73408-3

73408-3

No. 73408-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

OVERLAKE FARMS B.L.K. III LLC,
a Washington limited liability company,

Appellant,

v.

BELLEVUE-OVERLAKE FARM, LLC,
a Washington limited liability company,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE SAMUEL CHUNG

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

This case involves a partition dispute between family members who are cotenants. The Kapelas own 75%, and their cousins the Sferras own 25%, of Bellevue's Overlake Farm – the family's 40-acre legacy property. The Kapelas sought a physical partition in kind and the Sferras sought a court-ordered sale of Overlake Farm. RCW 7.52.010 mandates partition in kind unless it would result in "great prejudice to the owners" – material economic loss.

The trial court rejected the Sferras' claim for a sale, finding after a six-day trial that partition in kind of Overlake Farm was practical, would not result in *any* economic loss and would respect the Kapelas' familial and emotional ties to the property, where they have operated a horse farm for generations. After court-appointed Referees agreed on a physical partition that would result in 38 buildable lots at *no* economic loss, a successor judge nevertheless adopted the Referees' recommendation that the property be sold, not because it was worth more as a single parcel, but because of the prospect of prejudice to the minority cotenant should the parties disagree over future development of their adjacent parcels.

The successor judge's decision contravenes the plain language of the partition statute, which requires a partition in kind unless it

would cause material economic loss, or "great prejudice to *the owners,*" RCW 7.52.010, not to just one of them. Moreover, the decision undermines the purpose of the partition statute, which is to authorize judicial intervention to divide cotenancy property in kind precisely because the cotenants cannot themselves agree to do so. The court's reliance on a disagreement over details of a sewer covenant – after the Kapelas had agreed to encumber their property to secure their 75% share of the cost of extending sanitary sewer if mandated by the City – wrongly rewarded the Sferras for their intransigence, and allowed the minority cotenant to force a judicial sale upon a majority cotenant absent economic detriment.

Having found that the property could be equitably partitioned with no material loss to the owners, the court was obligated to divide it. Even if the cost of future improvements is a relevant consideration, the court then erred in refusing to exercise its broad equitable authority to dictate the terms of a sewer covenant. This Court should reverse and direct the partition in kind and owelty payment recommended by the Referees. Should this Court affirm the requirement of a sewer covenant, it should instruct the court to impose one on remand, with the assistance of a special master, if necessary.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering its Order Confirming in Part the Court Appointed Referees' Final Report and Recommendation. (CP 918-35)

2. The superior court erred in entering its Amended Order Confirming in Part the Court Appointed Referees' Final Report and Recommendation. (CP 1013-14) (Appendix A)

3. The superior court erred in entering its Order Denying Motion for Reconsideration, Amending March 25, 2015 Order. (CP 1015) (Appendix B)

4. The superior court erred in adopting those portions of the Referees' Final Report and Recommendation underscored in Appendix C. (CP 921-49)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. After a six-day trial, the trial court rejected a minority cotenant's request for partition of legacy family property by sale and appointed Referees who confirmed that the property may be partitioned in kind without material economic loss to the owners. Did a subsequent judge abuse his discretion in ordering a judicial sale of the property on the ground that physical partition may result

in future conflicts should the parties develop their respective parcels?

2. Where both cotenants agree to the establishment of a covenant to share the cost of extending sanitary sewer if it is required upon future development of partitioned property, did the court err in ordering a judicial sale of the property on the ground that partition in kind would create "great prejudice" to the minority cotenant in the absence of material economic loss?

3. Was the Referees' finding that "connection to a sanitary sewer is actually required" a basis for denying partition in kind where a city ordinance provides a variance to allow septic on lots of the size anticipated for development of the property in conformance with the City's subarea plan to maintain the neighborhood's rural and equestrian character?

4. Did the court err in refusing to exercise its equitable authority to impose a cost-sharing servitude detailing the timing and means of the parties' contributions to the cost of extending municipal sewer to their respective lots?

IV. STATEMENT OF THE CASE.

A. Statement of Facts.

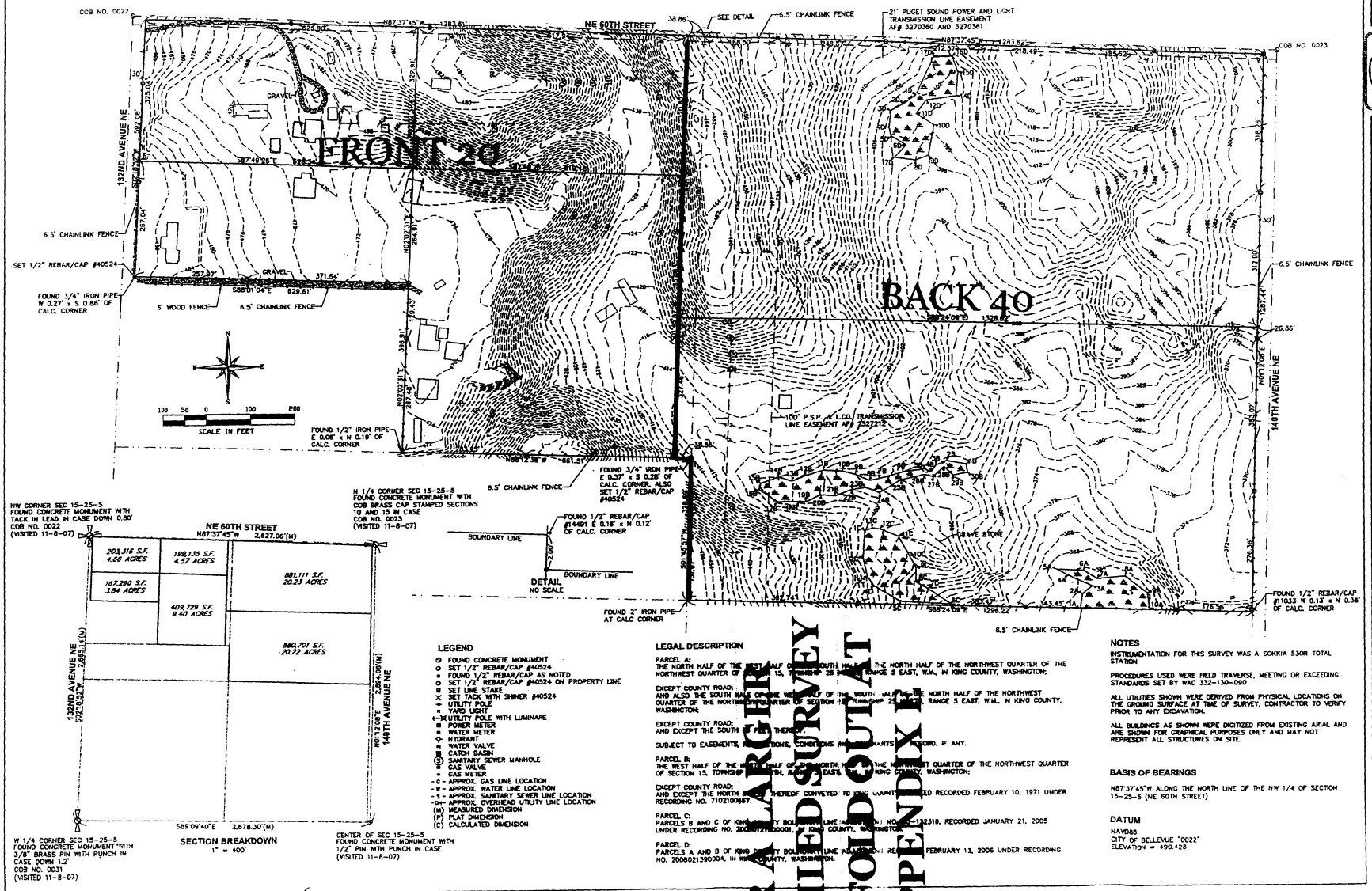
1. The Kapelas and Sferras own a 40-acre horse farm in Bellevue as tenants in common.

