*, 66 Md. 99, 6 Atl. 530, 531-532 (Md. 1886); *McMurray v. Brown*, 91 U.S. 257, 23 L. Ed. 321; *Grant v. Strong*, 21 L. Ed. 859; *Gorman v. Sanger*, 22 Mo. 137 (1855).

C. The Evidence is Undisputed That RCW 60.04.031(5) Subordinates Any Valid Professional Services Claim of Lien by Madi, and Gives Coastal Community Bank's Deed of Trust Priority.

The mechanic's lien statute, or the "construction lien statute" as many practitioners call it, was repealed, replaced, revised and recodified in 1991 and 1992, recodifying Washington's mechanic's lien statute that was adopted in 1893, which in turn was based on enactments dating back to 1854. 27 Wash. Prac. §4.51.

The attachment and perfection requirements of Washington's mechanic's statute are mandatory and cannot be waived by the court. *DKS Construction Management, Inc. v. Real Estate Improvement Company, LLC*, 124 Wn. App. 532, 534, 201 P.3d 170 (2004); RCW 60.04.031(6); RCW 60.04.091. The statute is strictly construed to determine the existence and scope of a Mechanic's lien. *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009). An architect's professional services lien rights for improvements in a project are inchoate, but the architect must comply strictly and exactly with the statute to perfect those rights. *See Lumberman's*, 89 Wn. App. at 286, 949 P.2d 382 (1997); *See also, Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105 (1991)(calling into question the constitutionality of liens that arise without notice or hearing).

Only after it is determined whether and to what property the lien attaches upon, the statute is liberally construed to protect it. *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009)(liens may attach to the improvements and/or to the real property).

The lien claimant bears the burden to prove their claim of lien on property is valid and superior to a deed of trust. *McAndrews Group, LTD v. Ehmke*, 121 Wn. App. 759, 90 P.3d 1123 (2004)(lien claimant bears burden under the test in RCW 60.04.031(5), remanding even where the lien claimant's testimony was un rebutted on the issue of visible professional services).

1. RCW 60.04.226 priority of deeds of trust and liens under RCW 60.04.021

RCW 60.04.226 provides priority to recorded deeds of trust under the Mechanic's lien statute. In order for Madi to have priority over Coastal, Madi must prove they complied with RCW 60.04.031(5) and that it's lien is an RCW 60.04.061 lien, and not merely an RCW 60.04.021 lien.

Professional services may give rise to a lien upon the improvement (RCW 60.04.021), or upon the land if all required notices are properly and timely recorded and the services were visible on the ground (RCW 60.04.061); *McAndrews*, 121 Wn. App. at 762. When the professional

services are of the type that are visible on the ground, those may create a lien upon the land. *Id.* (citing RCW 60.04.021 and RCW 60.04.061). But where the professional services are not visible on the ground, like preliminary architectural services, those merely create a claim of lien upon the *improvement*. RCW 60.04.021. RCW 60.04.021 indicates that the type of professional services that Madi Group performed, which were undisputedly not manifest on the property, are merely lien rights attaching to the *improvements*, and not the real property. RCW 60.04.021. RCW 60.04.021 provides:

“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.” (emphasis added).

RCW 60.04.021 authorizes Mechanic’s liens for professional services, but only upon the “improvement.” A deed of trust is superior to all liens under RCW 60.04 et seq, unless that lien is an RCW 60.04.061 lien upon the “lot or parcel of land.” RCW 60.04.226. For the RCW 60.04.021 lien to attach to the real property and become an RCW 60.04.061 lien, the professional services must “improve” the real property,

i.e. be “situated” upon the land. RCW 60.04.051. In the context of professional services liens, this will occur where the professional services are manifest on the real property, *either* in the real property records with a Notice of Professional services (RCW 60.04.031(5)), or when an inspection of the property would have revealed those services. *McAndrews*, (citing RCW 60.04.021 and RCW 60.04.061). Failing that, the lien, if any, can only be upon the improvement under RCW 60.04.021 and is subordinate to a deed of trust. RCW 60.04.226.

This is the balance the legislature struck in passing RCW 60.04 et seq in 1991 and 1992. Prior to that under the old regime, what is now defined as “professional services” often would receive a priority date on the real property only when the claim of lien was filed in the real property records. *CH2M Hill Inc. v. Greg Bogart & Company, Inc.*, 47 Wn. App. 414, 735 P.2d 1330 (Div. 1, 1987)(engineers had priority under the common law of when they filed their notice of claim of lien, regardless of when they began work); *Wyatt Stapper Architects, AIA, PS, v. 1501 Pacific Associates*, 60 Wn. App. 842, 846, 809 P.2d 206 (Div.2 1991)(same, reasoning professional services such as engineering should receive priority based upon when they record because preliminary work done by engineers is not visible at commencement).

