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No. 681788 -I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

WASHINGTON FEDERAL SAVINGS & LOAN ASSOCIATION,

Respondent/Plaintiff,

v.

MARK A. McNAUGHTON and MARNA L. McNAUGHTON, husband and wife, individually and the marital community comprised thereof,

Appellants/Defendants.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

On September 18, 2009, Respondent Washington Federal Savings & Loan Association's ("WaFed") predecessor-in-interest, Horizon Bank ("Horizon"), non-judicially foreclosed on two properties in Snohomish County owned by The McNaughton Group, LLC ("TMG") and commonly referred to as the "Sommerwood Property" and the "King's Corner Property" (collectively, the "Property"). Horizon was the successful bidder at the trustee's sale, with a credit bid of $6 million. The principal due on the note at the time of the foreclosure was $11.7 million.

Appellants Mark and Marna McNaughton (collectively, the "McNaughtons") guarantied the note, and WaFed now seeks a deficiency judgment against them of $5.7 million plus interest and fees. WaFed seeks to prove that Horizon's credit bid at the trustee's sale of $6 million represents the "fair value" of the property. For two reasons, one legal and one factual, WaFed's motion should have been denied.

First, as a legal matter, WaFed's appraisers used the wrong definition of "fair value." Thus, as a matter of law, WaFed failed to carry its burden of proof on summary judgment. WaFed's appraisers analyzed market value, not fair value. A fair value determination is premised on the absence of a distressed market and assumes that neither buyer nor seller is

acting under duress. Here, even though WaFed's appraiser points out that the economic conditions under which the trustee's sale took place were distressed, he made no adjustments to account for this condition.

Second, as a factual matter, disputed issues of material fact exist regarding the value of the Property. Indeed, Horizon's appraiser specifically admits that he failed to appraise all the property. He states that he did NOT value the sewer lift station servicing the Property and recommended that the bank hire an expert to do so. Indeed, documents produced by WaFed indicate that Horizon internally valued the lift station at approximately $3 million in addition to the market value of the Property. Despite these facts putting the ultimate issue of value into dispute, the trial court granted summary judgment resolving the factual dispute in WaFed's favor, rather than indulging every inference in favor of the non-moving party, the McNaughtons.

Before granting summary judgment, the trial court should have insisted on the application of the correct legal standard for reaching "fair value." Even assuming that the trial court applied the correct definition of "fair value," the fact that the appraisal was incomplete by its own terms should have prevented summary judgment. In short, WaFed failed to carry its initial burden of proof.

II. STATEMENT OF FACTS

The McNaughtons do not dispute the facts surrounding the execution of the note or the guaranties. See CR 689-92 & 694-714 (McKenzie Decl. & Exhs.); see also CR 36-40 (McNaughton Decl.) ¶¶ 2-9. Neither do they dispute that TMG defaulted on the note. The McNaughtons do, however, dispute WaFed's assertion that $6 million represents the fair value of the Property at the time of the foreclosure sale. Judgment should not have been entered against the McNaughtons without (1) the appropriate legal definition of "fair value" applied; and (2) a trial on the merits to resolve disputed issues of material fact.

A. The Appraisals Relied on by WaFed do not Reflect Fair Value as Defined by RCW 61.24.005(6)

WaFed relies on three appraisals (two from 2009, one from 2010) and its subsequent sale of the property in 2011 to support its assertion that $6 million represents fair value. These appraisals and sale do not use the appropriate legal definition of "fair value."

1. None of the Appraisals Analyze Fair Value

RCW § 61.24.005(6) defines "fair value" as

> [T]he value of the property encumbered by a deed of trust that is sold pursuant to a trustee's sale. This value shall be determined by the court or other appropriate adjudicator by reference to the most

> probable price, as of the date of the trustee's sale, which would be paid in cash or other immediately available funds, after deduction of prior liens and encumbrances with interest to the date of the trustee's sale, for which the property would sell on such date after reasonable exposure in the market under conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgably, and for self-interest, and assuming that neither is under duress. (Emphasis added).