This partition action concerns the largest remaining subdividable undeveloped land in the City of Bellevue, family legacy property, now owned in tenancy in common – 75% and 25% – by two family limited liability companies controlled by the descendants of the original purchasers. Overlake Farm, located in the Bridle Trails area of Bellevue, was originally part of a 60-acre horse farm that Army and Betty Seijas purchased in 1947. (FF 3, 5, CP 229; CP 292)

Army and Betty Seijas had two daughters, Betty Lou Seijas Kapela and Gloria Seijas Sferra. The Seijases deeded 20 acres of the original horse farm, known as the Front 20, to Betty Lou in 1978, as Gloria owned the family's other farm in Seattle. (2/19 RP 64, 2/21 RP 115; FF 3, CP 229; CP 18) The Seijases thereafter deeded each of their daughters 25% of the remaining property, known as the Back 40, while retaining the remaining 50%. (2/19 RP 66) Following their mother's death at age 96 in 2008, Betty Lou inherited her parents' interest in the Back 40. (FF 3, CP 229)

The Front 20 and Back 40 are contiguous properties, as shown in the survey (CP 316), reproduced on the next page:

PORTION OF NW 1/4 OF SECTION 15, TOWNSHIP 25N, RANGE 5E, WM



LEGEND

- FOUND CONCRETE MONUMENT
- SET 1/2" REBAR/CAP #40524
- FOUND 1/2" REBAR/CAP AS NOTED
- SET 1/2" REBAR/CAP #40524 ON PROPERTY LINE
- SET LINE STAKE
- SET TACK WITH SHINER #40524
- UTILITY POLE
- YARD LIGHT
- UTILITY POLE WITH LUMINARE
- POWER METER
- WATER METER
- HYDRANT
- WATER VALVE
- CATCH BASIN
- SANITARY SEWER MANHOLE
- GAS VALVE
- GAS METER
- -c- APPROX. GAS LINE LOCATION
- -w- APPROX. WATER LINE LOCATION
- -s- APPROX. SANITARY SEWER LINE LOCATION
- -o/w- APPROX. OVERHEAD UTILITY LINE LOCATION
- (M) MEASURED DIMENSION
- (P) PLAT DIMENSION
- (C) CALCULATED DIMENSION

LEGAL DESCRIPTION

PARCEL A:
THE NORTH HALF OF THE WEST HALF OF THE SOUTH HALF OF THE NORTH HALF OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 15, TOWNSHIP 25 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON;

EXCEPT COUNTY ROAD;
AND ALSO THE SOUTH HALF OF THE WEST HALF OF THE SOUTH HALF OF THE NORTH HALF OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 15, TOWNSHIP 25 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON;

EXCEPT COUNTY ROAD;
AND EXCEPT THE SOUTH [illegible] FEET THEREOF;

SUBJECT TO EASEMENTS, RESTRICTIONS, CONDITIONS AND COVENANTS OF RECORD, IF ANY.

PARCEL B:
THE WEST HALF OF THE NORTH HALF OF THE NORTH HALF OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 15, TOWNSHIP 25 NORTH, RANGE 5 EAST, W.M., IN KING COUNTY, WASHINGTON;

EXCEPT COUNTY ROAD;
AND EXCEPT THE NORTH [illegible] THEREOF CONVEYED TO KING COUNTY BY DEED RECORDED FEBRUARY 10, 1971 UNDER RECORDING NO. 7102100687.

PARCEL C:
PARCELS B AND C OF KING COUNTY BOUNDARY LINE ADJUSTMENT NO. [illegible]-132318, RECORDED JANUARY 21, 2005 UNDER RECORDING NO. 200501210001, IN KING COUNTY, WASHINGTON.

PARCEL D:
PARCELS A AND B OF KING COUNTY BOUNDARY LINE ADJUSTMENT [illegible] RECORDED FEBRUARY 13, 2006 UNDER RECORDING NO. 200602139000[illegible], IN KING COUNTY, WASHINGTON.

NOTES

INSTRUMENTATION FOR THIS SURVEY WAS A SOKKIA 530R TOTAL STATION

PROCEDURES USED WERE FIELD TRAVERSE, MEETING OR EXCEEDING STANDARDS SET BY WAC 332-130-090

ALL UTILITIES SHOWN WERE DERIVED FROM PHYSICAL LOCATIONS ON THE GROUND SURFACE AT TIME OF SURVEY. CONTRACTOR TO VERIFY PRIOR TO ANY EXCAVATION.

ALL BUILDINGS AS SHOWN WERE DIGITIZED FROM EXISTING ARIAL AND ARE SHOWN FOR GRAPHICAL PURPOSES ONLY AND MAY NOT REPRESENT ALL STRUCTURES ON SITE.

BASIS OF BEARINGS

N87°37'45"W ALONG THE NORTH LINE OF THE NW 1/4 OF SECTION 15-25-5 (NE 60TH STREET)

DATUM

NAVD88
CITY OF BELLEVUE "0022"
ELEVATION = 490.428

BY	CHKD BY	DATE	NOTES
TW	JEW	12-12-07	
TW	JEW	6-13-2013	ADDED GRAVE STONE

7-18-13

BOUNDARY AND TOPOGRAPHY
FOR
MS. CRISTINA DUGONI
6619 132ND AVENUE NE
P.O. BOX 1
KIRKLAND, WA. 98033

6
(CP 316)

SHEET
1 of 1

JOB No. 7110

FOR A LARGER DETAILED SURVEY SEE FOLDOUT APPENDIX I

6
(CP 316)

Betty Lou, and her three children, Cristina, Robert, and Dana, are the beneficial owners of appellant Overlake Farms BLK III, LLC. Gloria's daughters, Lisa and Linda Sferra, are the members of respondent Bellevue-Overlake Farm, LLC. Overlake Farms BLK III, LLC derives its 75% interest in the Back 40 from Betty Lou Kapela, and Bellevue-Overlake Farm, LLC derives its 25% interest in the Back 40 from Gloria Sferra. (FF 1-3, CP 228-29; CP 292) For clarity, in this brief the family LLCs are referred to by their family surnames – appellant Overlake Farms BLK III, LLC as "Kapelas" and respondent Bellevue Overlake Farm, LLC as "Sferras."