The common law supports RCW 60.04.021 emphasis on merely

attaching to the improvement. An architect's lien, where the building is not erected, does not attach to the land because it only attaches to the building. *Lipscomb v. Exchange Nat. Bank of Spokane*, 80 Wash. 296, 141 P. 686 (1914). An architect was not entitled to a lien on the land where there was excavation, but no construction of a building. *Id.* This is consistent with the modern statute that was provided in 1991 that limits an architect's lien for professional services to the "improvement" only. RCW 60.04.021. *See also, Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 316, 210 P.3d 308 (2009)(Chief Justice Alexander's dissent, discussing legislative history and purpose of RCW 60.04.021 versus RCW 60.04.061). Professional services, such as engineering services that were not visible on the site did not attach or perfect to the real property under the prior statutory scheme unless the claim was filed in the real property records. *Wyatt Stapper Architects, AIA, P.S., v. 1501 Pacific Associates*, 60 Wn. App. 842, 846, 809 P.2d 206 (1991). This common law is consistent with RCW 60.04.226, RCW 60.04.061, and RCW 60.04.021.

But now, RCW 60.04.031(5) gives such professional service providers the simple opportunity to record in the real property records if they want to claim a lien upon the land. However, failure to do so is perilous to priority on the land. RCW 60.04.031(6) provides: "A lien authorized by this chapter shall not be enforced unless the lien claimant

has complied with the applicable provisions of this section.” Secondary sources indicate that while apparently permissive, RCW 60.04.031(5) should be regarded as mandatory. 27 Wash. Prac. § 4.61.

2. RCW 60.04.031(5)

Because Madi Group claims a professional services lien, they must comply with RCW 60.04.031(5) to have an enforceable lien.

RCW 60.04.031(5):

“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 the 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 a 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 interpretation of the plain language in RCW 60.04.031(5)

indicates that the “notice” of professional services in the second sentence of the section refers to notice by way of the visible professional services in the first sentence. The statute plainly gives special effect to services that are “visible” on the site. Indeed, RCW 60.04.031(5) establishes two different types of RCW 60.04.011(5)(c) professional services—those that are visible on the site, and those that are not. The legislature deliberately groups visible professional services together with improvements of the categories that are also visible on the site in RCW 60.04.031(5). Namely, RCW 60.04.011(5)(a) and (b) services are grouped with “visible” professional services. Therefore, the legislature indicates that any notice must be recorded or be from an inspection of the real property to attach to the real property “lot or parcel” under the statute. RCW 60.04.031(5); RCW 60.04.061. Without being either manifest on the property or manifest in the real property records, the lien could only potentially attach under RCW 60.04.021 which is to the improvements only, and not have priority over a deed of trust. RCW 60.04.226. If the construction never started or the professional services were not manifest on the real property, then the liens wouldn’t attach to the land without recording in the real property records. This is the conclusion from *McAndrews* and the statute which gives special treatment to only “visible” professional services.

i. *McAndrews*.

The statutory language of RCW 60.04.031(5) was examined and applied in *McAndrews Group, LTD v. Ehmke*, 121 Wn. App. 759, 90 P.3d 1123 (2004) on analogous facts, only in *McAndrews* the question of whether the professional services were visible on the site saved the lien claimant in a priority dispute with a deed of trust when they failed to timely record a Notice of Professional Services. Here, it is undisputed that the professional services were not visible on the site, so *McAndrews* is dispositive of Madi Group's claims as a matter of law.

McAndrews, provides the three-prong test of when RCW 60.04.031(5) applies to prevent a professional services lien trumping an intervening lien claimant without notice of the lien in the public records:

“(1) Is [architecture] a professional service?

(2) Were no [RCW 60.04.011(5)(a) or (b)] statutorily defined improvements commenced on [the] property?

(3) Would an inspection [of the property] have revealed no visible professional services?”

If the undisputable answer to all three questions is “yes” then RCW 60.04.031(5) applies and Madi's lien is subordinate to Coastal Community Bank's lien. *McAndrews*, at 764. If RCW 60.04.031(5) does not apply, only then could Madi's professional services lien have priority over Coastal Community Bank's deed of trust because it purportedly dates

back to a prior start date (assuming no waiver and on proper proof). *McAndrews*, at 763-764, *citing*, RCW 60.04.21; RCW 60.04.061.