Note that the definition of "fair value" requires that neither party be "under duress." Compare the statutory definition of "fair value" to WaFed's appraiser's definition of "market value" as used in their appraisals:

> [T]he most probable price that a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, and knowledgeably, and assuming the price is not affected by unique stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:
>
> 1. Buyer and seller are typically motivated.
>
> 2. Bother parties are well informed or well advised, and both acting in what they consider their own best interest
>
> 3. A reasonable time is allowed for exposure in the open market

> 4. Payment is made in terms of cash in US dollars or in terms of financial arrangements comparable thereto
>
> 5. The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

CR 390-91, 505-06, 620-21 (emphasis added). Notably absent from these three identical definitions is the requirement that neither party be under duress. Indeed, the definition relied on by WaFed's appraisers assumes "the price is not affected by unique stimulus." And in none of the appraisals is either "fair value" or RCW § 61.24.005(6) even mentioned. See generally CR 367-688 (Bryan Decl. & Exhs. A-C).

"Market value" and statutory "fair value" are not synonymous, as the McNaughtons' expert, Anthony Gibbons, testified at his deposition. CR 267-68 (Deposition of Anthony Gibbons dated November 3, 2011 ("Gibbons Dep.") at 49:7-50:14). Mr. Gibbons has been appraising properties since 1982. CR 224-25 (Id. at 6:15-7:3). He has held an MAI designation since 1988 and also holds a Washington state appraisal license. CR 254 & 256 (Id. at 36:13-22, 38:5-17).

Mr. Gibbons testified: "As a general concept, if I picked up an appraisal and the appraiser says we have estimated the fair value of the

property, (sic) that would tell me they've done something differently than market value because the term we use is market value." CR 267-68 (Id. at 49:15-19). "The term 'fair value' is in my experience typically reserved for issues associated with a foreclosure or a trustee's sale and [they] (sic) are different – and so it's kind of reserved for that use." CR 274 (Id. at 56:14-18). Fair value is generally considered "an evaluation of the property under normal conditions." CR 276-77 (Id. at 58:24-59:1). That is, the application of a fair value analysis implies that at least one of the parties is under duress: "[T]he very nature of the term as it's being applied in a situation where almost by definition there's duress, I mean that's when the term gets applied because, ..., a trustee's sale suggests that a property is being lost and there's a level of duress associated with that event..." CR 277 (Id. at 59:2-12).

Hence, not only would one define the current market value of the property to determine "fair value," one would also have to analyze normal market conditions. That is, should a distressed real estate market exist – such as the Great Recession in which the Puget Sound found itself in September 2009 – an appraiser would have to take their analysis one step further and analyze how a normal (i.e. non-distressed) real estate market would value the same property. The result would equal "fair value." CR

278-79 (Id. at 60:18-61:2). In contrast, a market value analysis, such as WaFed's, only analyzes current economic conditions, regardless of the existence of a distressed real estate market. WaFed, and the trial court, applied the wrong definition – ignoring the statutory definition for one of WaFed's choosing.

2. Each of WaFed's Appraisals Reflect a Distressed Market, Contradicting the Statutory Definition

WaFed's market value analysis does not adjust for the distressed economic conditions under which buyers and sellers have been operating since at least 2008. Indeed, WaFed's appraiser acknowledges that "[t]his opinion emphasizes how rapidly the market change[d] (sic) in the late 3rd and early 4th Quarters of 2008 with the onset of the credit crisis." CR 392, 507. And in analyzing the "Highest and Best Use" of Sommerwood in April 2009, the appraiser notes:

> In terms of financial feasibility, as a vacant site, this is generally inferred from the pricing of comparable sites in the market. The market is currently in a state of flux, with wide variations in pricing of preliminary plats and finished lots are starting to be sold at significant discounts by builders and developers under financial duress. As such, feasibility considerations would need to take into account the current market conditions and appropriate compensation for risk.

CR 409 (emphasis added).

In other words, as the market worsens, the risk of taking on vacant property for the purposes of development increases, putting downward pressure on prices. And the injection into the process of banks that liquidate inventory obtained through foreclosure sales, has forced the price of land continually downward as developers and builders must compete with these fire sale prices.