2. The farm, which has enormous familial significance to the Kapelas, is capable of segregation into separate parcels but the parties could not agree to a physical partition.

Overlake Farm has enormous familial and emotional significance to the Kapelas. (2/19 RP 74, 96) Following her husband Bob Kapela's military service in 1970, Betty Lou and Bob moved to Overlake Farm in 1971 where they raised their three children. (2/19 RP 64) Betty Lou and Bob have lived on the Front 20 for the past 45 years. The Back 40 contains the dedicated burial sites of several deceased family members. (FF 4, CP 229; 2/19 RP 73)

The Kapela children, now adults with children of their own, still live adjacent to the farm or very close to it. (2/19 RP 64, 74)

Cristina lives a tenth of a mile north of Overlake Farm, where her two children, along with Betty Lou and Bob's other grandchildren, have grown up. (2/19 RP 72) Robert also lived adjacent to Overlake Farm until his death in 2014. Dana Kapela, along with her children, continues to live next to the farm.

The Kapelas board horses on the Front 20 and graze some on the Back 40 to pay the costs of maintaining Overlake Farm. (2/19 RP 66-67) The Kapelas also operate an outdoor summer camp for children on the property and use it for charity events. (FF 4, CP 229; RP 73)

Until the late 1990's, a partnership agreement governed Betty Lou and Gloria's ownership of the Back 40. In 1999, Gloria dissolved the partnership and conveyed her 25% interest to her daughters, Lisa and Linda Sferra. Since then, there has been no written agreement governing the parties' respective rights as tenants in common. (FF 4, CP 229) Betty directed Gloria's daughters Linda and Lisa to use the northernmost 10 acres, while Betty Lou used the 30 acres adjacent to the Front 20 as part of the Kapelas' horse farm. The parties cooperated in obtaining a boundary line adjustment that created two equally sized tax parcels, with a boundary that could be shifted northward to create a 30 acre/10 acre division. (2/19 RP 75)

Since 2001, and continuing after Betty's death in 2008, the parties have repeatedly discussed physically segregating their interests in Back 40, and have also explored the Kapelas buying out the Sferras' 25% interest. They have been unable to come to terms. (2/19 RP 79; 2/21 RP 108-09)

B. Procedural History

1. After a six-day trial, Judge Yu found that the property could be equitably partitioned, rejecting the Sferras' claim for a judicial sale and their contention that partition in kind would result in material pecuniary loss.

In contrast to the Kapelas, the Sferras feel no strong familial ties to the property and preferred a sale to a physical division of the property. (2/21 RP 101, 118) After Betty Lou succeeded to their mother's 50% interest following Betty's death in 2008, Gloria and her daughters hardened their position, making it impossible to reach an agreement to physically divide the Back 40. (FF 9, CP 230; 2/19 RP 75-76, 79-80)

On July 28, 2011, the Kapelas therefore commenced this action for partition pursuant to RCW ch. 7.52. (CP 1-5) The Kapelas sought to continue to use their share of the Back 40 as a horse farm. (FF 10, CP 230) They believed that a physical partition would allow

the Sferras to use their 25% interest as they wished without continued conflict. (FF 10, CP 230)

The Sferras admitted that the Kapelas owned a 75% and the Sferras a 25% interest in the Back 40, that the Kapelas had cleared the 30 acres adjacent to the Front 20 for their horse farm, and that the co-tenants were operating without a written agreement. (CP 6-8) The Sferras denied that that the Back 40 could be physically divided without "great prejudice," and counterclaimed for an order forcing the sale of the property pursuant to RCW 7.52.080. (CP 8-10) The Sferras claimed that physical partition was not possible because the parties "cannot cooperate with respect to this property." (2/19 RP 98)

The Honorable Mary Yu presided over a six-day trial in King County Superior Court, considering testimony from the parties, their appraisers, land use planning consultants and other experts. (CP 228; FF 11, CP 231) Both parties' experts agreed that development of the Back 40 would yield 38 lots. (FF 11, CP 231; 2/25 RP 12) The experts also agreed that it was feasible to partition the Back 40 so that the Kapelas would receive approximately 75% of the lots, and the Sferras the other 25%. (FF 18, CP 233) At trial, the parties valued

the property "as is" between $5.9 and $13.5 million. (Ex. 1; 2/25 RP 115)

Emphasizing the economies of the relatively expeditious short plat process, the Kapelas' experts presented several options to develop the entire Back 40 using 9-lot short plats. (FF 11, CP 231; *See* Exs. 32, 35, 38, 39) Without offering any partition proposals of their own, the Sferras' experts criticized the Kapelas' plans to physically partition the property as not feasible or inequitable, arguing that there would be a 9% to 17% loss of value were they to attempt to develop only nine, rather than all 38 lots, that it would be inequitable to require their nine lots to bear the entire cost of a sewer extension that would also benefit the Kapelas' 29 lots, and that wetlands would impede development of a portion of the property. (FF 11, CP 231; *see* 2/26 RP 31)

In a memorandum decision (CP 193-96) and Findings of Fact and Conclusions of Law (CP 228-35) (Appendix D), Judge Yu rejected the Sferras' contention that "there was no partition scenario that would yield an equitable result." (FF 16, CP 232-33) She found that the Sferras' experts' assertion that the price per lot would be lower were only nine lots sold, rather than if the entire Back 40 were sold as one block ("assemblage premium," *see* 2/26 RP 34-36), to be

"based on a host of assumptions and variables," and that, in any event, "[s]ome loss in value is not great prejudice." (CP 194-95; CL 4, CP 234)

Addressing the extension of sanitary sewer to the property, Judge Yu found that the City of Bellevue could allow onsite septic systems in lieu of requiring extension and expansion of its sewer lines at an estimated cost of $1.4 million. (FF 7, CP 230) Judge Yu found that the Kapelas agreed to fund, or would enter into a covenant to fund, their 75% share of the sewer improvement expense "if sewer extensions were necessary to develop the Property." (FF 7, CP 230; *see* 2/19 RP 111, 142-43)

Judge Yu concluded that the Sferras failed to prove that the property could not be partitioned without "great prejudice" – defined, consistent with the caselaw, as "essentially material economic loss." (CL 4-6, CP 234) Judge Yu found that a partition would not result in material pecuniary loss to the Sferras, but she also considered the "human and family element" – the significant familial attachment the Kapelas have to the property:

> Defendant did not meet its burden of proof to convince the Court that it is not possible to carve out an equitable partition without material pecuniary loss to Defendant – i.e., such that the relative value of the share would be materially less than the sum Defendant would realize from one-fourth share of the proceeds of a sale of the

> whole. The Court also cannot overlook the fact that Plaintiff, as one of the co-tenants, desires to keep and utilize the Property. There is a human and family element to the Property that cannot be discounted.