In *McAndrews*, a surveyor was hired and performed professional surveying services on property and installed fluorescent survey markers on the boundaries, corners, and varying control points on the property in question. *McAndrews*, at 761. A lender recorded a deed of trust five months after the intermittent survey work began. *Id.* Seven months after that, the surveyor recorded a professional service lien claim on the property for the outstanding balance due for professional services. *Id.* The trial court dismissed the surveyor's claims against the lender ruling that the lender had a superior interest in the property because "the surveyor's professional services would not be readily visible from a cursory inspection of the property." *Id.* The court of appeals agreed in part with the lower court, holding that surveying is a professional service by definition, and there were no statutorily defined improvements to the property by the lien claimant. *Id.* at 765. But, as to the third prong of the test, the court held that a genuine issue of material fact existed as to whether or not the surveyor's professional services were visible on the property when the lender recorded, which included "three-foot tall 'witness posts' topped with florescent pink ribbon." *Id.* at 765. This question of whether the "professional services" were visible on the site

was the only reason that saved the Professional Service provider's claim to an enforceable lien because the surveyor did not record a Notice of Professional Services in the real property records. RCW 60.04.031(6).

RCW 60.04.031(5) is intended to only protect visible professional services from being given a priority date of the date of the claim of lien, and to give the opportunity to non-visible professional service providers to record in the real property records a notice to give a priority date. Failure to do so results subordination. RCW 60.04.031(5). Failure to record until after a deed of trust is recorded results in loss of priority, if any. RCW 60.04.226.

ii. Legislative History

The legislative report is consistent with the *McAndrews* rule. "Some services relating to a construction project give rise to lien rights, but do not produce anything visible at the site during early stages of the project. Examples are architect and engineering services, soil samples, and biologist reports. These potential lien claimants *must* record a notice in the real property records of the county which describes the work. This gives subsequent purchasers or lenders an opportunity to discover these possible claims." 1991 Final Leg. Report 52nd Washington State Leg. at p.223 (SSB 5497 C 281 L 91) (emphasis added). Madi points out that "shall" changed to "may" in 1992. (CP 236). This was obviously to protect

professional service providers that had “visible” professional services.

iii. Failure to file formal notice of non-visible services.

Here, like the surveyor in *McAndrews*, it is undisputed that Madi did not timely file a Notice of Professional Services lien. Madi recorded the RCW 60.04.031(5) Notice after Coastal Community Bank recorded its lender’s deed of trust. Likewise, as with surveying services in *McAndrews*, it is undisputed that architecture service is a professional service as defined in statute. RCW 60.04.11(13)(assuming all the services provided by Madi are architectural services that improved the real property). Here, like in *McAndrews*, there were no RCW 60.04.011(5)(a) or (b) statutorily defined improvements on the property by the potential lien claimant, (CP 066). As stated in Madi’s March 3, 2009 recorded notice, the professional services were limited to “schematic designs, architecture, engineering, jurisdictional coordination, permit submittal, documents and construction documentation.” (CP 047). Here Madi does not claim that its professional services were visible on the site, the only way under RCW 60.04 *et seq.* their lien would not be subordinated. RCW 60.04.031(5); RCW 60.04.226. Therefore, here, unlike in *McAndrews*, it is undisputed that an inspection of the property would not have revealed, and did not reveal, the professional services of Madi. (CP 066). There was no

surveying by Madi or other evidence of professional services on the property that would have been shown by a cursory viewing of the property. (CP 066). It is undisputed that construction by Pacific Ventures nor Madi Group ever began. (CP 172-174). Therefore, unlike in *McAndrews*, here there is no genuine issue of material fact. The lien never attached to the property for failure to record the Notice pursuant to RCW 60.04.031(5), and therefore is subordinate to Coastal's lien under RCW 60.04.226. Accordingly, RCW 60.04.031(5) applies and Madi's lien is subordinate to Coastal Community Bank's lien as a matter of law.

iv. Madi's construction is incorrect.

Madi will argue that "actual notice" of schematics drawn by Madi Group seen by Coastal gives Madi a priority under RCW 60.04.031(5) on the real property. Madi Group will argue that *McAndrews* does not apply because Coastal had actual knowledge that Madi Group was working for the debtor Pacific Ventures. This argument is unavailing, and misses the point of the strict recording of notice requirements of RCW 60.04 et seq, including RCW 60.04.031(5). Madi is wrong for two reasons.