The comparable sales chosen by the appraiser for Sommerwood in 2009 also reflect the market's distress. For example, comparable sale four had been under contract for two years, but the sale fell through because of changing market conditions. CR 425. Comparable sale 12 was back on the market as finished lots at a lower price point than it sold for at the preliminary plat stage. Id. And the residual analysis performed by the appraiser indicates market distress: "While these low price points are not representative of healthy market transactions, the increasing frequency of these transactions suggest that a lower price threshold is in the future." CR 426.

WaFed's appraisals contain repeated references to the distressed Puget Sound economy, precisely demonstrating that the analysis conducted was a market analysis, not a fair value analysis as is required

for determining a deficiency under RCW 61.24.100(5). For example, the appraisals point out:

- "Over the past year, the Puget Sound economy has followed the national economic decline that started during the 2006-2007 period." CR 293, 508, 623.

- "In conjunction with the decline in the median home price, marketing periods increased and the number of sales declined." CR 393.

- "[W]ith a number of reports of lots being taken back by the lenders on development loans and sold at significant discounts from the prices of the past few years, there is likely to be a further period of price fluctuations." CR 397.

- "Taken all together, the current inventory and pipeline indicates approximately 6 to 8 years of supply. This suggests a protracted period of adjustment in the subject's market with significant price declines projected as lot developers become more competitive or banks repossess properties and are forced to liquidate." CR 399, 515 (emphasis added).

- "The current oversupply is exerting strong downward pressure on the price for finished lots. There is further downward pressure on pricing

as a result of falling prices of finished houses in the market as well." CR 513, 628.

- "There are other cases of short sales of finished lots at prices similar to the prices for land at preliminary plat 2 to 3 years ago. Situations like this are becoming more frequent in the market and are eroding the price thresholds on existing inventory because inevitably finished housing will be constructed on these lots to compete with other new construction." CR 515.

- Finally, a May 29, 2009 review of the April 24, 2009 appraisal performed by Rick W. Tunnell & Assoc., LLC for Horizon is much more explicit and provides the following caution regarding the economy:

> The recent events of the past year have had profound affects (sic) on the national and local economies and commenced with the sub-prime market implosion in June of 2007, followed by a series of major brokerage house failures, the collapse of Countrywide Mortgage and subsequent failure of Indy Mac Bank. In September 2008, secondary mortgage giants FHLMC and FNMA essentially failed and were rescued by the government with subsequent billions of dollars allocated to provide for the purchase of bad mortgager debts, capital (TARP money) to banks, "bailouts" to AIG and others, and finally to the most recent and continued advances to the big three US Automakers. In mid March the Federal Reserve announced plans to further increase the government's role in halting the

> recession buy (sic) several bold moves that focused on buy Treasury Securities, toxic assets, etc.
>
> ...
>
> Where this will end is anyone's guess as the country is in uncharted territory but it does remain clear that the residential markets in particular are subject to potential and additional deterioration while the commercial component is also subject to over-building in certain geographic areas and product types.

CR 325.

All of these observations parallel those made by Mr. Gibbons at his deposition as to the difference between "market value" and "fair value" analyses.[1] Yes despite recognizing these distressed market conditions, WaFed's appraisers make no adjustments for "duress" as required by the "fair value" definition of RCW 61.24.005(6).

B. WaFed's Appraisals Specifically Exclude the Value of the Sewer Lift Station Rendering the Valuations Incomplete

Not only do the appraisals relied on by WaFed fail to evaluate the Property's fair value, they also fail to value the sewer lift station that

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[1] Mr. Gibbons testified that, for example, unusually high unemployment for a considerable period of time (as was the case in 2009) is not normal. Nor is the sale of half-completed development projects (also as happened in 2009). Hence, the normal economic conditions under which fair value is assessed may be expressed as a negative by recognizing that current economic conditions are not normal (i.e. distressed), and neither were the economic conditions that existed in September 2009 when the trustee's sale took place. CR 272 (Gibbons Dep. at 54:1-24).