(CL 6, CP 234)

Judge Yu therefore denied the Sferras' claim for partition by sale and granted the Kapelas' claim for partition in kind, subject to the final report of three neutral Referees appointed pursuant to RCW 7.52.080 "to consider and prepare a report on whether and how the Property can be equitably partitioned, subject to any owelty payment under RCW 7.52.440, and without great prejudice." (CL 9, CP 234-3; CP 236-42)[1]

2. In their Draft Report and Recommendation, the Referees found that the property could be partitioned without great prejudice, with owelty of $137,500, and recommended the establishment of a $1.4 million cash escrow for a sanitary sewer connection, with the Kapelas funding 75%.

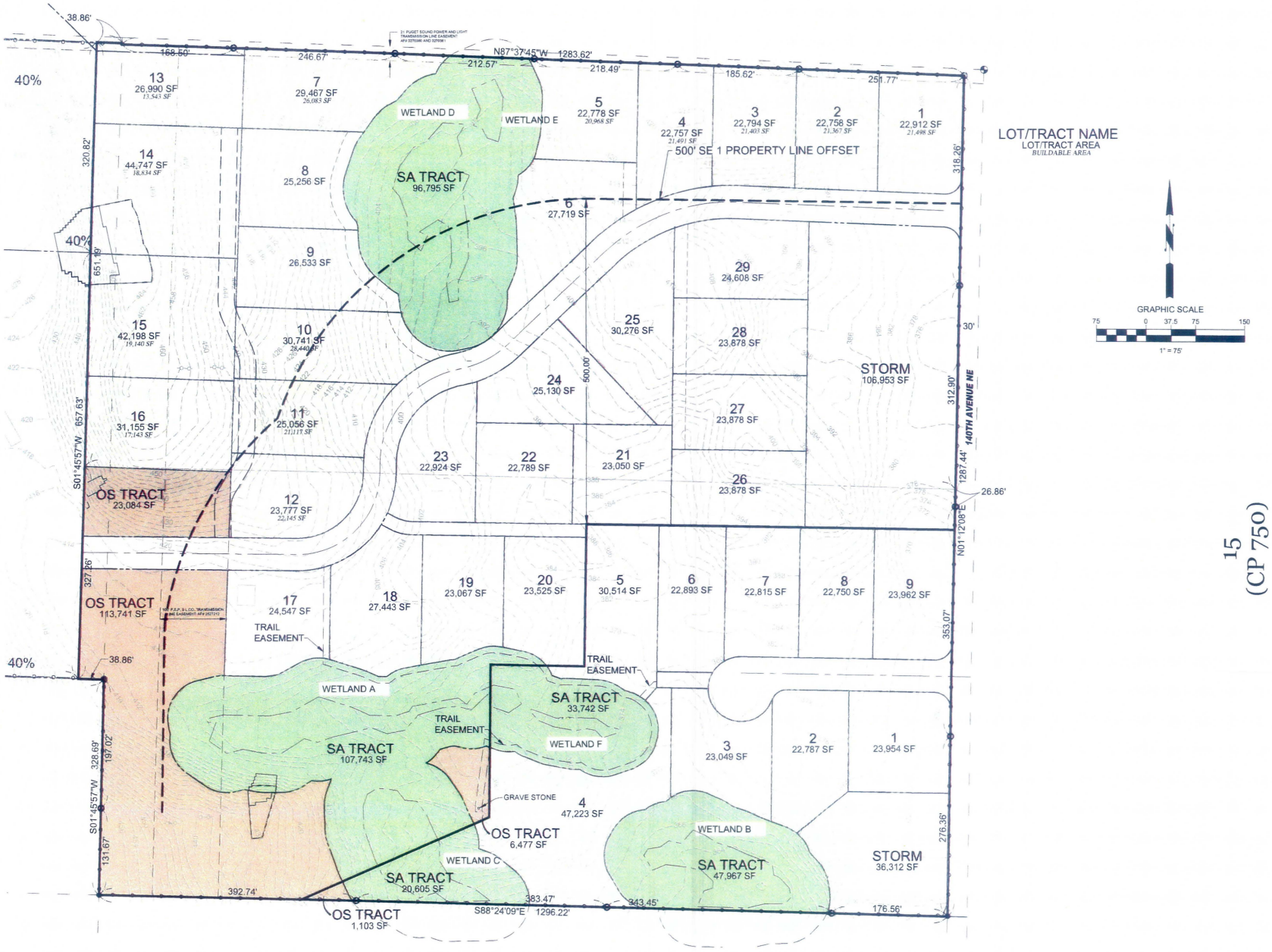
Before the Referees, the parties agreed that under current zoning and land use regulations, the Back 40 would yield 38 buildable lots, resulting in 29 lots for the Kapelas and nine lots for

[1] The Kapelas objected to the selection of developer Jim Reinhardsen as a Referee proposed by the Sferras, on the ground that Linda Sferra had consulted with him concerning a potential sale of the property and its highest and best use. (CP 708-10; 2/21 RP 104-05) Judge Yu overruled the objection. (CP 715)

the Sferras, with a payment in owelty to arrive at a precise 75%-25% partition. They also agreed that the eastern portion of the property, furthest away from the Front 20, was best suited for partition in kind, although they disagreed about whether SE or NE quadrant was the more equitable portion to award the Sferras. (CP 296-98, 651-75)

The parties further agreed that if the City did require connection to municipal sewer facilities, the cost should be proportionately split 75%-25%. The Kapelas asserted that the City could, and would in fact prefer to, grant a septic variance rather than extend sewer lines into the rural neighborhood, citing the City's Bridle Trails subarea plan. (Ex. 220; CP 294, 339-45, 364, 805-07) The Sferras argued that the City would require the costly sewer extension. (CP 628; *see* CP 758-61) As they had before Judge Yu (2/19 RP 111), the Kapelas again agreed with the Sferras to bear their proportionate share of the expense of a sewer extension, were the City to require one, that would benefit all of the partitioned property. (CP 728, ¶35)

In their draft report, the Referees recommended a partition in kind of the entire property, providing the Sferras with nine lots in the Southeast Quadrant as "the most logical for partition." (CP 734, ¶50-52) Their recommendation is reflected in CP 750, reproduced on the following page:



15
(CP 750)

DESIGN GROUP
JON W. NELSON, P.E.
PROJECT MANAGER
CJK
DESIGNED

NO. | DATE | REVISION

SHULZ SE 1
CONCEPTUAL SITE PLAN SHULZ

PREL

STA
INE ESC

Like Judge Yu, the Referees rejected the Sferras' contention that the property would be worth more as a whole than if partitioned, finding that "the value per lot between large and small projects is roughly equal with developers paying the same pro rata value for 25% of the Property as they would for the entire Property," (CP 732, ¶42) and that "there is no basis to assert that lots in a nine lot subdivision would sell at any different pace than a 38 lot subdivision." (CP 733, ¶46) The Referees determined the price per lot was $275,000 – midway between the $250,000 price set by the Kapelas' appraiser and the $300,000 price set by Sferras' appraiser - for a total value of $10.45 million. As 25% of the 38 lots entitled the Sferras to 9.5 lots, the Referees recommended an owelty payment of $137,500 from the Kapelas to the Sferras. (CP 735-36, ¶¶55-56)