First, this doesn't comply with the plain language of the statute and *McAndrews*. Second, it is well settled that non-visible professional services that do not result in an improvement situated on real property do not attach to the real property without recording. *Lipscomb v. Exchange*

Nat. Bank of Spokane, 80 Wash. 296, 141 P. 686 (1914); *Wyatt Stapper Architects, v. 1501 Pacific Associates*, 60 Wn. App. 842, 846, 809 P.2d 206 (1991). Only, arguably, a notice in the real property records could associate the professional services to the real property, otherwise the lien is only authorized on the improvement. RCW 60.04.021. This was provided as an option to professional service providers in RCW 60.04.031(5). Those who fail to do that, fail at their peril.

v. Application of RCW 60.04.031(5) and RCW 60.04.226 renders Coastal's deed of trust superior because it was recorded first.

An architect who fails to record notice of their professional services that are not manifest on the real property until after a purchase money lender records their deed of trust may not claim the priority of a mechanic's lien on the property unless their professional services were visible on the property. RCW 60.04.031(5); RCW 60.04.226; RCW 60.04.021; RCW 60.04.061; *McAndrews Group, LTD v. Ehmke*, 121 Wn. App. 759, 90 P.3d 1123 (2004)(applying RCW 60.04.031(5) and remanding to the trial court to determine whether the professional services survey stakes were visible on the property as a question of fact).

Because it is undisputed that none of Madi's claimed professional services were visible on the property when Coastal lent the purchase money and recorded their deed of trust, Madi's claim to a lien on the

property, even if they are entitled to one on the property, is subordinated by RCW 60.04.031(5).

Moreover, because Madi filed a Notice of Professional Services after Coastal's deed of trust, that day was the first day a lien on the property, if any, could attach and perfect because there were no visible professional services. RCW 60.04.021; RCW 60.04.061. Therefore, by operation of RCW 60.04.226 and Madi Group's failure to record a Notice of Professional Services, Coastal's deed of trust is superior. The issue of whether Coastal had actual knowledge is immaterial to the priority of Coastal's deed of trust on the real property because any claim of lien under any actual knowledge has been waived under *McAndrews*, or alternatively, would only attach to the improvement, and not the real property. RCW 60.04.021.

Without recording in the real property records in a timely manner, an architect who provides non-visible professional services may claim a lien only upon the *improvements* if there is an intervening deed of trust recorded. RCW 60.04.021; RCW 60.04.226. Here, however, the architect supplied no improvements on the land that create a lien on the "lot or parcel" because a building was never erected on the property and there were no visible professional services. RCW 60.04.061. The plans are potential improvements that are lienable, but Madi has stated that those

plans were not intended for construction (CP 167) (calling into question whether the services are even “professional services”). Namely, Vijay Jayachandran stated “none of the drawings were signed by mADI GROUP or KPFF at that stage. How they issued a permit on drawings that were not stamped or signed by us is a mystery to me. We will inquire from the County on this practice of theirs. That is what we mean when we say that the drawings were not issued for construction. You are proceeding at your own risk. You say you cannot provide indemnity to us. How can we be held responsible when the drawings have not been stamped or signed by us?”(CP 167). Moreover, Madi has time and again asserted that Madi owned the plans. (CP 181).

It is well settled in Washington that an architect may not have a mechanic’s lien upon the land if a building is not erected.

D. Genuine issues of material fact preclude granting the order that Madi’s claim of lien attached to the real property and is superior to Coastal’s deed of trust.

An order granting summary judgment is reviewed *de novo*, taking all facts and reasonable inferences in light most favorable to the non-moving party. *Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 497, 210 P.3d 308 (2009). The fact that the evidence used for the priority date indicates a future contract, and the fact that there was a preliminary

\$10,000.00 contract while Pacific Ventures sought lenders, and secondary contract after Pacific Ventures became owner renders Madi's priority date in dispute. The evidence shows \$10,000.00 was paid discharging the initial contract.

Moreover, Madi must prove at trial what services it provided are lienable because the promissory note ostensibly includes money for services that are not lienable under Washington law.

Madi Group has not met its burden on the motion of proving the amount of its lien. A mechanic's lien is security only for a valid claim. It is necessary for the claimant to plead and prove that the performance for which the lien is claimed was executed in a proper and workman like manner. *Lundberg v. The Corp. of the Catholic Archbishop of Seattle*, 55 Wn.2d 77, 346 P.2d 164 (1959).