benefits the Property. CR 381. In both 2009 and 2010, the appraiser specifically pointed out, as an "extraordinary assumption," that the value of the sewer lift station to the Property was not included in the appraisal:

> Extraordinary Assumptions: The subject is improved with a sewer lift station that, according to the owner, cost $2 million to install and was intended to serve the development of multiple plats in the immediate market area. This appraisal does not attempt to establish the value of this lift station beyond recognizing the service that it provides to the plat that is the subject of this appraisal. We recommend that the Client employ experts to establish the contributory value of this structure for properties that are located in the immediate area and would benefit from service provided by this station.

CR 381, 610 (emphasis added).

And again in the body of the appraisal the appraiser states:

> There is also a sewer lift station that has been installed on the subject. Reportedly this station cost $2,000,000 to install and was proposed to serve multiple plats. The appraisers are not experts with regard to the value that this piece of infrastructure represents and we recommend that experts are consulted to determine the value for not only the subject but for other nearby plats via latecomer fees, etc.

CR 405, 635 (emphasis added). WaFed has no appraisal that addressed the value of the lift station to the Property. CR 217 (¶9).

Moreover, internal documents of Horizon (WaFed's predecessor-in-interest) produced by WaFed demonstrate a material dispute regarding the Property's value. These documents show that Horizon believed the lift station had a $3 million value in addition to the appraised value of the Property. Credit memoranda dated August 17, August 28, and September 23, 2009 all provide the substantially the same estimate of value:

> [Resource Transition Consultants, LLC] has had various conversations with potential purchasers for the Sommerwood and King's Corners parcels and has advised management that a potential purchaser maybe (*sic*) willing to pay $3,000,000 for the value of the lift station.
>
> ...
>
> Management believes the lift station adds additional value to the property and based on feedback from RTC, the cost estimate to construct a lift station and McNaughton's marketing material has estimated the value of the sewer lift station to be $3,000,000. Below is a table detailing the property valuation:
>
> Sommerwood Property Valuation

Sommerwood Parcel appraisal(1)	$4,115,000
Kings Corner, Phase II Parcel appraisal(1)	$930,000
Sewer Lift Station(2)	$3,000,000
Less adjustments for legal and miscellaneous expenses:	($60,000)

Legal	$50,000	
Miscellaneous	$10,000	
Total Valuation		**$7,985,000**

CR 349-54 (emphasis added). These documents alone demonstrate a disputed issue of material fact regarding the Property's fair value.

Moreover, Horizon personnel requested permission to bid up to $7,985,000 at the trustee's sale. CR 356. On September 16, 2009, an email was sent in response to the question of what the bank should bid at the trustee's sale. In response, an outside consultant to Horizon stated: "We would suggest that the bank consider an amount somewhere around $6MM … In addition, we would suggest that bank be prepared to ere. t (sic) at auction (in case someone bids) up to your impaired book balance ($7.9M) or to whatever number you are comfortable with…." CR 358-59.

This evidence is the only documentary evidence produced by WaFed that indicates how Horizon arrived at its $6 million credit bid for the Property. The correspondence reflects Horizon's belief that the "impaired book balance" of $7.9 million equated with the Property's market value – far in excess of the $6 million credit bit made at the trustee's sale.

Despite WaFed's appraiser's admission that the appraisals are incomplete, and despite internal memorandum demonstrating a higher market value than what was bid at the trustee's sale, the trial court ruled in WaFed's favor. To do so, the trial court must necessarily have resolved these conflicts in the evidence to find that the sewer lift station added no value to the Property, and that Horizon's internal valuations had no merit. The trial court should not have resolved these conflicts on summary judgment.

C. The McNaughtons Presented Sufficient Conflicting Evidence of Value to Preclude Summary Judgment

The 2009 appraisal for Sommerwood relied on by WaFed cites as comparable sales five properties listed for sale (not sold) in April 2009, six sales that occurred three years before in 2006, and two sales occurring in 2007. CR 411. Yet the appraisal fails to identify as a comparable a September 2008 sale located within one-half mile of the Property.