While recognizing that "no application for a sewer variance has been submitted to the City of Bellevue and, as a result, neither the parties nor the City undertook a careful analysis of whether a variance to a sanitary sewer service requirement would be possible," (CP 726, ¶30), the Referees nonetheless reported based upon undisclosed "interviews with members of the City of Bellevue's utility division," that "connecting to a sanitary sewer is actually required and the small parcel cannot be subdivided without provision for

sanitary sewer service." (CP 736, ¶59) They estimated the cost of the sewer extension at $1.4 million. (CP 736, ¶60) Assuming the Sferras developed the smaller parcel first, the Referees concluded that the Sferras "would sustain great prejudice" if required to carry the entire cost of a sewer extension benefitting all parcels, while simultaneously providing "an out-size benefit to the remaining parcel." (CP 737, ¶61)

The Referees concluded that this "great prejudice can be mitigated only by an appropriate upfront cost-sharing agreement between" the parties. (CP 737, ¶62) Acknowledging Judge Yu's finding that the Kapelas agreed to fund 75% of the sewer costs, the Referees recommended the parties enter into a "reciprocal covenant" to pay their respective shares of $1.4 million into escrow, to be held pending construction. (CP 738, ¶63(a)) Any unpaid costs in excess of the funds in escrow would be a lien against a party's property, foreclosable in accordance with law. (CP 739, ¶63(d)) The covenant would also require "appropriate easements for sanitary sewer, natural gas, domestic water, telephone and cable TV, power and storm water," with the party first to subdivide to propose their locations. (CP 739, ¶63(e)) Any disputes between the parties would

be resolved by binding arbitration to conclude within 60 days of a demand. (CP 739, ¶63(g))

The Referees solicited the parties' comments to the draft report, but did not tell the parties that their failure to agree to the details of a sewer covenant would result in their recommending a court-ordered sale of the property. The Kapelas again agreed to a cost-sharing covenant, but recommended that a sewer variance application be pursued as a condition precedent to the much more costly sewer extension. (CP 787, 806) Instead of tying up $1 million in cash for an undefined length of time, the Kapelas proposed posting a surety bond to secure their 75% contribution to the estimated $1.4 million cost of a sewer extension. (CP 800-01, 806-07) They proposed that the security be converted to a cash escrow when "the extension is actually going to happen, e.g., approval of the developer utility extension application." (CP 800) The Kapelas pointed out that it could be years before either party (or, more likely, a developer) elected to undertake the extension, that the City of Bellevue allows a surety rather than cash, and the Sferras, whose contribution is limited to 25%, had little incentive to control cost. (CP 806-07)

The Sferras "insisted on the availability of a cash escrow for the sewer costs." (CP 946-47, ¶64) They also objected to the Referees

requiring the parties to "agree" to the terms of the proposed covenant, which required "extensive future cooperation." (CP 760) The Sferras argued that the Referees had no authority to attempt to prevent the "great prejudice" that the Sferras claimed they would suffer were they to fund the entire cost of bringing sewer to their nine lots. (CP 760)

3. In their Final Report, the Referees adopted the Sferras request for a court-ordered sale, unless the parties reached an agreement within 90 days. A new superior court judge ordered a sale at public auction on the ground that partition in kind would "cause great prejudice to the one-fourth owner."

In their Final Report, the Referees maintained their previous recommendation for an allotment of nine lots to the Sferras and 29 lots to the Kapelas (CP 939-42), modifying the recommended owelty based upon a revised valuation of $262,500 per lot, with a resulting owelty payment from the Kapelas of $131,500. (CP 942, ¶55) However, rather than address directly the parties' objections to the terms of a sewer covenant in response to their Draft Report or ask the parties to themselves draft a proposed sewer covenant, the Referees reversed their recommendation for a partition in kind, acceding to the Sferras' objection to *any* physical partition of the property and adopting the Sferras' recommendation for a court-

ordered sale. Even though they had recommended binding arbitration for resolving disputes, the Referees reported that the parties' inability to cooperate precluded a partition in kind:

> [The] responses of the parties reflected their long-standing inability to agree on issues associated with the disposition of the Property. Despite the Referees' interest in fashioning a creative solution to accommodate a partition in kind in this case, the Referees are forced to acknowledge that no such solution is feasible absent the cooperation of the parties, and that it would be counter-factual to assume such cooperation. Predicating a solution on such cooperation would only place this Court in the position of having to police a difficult process of partition and land development over a long period of time."

(CP 947, ¶65) The Referees reported that "due to the cost of the required sewer extension, a partition in kind would impose great prejudice on the smaller parcel." (CP 947, ¶66)

The Referees recommended that "[t]he Court provide the parties a period of 90 days within which to attempt to reach an agreement regarding the disposition or partition of the Property." (CP 947, ¶A) In the event the parties failed to reach an agreement, they recommended a court-ordered "open-market sale of the Property," with "a partition of the proceeds." (CP 947, ¶B) The Referees recommended that the sale "be conduct[ed] by a real estate professional," and "not conducted as an auction." (CP 948, ¶C.1, 2)

Following Judge Yu's appointment to the Supreme Court, the Referees' Final Report came before a new superior court judge. Judge Samuel Chung adopted the Referees' determination "that a partition-in-kind would cause great prejudice to the one-fourth owner" and approved a court-ordered sale should the parties fail to agree within 90 days. (CP 969) Judge Chung, however, ordered a sheriff's sale at auction pursuant to RCW 7.52.270 on the ground that the open-market sale recommended by the Referees conflicted with the requirements of the partition statute. (CP 969)

The Kapelas timely appealed. (CP 965, 1009) Over the Sferras' objection, the Judge Chung stayed the court-ordered sheriff's sale. (CP 1016)

V. ARGUMENT

A. Having found the property capable of a partition in kind without material economic loss, the court erred in ordering a sheriff's sale if the parties did not agree to the terms of a covenant regarding the property's future development.

Judge Yu found that this 40-acre family legacy property could and should be partitioned in kind without prejudice to the cotenants, rejecting the Sferras' claim that a court-ordered sale was necessary to alleviate material economic loss. The Referees, whom Judge Yu appointed in furtherance of her "flexible, equitable powers under the

partition statute," (CL 9, CP 234), concurred, recommending division of the property into 38 lots of roughly equal size and each worth $262,500 "as is," with nine lots and a $131,250 owelty payment to the Sferras. But in their final report, they recommended a partition by forced judicial sale over the objections of the Kapelas even though the Kapelas agreed to a covenant to fund their 75% share of a sewer extension to the Sferras' nine lots that would benefit and materially increase the value of the entire property.