That burden is on Madi, and Madi cannot merely rest on the allegation that "there is no evidence that all the requirements for an enforceable lien have not been met." (CP 106). Madi must prove the claimed services are all professional services as contemplated by RCW 60.04 *et seq.*

Madi Group claims it has provided professional services in the general nature of "schematic designs, architecture, engineering, jurisdictional coordination, permit submittal, documents and construction

documentation.” (CP 0139). Madi Group has not provided a contract that spells out its services so that a Court may determine whether specific services are lienable and whether there is a contract price for such, or whether the price they are seeking to lien is reasonable. Madi Group has no set of plans for construction or offered such into evidence, no construction contract in evidence, no building permit has been obtained, and no building has been built.

RCW 60.04.021 authorizes Mechanic’s liens for professional services for an architect and engineering, but only for lienable professional services. RCW 60.04.011(13) defines what “professional services” are lienable under the construction lien statute. Only those professional services which improve real property are lienable.

RCW 60.04.011(5) defines “Improvement” to include “professional services” in preparation for “construction.” RCW 60.04.011(13) defines “Professional services” to include architectural services for the “improvement” of real property. This is circular. Black’s Law dictionary defines “improvement” as: “An addition to real property, whether permanent or not; esp., one that increases its value or utility or that enhances its appearance. — Also termed *land improvement*. Cf. FIXTURE.” Black’s Law Dictionary p.773 (8th dx ed. 2004).

Land use planning and development services are not lienable because they do not improve real property. *Wenatchee Federal Savings & Loan Ass'n v. Mission Ridge Estates*, 8 Wn.2d 749, 498 P.2d 841 (1972);

Architectural services which do not result in an erected building are not lienable. *Lipscomb v. Exchange National Bank*, 80 Wash. 296, 141 Pac. 686 (1914).

If Madi Group is unable to differentiate which professional services they performed that are lienable, they may not claim any lien. *Wenatchee Federal Sav. & Loan Ass'n v. Mission Ridge Estates*, 80 Wn.2d 749, 498 P.2d 841 (1972) (“When items are commingled in such a manner that one is unable to determine with certainty what are and what are not lienable, then the entire lien is of no effect”) *citing, Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 P. 541 (1910).

E. ATTORNEY’S FEES

Pursuant to RAP 18.1, Coastal Community Bank respectfully moves the Court and requests attorney’s fees, expenses, and costs on appeal pursuant to RCW 60.04.181 against the lien claimant. *DKS Construction Management, Inc. v. Real Estate Improvement Company, LLC*, 124 Wn. App. 532, 534, 201 P.3d 170 (2004)(citing *Schumacher Painting Co. v. First Union Mgmt., Inc.*, 69 Wn. App. 693, 702, 850 P.2d

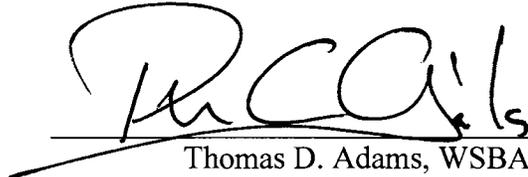
1361 (1993)). This request is based upon RCW 60.04.181(3) which allows for attorney's fees and necessary expenses incurred by the attorney defending against a lien in the superior court, court of appeals, supreme court, as the court deems reasonable. If this court remands for further proceedings, the trial court may determine reasonable fees. *McAndrews Group, LTD v. Ehmke*, 121 Wn. App. 759, 90 P.3d 1123 (2004).

VI. CONCLUSION

Here, there are no genuine issues for the trier of fact on Coastal's issues of waiver and subordination. Therefore, Appellant Coastal Community Bank respectfully requests judgment as a matter of law dismissing Madi's claims against it, and granting reasonable attorney's fees pursuant to RCW 60.04 *et seq.* Alternatively, failing to find waiver and or subordination, there are genuine issues of material fact as to the scope, start date, amount of Madi's claimed professional services lien. Simply liquidating an amount due on a contract that may encompass more services than lienable services is not sufficient evidence to prove the amount of a Mechanic's lien.

Dated this 11th day of October, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document, and a copy of the Reporter's Transcript of Proceedings, to be delivered via legal messenger to:

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DATED the 11th day of October, 2010 at Everett,
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PATTY L. LETOURNEAU

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