On September 12, 2008, the McNaughtons, through a related entity, Bear Creek Highlands, LLC, sold an approximately 30-acre property to the Everett School District (the "District"). CR 30-40 (¶9). The Bear Creek Highlands property, like Sommerwood, at the time of the sale was undeveloped land with preliminary plat approval for development

as a residential subdivision (approximately 206 lots). Id. The property was sold to the District for $22,760,000 (the price was supported by an appraisal prepared for the District before closing) in September 2008, just eight months before the April 2009 appraisal. Id. This purchase price translates to approximately $110,500 per unimproved lot, a substantially higher value than the $42,000 per lot value assigned to Sommerwood by the April 2009 appraisal. Id.

WaFed's appraiser does not identify the sale of Bear Creek Highlands in the April 2009 appraisal as a comparable, unimproved, vacant land sale even though the Bear Creek Highlands' sale is significantly more recent than the other comparable sales cited in the appraisals. The failure to identify this comparable sale raises credibility issues as to the accuracy of the 2009 Sommerwood appraisal and its conclusion of value. Further, it contradicts WaFed's valuation evidence that Horizon's credit bid, in fact, reflects the fair value of the Property, again raising an issue of material fact that precludes summary judgment.

D. Appraisals of Comparable Properties Prepared for Other Lenders Support a Value of the Property Substantially Higher Than Either the 2009 Appraisals or Horizon's Credit Bid.

Further, in 2009, entities related to the McNaughtons, Creekstone, LLC ("Creekstone") and TMG, had other properties in the immediate

vicinity of the Property that were financed by lenders other than Horizon/WaFed. Appraisals prepared for these other properties – which are contemporaneous with the appraisals relied on by WaFed – further demonstrate that disputed issues of material fact exist as to whether the 2009 appraisals relied on by WaFed and the Horizon credit bid reflect a credible estimation of the Property's "fair value."

Regarding Sommerwood:

TMG had an acquisition and development loan from Frontier Bank ("Frontier") securing the "Creekstone Property" located just north (within one-quarter mile) of the Property. CR 40 (¶ 10). Creekstone, like Sommerwood, at the time was unimproved land with preliminary plat approval for 248 lots. Id. Frontier obtained an appraisal of Creekstone from Richard DeFrancesco of Macaulay & Associates, Ltd. with a valuation date of July 15, 2009. CR 46-105. Mr. DeFrancesco concluded the value of Creekstone to be $66,000 per approved lot (for a total valuation of $16,370,000). CR 90. This conclusion of value is substantially higher than the $42,000 per lot valuation reached in the April 2009 appraisal.

Regarding King's Corner:

TMG had a loan with Frontier Bank for a different King's Corner property located immediately south of the King's Corner that is the subject of this litigation and west of Sommerwood. CR 40-41. In an appraisal with a valuation date of August 7, 2009, Mr. DeFrancesco valued the property at $40,000 per unit, a higher value than the $32,000 per unit valuation arrived at in the June 2009 appraisal. CR 143; see generally, CR 107-56.

Using the per lot/unit valuations as determined by Mr. DeFrancesco in his appraisals for Frontier (both of which had valuation dates closer to the September 18, 2009 foreclosure sale than either of the 2009 appraisals prepared for Horizon), the Property potentially had a combined market value of $7,628,000 (Sommerwood Property: 98 lots x $66,000/lot = $6,465,000; King's Corner Property: 29 units x $40,000 per unit = $1,160,000), over $2.6 million higher than the combined market value of $5,045,000 in the 2009 Horizon appraisals (and over $1.6 million higher than Horizon's credit bid).[2] The discrepancies between the

[2] The McNaughtons do not concede that a valuation of the Property based on the per lot/unit values from Mr. DeFrancesco's appraisals for Frontier represent the "fair value" of the Property. However, Mr. DeFrancesco's appraisals clearly demonstrate the

valuations arrived at by Mr. DeFrancesco for Frontier and the valuations in the 2009 Horizon appraisals relied on by WaFed underscore the existence of genuine issues of material fact that preclude granting WaFed's motion for summary judgment.