Judge Chung's adoption of the Referees' recommendation capitulating to the minority cotenant's desire for sale of this family legacy property, based solely on a perceived inability to agree to the terms of a sewer covenant, was a manifest abuse of discretion. It was undisputed, as Judge Yu, the Referees and Judge Chung found, that the property was capable of physical division without any material economic loss to the cotenants. Rather than finding a physical "partition cannot be made without great prejudice to the owners," as required by RCW 7.52.010 and .080, Judge Chung instead found "that a partition in kind would cause great prejudice to the one-fourth owner." (CP 1014) He erroneously relied on the Sferras' assertion that only the minority cotenant would suffer material economic harm *if* they short platted their property, *if* the City

requires a costly sewer extension that would increase the value of their 9 lots and also benefit the larger Kapela parcel, and *if* the Kapelas did not reimburse them for that benefit. But it was undisputed that the Kapelas *agreed* with the Sferras to pay their proportionate share of a sewer extension, if the City required one as a condition to the properties' development. The Sferras, minority cotenants, could not, by sheer obstinance, defeat the presumption in favor of partition in kind by manufacturing "great prejudice" to themselves.

The court's reliance on the parties' lack of agreement on the specific terms of a covenant under which they would pay their proportionate contributions is, as a matter of law, an improper consideration in a judicial partition, in which the court is granted the broad equitable authority to impose terms upon the parties precisely because they cannot themselves agree. The trial court's abdication of its duty to exercise its equitable authority allows a minority owner to defeat a partition in kind, in contravention of the public policy underlying RCW ch. 7.52. This Court should reverse and remand with instructions to order a partition in kind, and, if necessary, dictate the terms of a cost-sharing covenant.

1. This Court reviews the trial court's decree in a partition action in light of the strong presumption in favor of a physical division of land unless partition in kind "cannot be made without great prejudice" – material economic loss – "to the owners."

This Court reviews the trial court's decree in a partition action for abuse of discretion. *See Kelsey v. Kelsey*, 179 Wn. App. 360, 365, ¶ 11, 317 P.3d 1096, *rev. denied*, 180 Wn.2d 1017, *cert. denied* 135 S.Ct. 451 (2014). A discretionary decision based on an erroneous view of the law is necessarily an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993); *Atwood v. Shanks*, 91 Wn. App. 404, 409, 958 P.2d 332, *rev. denied*, 136 Wn.2d 1029 (1998). Here, the trial court misinterpreted the statutory requirement of "great prejudice to the *owners*" (plural) in ordering a partition by sale where the parties' property was capable of physical division, based on speculation that only *one* of the owners – the minority cotenant – might be inconvenienced in the future. (Arg. § A.2, *infra*)

The court further erred in basing its decision on a failure to agree to the precise terms of a sewer covenant to which both parties consented. The court's decision undermined the fundamental purpose of the partition statute, which is to authorize judicial intervention to divide cotenancy property precisely because the

cotenants cannot themselves agree to do so. It rewarded the minority cotenants for their intransigence by granting their request for a court ordered sale against the wishes of the majority cotenant and in the absence of material economic detriment. (Arg. § 3, *infra*)

A trial court similarly abuses its discretion "if the trial court relies on unsupported facts" in making its decision. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 494, ¶ 17, 145 P.3d 1196 (2006). A decision in reliance on facts that do not meet the correct standard is also a manifest abuse of discretion. *In re Marriage of Muhammad*, 153 Wn.2d 795, 803-05, 108 P.3d 779 (2005) (reversing division of assets based on trial court's consideration of "marital fault"); *In re Marriage of Hay*, 80 Wn. App. 202, 206-07, 907 P.2d 334 (1995) (improper consideration of tax effects of sale absent showing that sale was imminent); *In re Marriage of Wicklund*, 84 Wn. App. 763, 770, 932 P.2d 652 (1996) (reversing restriction on parental rights "because the parent is gay or lesbian."). Here, the successor court erred in finding "great prejudice" not on material economic loss to the owners resulting from partition in kind– there was none – but on speculation that the Sferras would bear the cost of extending sewer to the Sferras' lots where it was undisputed that the Kapelas agreed to a binding covenant requiring

their 75% contribution to the cost of such a sewer extension if and when it should be required. (§ A.4, *infra*).

Moreover, a court's refusal to exercise its broad equitable discretion is, in and of itself, a manifest abuse of discretion. *See Bowcutt v. Delta North Star Corp.*, 95 Wn. App. 311, 321, 976 P.2d 643 (1999) (failure to "examine the appropriate terms of the injunction in light of the circumstances"); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 791, ¶ 39, 295 P.3d 1179 (2013) (trustee's failure to exercise independent discretion). The parties asked the trial court to exercise its equitable authority to partition their property because they could not agree on how to divide it themselves. Judge Yu appointed three Referees to recommend "whether and how the Property can be equitably partitioned, subject to any owelty payment under RCW 7.52.440, and without great prejudice." (CL 9, CP 233-34) Having found that the property could be equitably partitioned with no material economic detriment to the owners, Judge Chung lacked the discretion to refuse to exercise his broad equitable authority to dictate the terms of a sewer covenant for the property's future development if the parties themselves were unable to agree to its details. (§ A.5, *infra*)

This Court should reverse for any one, and for all, of these reasons. It should remand with instructions to order the partition in kind and owelty payment recommended by the Referees. At a minimum, the court should be directed on remand to enter the cost-sharing covenant proposed by the Kapelas, or appoint a special master to recommend the terms of a covenant for entry by the court.

2. The partition statute follows the common law's presumption that cotenancy land that is physically capable of division be partitioned in kind, authorizing a court-ordered sale of land only if its division is not possible or would result in material economic loss.

Judge Yu's findings and the Referees' Final Report provided no basis, as a matter of law, for Judge Chung to enter a final order overcoming Washington's presumption that land be physically partitioned in kind. By statute, the superior courts are granted the broad equitable authority to partition property held in tenancy in common when the cotenants themselves are deadlocked or otherwise cannot agree on its division. A judicial partition requires a physical division of the property in proportion to the cotenants' respective interests, with an equalizing owelty payment, if necessary, unless a physical partition "cannot be made without great prejudice to the owners," RCW 7.52.010, .080, .440., not just to a single cotenant.

The statutory requirement of "great prejudice to the owners" thus limits the trial court's broad equitable discretion in partition actions, reflecting the historical prohibition against courts of equity imposing a sale on co-tenants absent their unanimous consent:

> In the original jurisdiction of equity there was no such thing as partition by means of sale, except where all parties were *sui juris* and consenting. Wanting such capacity and consent, the division was always in kind, and where the land was incapable of exact or fair division, compensation for the inequality was made by an award of "'owelty of partition.'" 4 Pomeroy's Equity Juris. (3d Ed.) §§ 1389, 1390.