III. ARGUMENT AND AUTHORITY

A. Standard of Review

The appellate court reviews summary judgment decisions de novo. Seybold v. Neu, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). "The court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue." Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). "A material fact is one on which the litigation depends, in whole or in part." Young v. Key Pharmaceuticals, 112 Wn.2d 216, 234, 770 P.2d 182 (1989) (Dore, J. concurring in part and dissenting in part). All evidence submitted must be construed in the light most favorable to the non-moving party, here the McNaughtons. Id. When contradictory evidence exists, or the movant's

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existence of genuine issues of material fact regarding the fair value of the Property that preclude resolving this matter on summary judgment.

evidence is impeached, an issue of credibility is present that should not be resolved on summary judgment. Balise, 62 Wn.2d at 200.

B. The Trial Court Relied on the Wrong Legal Standard in Granting Summary Judgment

1. Fair Value is Not the Equivalent of Market Value

The Legislature added "fair value" to the non-judicial foreclosure scheme in 1998. *See* 27 Marjorie Dick Rombauer, Wash. Prac., Creditors' Remedies – Debtors' Relief § 3.35 (Supp. 2011) ("Note that the term defined is "fair value" not "fair market value" and therefore cannot be assumed to have the same meaning."). Given that the real estate market continued to grow through 2007, no case law exists interpreting this section exists because no need existed to invoke its terms. However, the language of RCW 61.24 et seq. provides the basis for utilizing the same fair value analysis set forth in the judicial foreclosure statute, RCW 61.12.060, otherwise known as an upset price.

RCW 61.24.100(5) provides that in any action against a guarantor "following a trustee's sale under a deed of trust securing a commercial loan" the guarantor may request that the Court determine the fair value of the property sold, which the McNaughtons did via their answer to WaFed's complaint. See CR 1284. If the fair value of the property is

greater than the price paid at the foreclosure sale, then the fair value figure is used to calculate the deficiency. RCW 61.24.100(5). A fair value determination is "in lieu of any right any guarantor would otherwise have to establish an upset price pursuant to RCW 61.12.060 prior to a trustee's sale." Id. (emphasis added). The reference to "upset price," particularly when combined with the requirement in RCW 61.24.005(6) (defining fair value) that neither party be under duress (quoted supra), provides the trial court with a direct analogy to an "upset price" for purposes of analyzing fair value.

Under the judicial foreclosure statute, RCW 61.12, et seq., borrowers are entitled to an upset price hearing either before or after the foreclosure sale (similarly, fair value hearings happen after a non-judicial foreclosure sale). An upset price hearing before a judicial foreclosure sale sets the minimum price that must be bid for the property or credited to the borrower for purposes of determining their deficiency. If held after a judicial foreclosure, an upset price hearing determines whether the price obtained at the sale represents the "fair value" of the property, and if it does not, what fair value should be credited to the borrower, again for purposes of determining the deficiency against the borrower. RCW

61.12.060.[3] When determining fair value at an upset price hearing, the trial court may take into consideration current economic conditions. RCW 61.12.060 ("[T]he court, ..., may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.").

Like the non-judicial foreclosure statute, RCW 61.24.005(6) and 61.24.100(5), the upset price statute, RCW 61.12.060, also refers to "fair value," not "market value." Further, the public policy behind both statutes appears to be the same – to prevent the creditor from receiving a windfall. As stated above, while no case law exists interpreting the 1998

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[3] RCW 61.12.060 provides:

In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment. The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.

The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the **fair value** of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation. If the **fair value** as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted. (Emphasis added).

amendments to the Non Judicial Foreclosure Act, there are several cases interpreting and analyzing fair value for purposes of setting an upset price.

The Washington Supreme Court, in Lee v. Barnes, 61 Wn.2d 581, 585, 379 P.2d 362 (1963) (quoting Suring State Bank v. Giese, 210 Wis. 489, 246 N.W. 556 (1933)) described the public policy for requiring a fair value determination as follows: "In normal times competitive bidding is the circumstance that furnishes reasonable protection to the mortgagor, and avoids the sacrifice of the property at a grossly inadequate sale price." In the absence of market that promotes competitive bidding, "the device of a judicial sale largely fails of its intended purposes because of the lack of competitive bidding." Id. The Lee Court found that market conditions in 1963 warranted the application of this public policy because "there [was] no prospect of bidders ready and willing to offer an adequate price, other than the owner of the mortgage debt, who should not be permitted to take an unconscionable advantage of his position." Id. at 586.

The Lee Court went on to list those factors that may be considered by a court to set an upset price before foreclosure or to determine fair value (not market value) when asked to confirm a sale after foreclosure. The court must "assume the position of a competitive bidder determining a

fair bid at the time of sale under normal conditions." Id. The factors for that bidder to consider are:

> 1. The usefulness of the property under normal conditions;
> 2. The potential or future value of the property.
> 3. The type of property involved;
> 4. The potential future economy;
> 5. Any other factor that bidder might consider in determining a fair bid for the mortgaged property.

Id. at 586-87.

Neither the 2009 nor 2010 appraisals, nor Horizon's credit bid, nor WaFed's subsequent sale of the Property took into account any of these factors. See also Nat'l Bank of Wash. v. Equity Investors, 81 Wn.2d 886, 925, 506 P.2d 20 (1973) ("[W]e think that [RCW 61.12.060] is properly invoked in any case where all of the circumstances leading to and surrounding a distress or foreclosure sale warrant the superior court in the exercise of a sound discretion in finding that there will be no true competitive bidding."); Am. Fed. Sav. & Loan Ass'n of Tacoma v. McCaffrey, 107 Wn.2d 818, 728 P.2d 155 (1985) ("The statute calls not for what the court would determine to be the minimum value, but rather its fair value.") (emphasis in original).

2. WaFed's Reliance on McClure v. Delguzzi is Misplaced

Before the trial court, WaFed relied on McClure v. Delguzzi, 53 Wn. App. 404, 767 P.2d 146 (1989), but this case is distinguishable. As an initial matter, the McClure court incorrectly states that the statute calls for "fair market value." Id. at 406-07. It does not. RCW 61.12.060 speaks in terms of "fair value." Further, unlike the case on which it relies, Nat'l Bank of Wash. v. Equity Invs., 81 Wn.2d 886, 506 P.2d 20 (1973), the McClure court created a dichotomy between an "upset price" and "fair value." See id.

But the Washington Supreme Court in Nat'l Bank of Wash. did not speak in terms of a dichotomy between these two terms – and neither does the statute. Indeed, the idea that an upset price is somehow distinguishable from a fair value determination was rejected in Nat'l Bank of Wash., when the court stated: "[w]e think that the statute [RCW 61.12.060] means that the upset price should reflect 'the fair value of the property,' for that term 'fair value' appears twice and the term 'value' once in the statute." 81 Wn.2d at 926 (emphasis added.)

Further, the Nat'l Bank of Wash. court set the upset price after the foreclosure sale at a confirmation hearing – exactly the opposite of what

the McClure court holds, and exactly what the non judicial foreclosure statute requires. Id. at 923-25; RCW 61.24.100(5). As the Washington Supreme Court has held, an "upset price" is a "fair value" determination and the statute merely provides two times at which such a determination may be made: (1) before the foreclosure sale; and (2) at confirmation of the foreclosure sale. Id.; see also RCW 61.12.060; 28 Marjorie Dick Rombauer, Wash. Prac., Creditor's Remedies – Debtor's Relief § 7.43 (Supp. 2011). The express language of the upset price state, and the Supreme Court's interpretation of that language, squarely refutes WaFed's attempt to distinguish an upset price determination in a judicial foreclosure action from a fair value determination in a non-judicial foreclosure.