Williamson Inv. Co. v. Williamson, 96 Wash. 529, 534, 165 P. 385 (1917).

While Washington's partition statute abandoned equity's rigid prohibition against partition by sale, the requirement in RCW 7.52.010 and .080 that a court find that "the partition cannot be made without great prejudice to the owners" maintains a strong preference for partition in kind. "'The power to convert real estate into money against the will of the owner, is an extraordinary and dangerous power, and ought never to be exercised unless the necessity therefor is clearly established.'" *Williamson*, 96 Wash. at 535, quoting *Vesper v. Farnsworth*, 40 Wis. 357 (1876). Thus, Washington law continues to "'favor[] partition of land among tenants in common, rather than a sale thereof and division of the

proceeds, and it is only when the land itself cannot be partitioned that a sale may be ordered.'" *Williamson*, 96 Wash. at 535, quoting *Kloss v. Wylezalek,* 207 Ill. 328, 69 N.E. 863 (1904).

Washington is not alone in maintaining equity's historical preference for the physical division of real property between co-tenants, treating the statutory alternative of partition by sale as in derogation of the common law, and thus strictly construed. 59 Am. Jur.2d Partition, §118 at 865 ("The right of selling the land and dividing the proceeds, given by statute, is an innovation upon the common law, and since it takes away from the owner the right to keep his freehold in kind, it is to be strictly construed")," quoted in *Butte Creek Island Ranch v. Crim*, 136 Cal. App. 3d 360, 365, 186 Cal. Rptr. 252 (1982).

This preference is premised on equity's historical respect for the uniqueness of real property, recognizing the emotional bonds that individuals have to land. *See, e.g., Ark Land Co. v. Harper*, 215 W. Va. 331, 599 S.E.2d 754, 761 (2004) ("sentimental or emotional interests in the property . . . should ordinarily control when it is shown that the property can be partitioned in kind, though it may entail some economic inconvenience to the party seeking a sale."); *Delfino v. Vealencis*, 181 Conn. 533, 436 A.2d 27, 33 (1980)

(reversing an order of sale; co-tenant "made her home on the property; . . . derives her livelihood from the operation of a business on this portion of the property, as her family before her has for many years.").

Washington courts place the burden on the party seeking a partition by sale to establish great prejudice, and require more than "inconvenience of the other owners, or a depreciation in value of the interests by a partition . . .". *Hamilton v. Johnson*, 137 Wash. 92, 100, 241 Pac. 672 (1925); *Williamson*, 96 Wash. at 537 ("The burden to show great prejudice, therefore, rests upon him who asserts it."). In *Williamson*, the Court defined the statutory term "great prejudice" as "material pecuniary loss," directing the court's inquiry to "'whether the value of the share of each in case of a partition would be *materially* less than his share of the money equivalent that could probably be obtained for the whole.'" 96 Wash. at 536, quoting *Idema v. Comstock,* 131 Wis. 16, 110 N.W. 786 (1907) (emphasis added).

The *Williamson* Court held that *some* loss in value – in that case, a 10% to 30% reduction in value in a declining and depressed real estate market – is insufficient to establish great prejudice:

> Simply because the aggregate value of the halves would be somewhat less than the value of the whole, must the law on that account force one, or possibly both, of the common owners to change the form of his holding, a thing never favored in law . . .? We think not.

96 Wash. at 539. Consistent with *Williamson*, this Court has affirmed the trial court's authority to order a partition by sale where, for instance, a physical partition is physically impossible "because the properties could not be legally divided under the County's zoning and subdivision ordinances," *Friend v. Friend*, 92 Wn. App. 799, 804, 964 P.2d 1219 (1998), *rev. denied*, 137 Wn.2d 1030 (1999), or where "substantial pecuniary loss" would result. *Hegewald v. Neal*, 20 Wn. App. 517, 526, 582 P.2d 529 ("this unusual property worth $300,000 would be worth only $200,000 if partitioned in kind"), *rev. denied*, 91 Wn.2d 1007 (1978).

Unlike in these cases, Judge Yu's unchallenged findings, reiterated by the Referees in their report, established that this property was capable of physical partition without "great prejudice." (CL 4-6, CP 234) The Sferras and the Kapelas agreed that the Back 40 was subdividable into 38 lots of roughly equal size. Both Judge Yu and the Referees rejected the Sferras' assertion that the sale of all 38 lots would result in a materially higher price – an "assemblage premium." (FF 16, CP 232-33; CP 934-35, ¶39) And Judge Yu

properly considered "there is a family element that cannot be discounted," (CL 6, CP 234), including that the property contains several memorial sites for deceased family members. *See Ark Land Co. v. Harper*, 599 S.E.2d at 762 (recognizing importance of "longstanding family ownership of the property and their emotional desire to keep their ancestral family home within the family").

The Referees' report reaffirmed Judge Yu's conclusions – the Property can in fact be equitably partitioned, with the Sferras obtaining 9 lots in the southeast quadrant of the Back 40 and the Kapelas obtaining the remaining 29 lots, with an owelty payment of $131,250. (CP 939, ¶43; CP 942, ¶56) These findings should have ended the inquiry.

Instead, the Referees reported that the Sferras would likely be obligated at some indefinite point in the future to pay $350,000, or 25% of the estimated $1.4 million expense for a sewer extension, in order to obtain a nine lot short plat of their property, with the Kapelas agreeing to fund the remaining 75%, secured by a covenant running with the land. The court then wrongly adopted the Referees' recommendation that a partition in kind would impose great prejudice *on the Sferras* (CP 944, ¶61; CP 1014), **not** to "*the owners,*" as required by RCW 7.52.010 and .080.

The court's reasoning contravenes not only the statutory language, but undermines the purpose of the partition statute by unjustly advancing the interests of a minority co-tenant who favors an immediate sale of the property. Before a court imposes upon the parties a forced sale of their property, it must find that a partition in kind materially and adversely affects the economic interests of all the owners, not just those that favor sale. *See Delfino v. Vealencis*, 436 A.2d at 33 (1980) (reversing order for sale and directing partition in kind on remand; "the court must consider not merely the economic gain of one tenant"); *see also Schnell v. Schnell*, 346 N.W.2d 713, 719 (N.D. 1984) (reversing order for sale and directing partition in kind on remand; "the question in a partition action is whether or not partition can be accomplished without great prejudice to the owners; not to the owner, but to all of them."); *Gartner v. Temple*, 855 N.W.2d 846, 854 (S.D. 2014) (affirming order for partition in kind; "the undervaluation of permanent structures . . . affects only him. Thus, such an undervaluation could . . . not militate against a partition in kind.").

Judge Chung's order directing a sale of the property in the face of Judge Yu's unchallenged findings and the Referees' report that a partition in kind is feasible without material economic loss to the

owners was an error of law. This Court should reverse with instructions to direct the partition in kind that RCW ch. 7.52 mandates in the absence of "great prejudice to the owners."