3. Remand is Appropriate

In similar situations, where the wrong legal standard has been applied, the appellate court will remand the matter back to the lower court for reanalysis under the correct standard. The McNaughtons respectfully assert that remand is the appropriate action here with directions to apply the correct legal standard should WaFed again move for summary judgment. See Antonius v. King County, 153 Wn.2d 256, 271, 103 P.3d 729 (2004) ("In these circumstances, where the trial court applied the

wrong legal standard to determine whether summary judgment was appropriate, the proper course is to remand this case to the trial court.")

C. Credibility is a Material Issue of Fact for Trial

1. The Internal Inconsistency of WaFed's Appraisal Raises a Material Issue of Credibility for Trial

Not only did the trial court apply an incorrect standard, but there also exist material credibility issues that provide an alternate ground for denial of summary judgment. Where an issue of credibility exists as to a material issue of fact on which the outcome of the litigation relies, summary judgment is inappropriate. Balise, supra, 62 Wn.2d at 200.

For example, in Balise, the appellate court reversed a summary judgment in favor of an employer. There, the liability of the defendant employer depended on whether the defendant employee was acting in the course of his employment when he crashed head-on into the plaintiff. The defendant employee's credibility on this issue was called into question for several reasons: (1) he had filed a worker's compensation claim against his employer based on the same car crash but then abandoned it; (2) he admitted in his answer that he was acting in the course of his employment at the time of the crash, but then amended his answer to eliminate that admission; (3) the nature of the tools he carried in his car (some belonged

to his employer); and (4) a provision in his union contract entitling him to compensation for travelling outside a specific area. Id. Based on these contradictions, only a finder of fact could determine the truth.

Similarly in Riley v. Andres, 107 Wn. App. 391, 27 P.3d 618 (2001), the appellate court reversed a grant of summary judgment on an adverse possession claim because "their claim to have acquired title by using the property as an owner is inconsistent with Mrs. Riley's statement that the property was not theirs." 107 Wn. App. at 397. And in Powell v. Viking Ins. Co., 44 Wn. App. 495, 722 P.2d 1343 (1986), the appellate court reversed a grant of summary judgment on an uninsured motorist claim because the police report and affidavit testimony from the same witness were contradictory. 44 Wn. App. at 503. Again, only a trial could determine which of the contradictory statements was to be believed.

Here, the appraisals on which WaFed relies are internally inconsistent. That is, they cannot both purport to measure market value and at the same time refuse to "establish the value of this [sewer] lift station beyond recognizing the service that it provides to the plat that is the subject of this appraisal." See, e.g., CR 381. This inconsistency is highlighted by the internal Horizon documents WaFed produced in discovery that demonstrate that Horizon placed a value on the sewer lift

station of $3 million. See CR 349-59. Such contradictory evidence of value (a material issue of fact in this case) when construed in the light most favorable to the McNaughtons, calls into question the credibility of the appraiser's conclusion of value and whether his report even measures market value much less fair value. This factual dispute cannot be resolved without a trial.

2. Contradictory Evidence of Market Value Precludes Summary Judgment

Finally, the McNaughtons provided the trial court with two appraisals of raw land with preliminary plat approval – just like Sommerwood – and located in the immediate vicinity of Sommerwood that reach higher conclusions of value than those relied on by WaFed. Again, when construed in the light most favorable to the McNaughtons, these higher values call into question the credibility of WaFed's appraiser's conclusion of value. Where such material conflicts in the evidence exist, summary judgment is inappropriate.

IV. CONCLUSION

The McNaughtons respectfully assert that the trial court erred when it applied a market value analysis to the Property. Such an analysis does not correctly adjust for distressed market conditions and the lack of

competitive bidding that was present in September 2009. Further, WaFed's appraisals are incomplete, failing to appraise all rights incident to the Property, and failing to consider contradictory conclusions of value that would have influenced the appraiser's final market value. Under these conditions, and taking all the evidence in the light most favorable to the McNaughtons, summary judgment should not have been granted to WaFed.

DATED this 6th day of May, 2013.

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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 6th day of May, 2013, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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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 6th day of May, 2013, at Seattle, Washington.

Betty Lou Taylor