3. Judge Chung's reliance on the parties' failure to agree to the terms of a sewer covenant does not support his conclusion that the property could not be physically partitioned without great prejudice.

Having determined that partition of the property in kind was possible without *any* economic loss, the court erred in relying on the lack of agreement to the precise details of a sewer covenant to conclude that the property could not be partitioned without great prejudice. It is undisputed, as both Judge Yu and the Referees found, that the Kapelas agreed to pay 75% of the cost of a sewer connection, if and when it became necessary, and agreed that this obligation could be imposed as a covenant running with the land. Even if the cost of future improvements to the Sferras' property were a relevant consideration, the court's conclusion that the Sferras could not short plat their nine lots without suffering "great prejudice" is unsupported by any findings and contravenes the undisputed fact that the Sferras would not have to shoulder more than 25% of those future expenses.

It was not "substantial pecuniary loss," *Friend*, 92 Wn. App. at 804, that caused Judge Chung to disregrd Judge Yu's findings,

including her proper consideraton of the Kapelas' legitimate and deeply held familial ties to Overlake Farm. Judge Chung instead adopted the Referees' recommendation that the property be sold at judicial sale based upon the prospect of continued disagreement between the Sferras and the Kapelas over future development of mutually advantageous infrastructure. As a matter of law, that was an improper consideration and was insufficient to overcome the statutory presumption in favor of a partition in kind.

The partition statute exists precisely because co-tenants are deadlocked and cannot agree. The statute nonetheless prefers physically dividing their property into contiguous parcels, on which the previous cotenants will necessarily share a boundary. No Washington court has held that the statutory presumption in favor of partition in kind may be overcome by evidence that the former co-tenants will be uncooperative neighbors. Judge Chung's adoption of the Referees' recommendation to direct a judicial sale of the property based on the potential for future disagreement is directly contrary to the Supreme Court's admonition that "great prejudice means material pecuniary loss, not *mere temporary inconvenience* or temporary impairment of an income slight in comparison with the

value of the property for the uses for which it is suitable." *Williamson*, 96 Wash. at 537 (emphasis added).

Other courts have rejected the Referees' reasoning, adopted by Judge Chung, holding that the prospect of future disagreement is *not* a proper basis to overcome the statutory presumption in favor of a partition in kind. For instance, the Nebraska Supreme Court reversed a court-ordered partition by sale because "[t]he referee's report was based in significant part upon his determination that the devisees could not agree about anything" in *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868, 878 (2012). The Oklahoma Court of Appeals reversed an order of sale premised on the parties' inability to agree on the amount of owelty that would be required because the ranch could not be equally divided into half-interests in *Dewrell v. Lawrence,* 58 P.3d 223, 227, ¶ 13 (Okla. Civ. App. 2002) ("The court will not be denied the exercise of its equitable powers in partition proceedings by the failure of all parties to agree . . .").

The South Carolina Court of Appeals similarly held that the parties' inability to "agree on how to divide the properties in kind" did not support a court-ordered sale, or the trial court's conclusion that "a writ of partition would involve unnecessary expense." *Brown v. Brown*, 402 S.C. 202, 740 S.E.2d 507, 511 (Ct. App. 2013) (to the

contrary, "their disagreement is precisely what caused Gregory to file this partition action."). And the West Virginia Supreme Court held that the trial court "misapprehended the law of partition" in ordering a judicial sale based on "the hostility between the parties rather than the respective values of the subject properties" where there "was no showing that, if the property were divided into two halves of equivalent value, the value of each half would be significantly less than the value of that half of the property left undivided." *Myers v. Myers*, 176 W. Va. 326, 342 S.E.2d 294, 297-98 (1986).

By concluding that "a partition in kind would cause great prejudice to the one-fourth owner" (CP 1014) based on nothing more than the parties' inability to agree to the details on a sewer extension covenant, the court defeated the presumption in favor of partition in kind of this family legacy property based solely on the minority owners' desire to sell. "[T]he right of a cotenant to partition property is absolute and not to be defeated by the mere unwillingness of a party to have a partition." *Diehl v. Hieronymus,* 426 P.2d 368, 371 (Okla. 1967). The court erred in ordering a partition by sale based on nothing more than the Sferras' contention that a sale "would be more advantageous to [them] than would ownership of only" a portion of

the partitioned property. *Butte Creek Island Ranch v. Crim*, 136 Cal. App. 3d at 368.

A minority cotenant seeking a sale of property would never agree to anything were disagreement alone a sufficient basis to overcome the presumption of partition and force a judicial sale. In the absence of material economic harm, the Kapelas' sincerely-held bonds to their farm "cannot be nullified or tossed aside, simply because other family members do not share the same sentiments for the family home." *Ark Land Co. v. Harper*, 599 S.E.2d at 763, n.7. This Court should reverse the trial court's order of sale because it was based on an erroneous interpretation of the partition statute's requirement that a partition in kind should be ordered unless it would result in "great prejudice to the owners." RCW 7.52.010.

4. Judge Chung erroneously adopted the Referees' speculation that a sewer connection is required as a condition to approval of a short plat and would greatly prejudice the Sferras.

Even if the prospect of future disagreement over implementing a sewer extension covenant was a permissible consideration toward establishing "great prejudice," the order of sale must be reversed because the Referees' finding that "connection to a sanitary sewer is actually required" and would impose great

prejudice on the minority owner, (CP 943-44, ¶¶59, 62), is speculative and not based on substantial evidence.

"[T]he existence of a fact cannot rest upon guess, speculation or conjecture." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972); *see also Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984) ("The opinion of an expert must be based on facts."). The Referees' speculation on the occurrence and timing of future development contravenes the principle that a partition be based on the property's current, not speculative future, value. *See Carson v. Willstadter,* 65 Wn. App. 880, 886, 830 P.2d 676 (1992) (reversing where "trial court improperly assumed the parcels would be subdividable, when by the referee's own testimony they may not be.").

It is undisputed that the City grants variances to allow septic on the large one-acre parcels in the Bridle Trails area. (CP 339-45, 364, 805-07; 2/19 RP 109-10, 142; Exs. 5, 220 at 56 (Policy S-BT-33)) Both parties' experts admitted that there could be no determination whether a variance would be granted to any portion of the property until an application were submitted to the City of Bellevue. (2/20 RP 22-28; 2/21 RP 52, 87; 2/25 RP 177-78; 2/27 RP 21) The Referees agreed. (CP 930, ¶30) Yet the Referees speculated

that a variance would not be granted by finding that a sewer connection was required based on undisclosed "interviews with [undisclosed] members of the City of Bellevue's utility division." (CP 943, ¶59)

Specualting on future development scenarios contravenes the principle that in partitioning real property, the court must look to its *current* fair market value. *See Carson,* 65 Wn. App. at 884 ("common sense and Washington authority" suggest that property in partition actions should be valued at the time of partition). While "[a] court of equity, in a partition suit, will give the cotenant the fruits of his industry and expenditures, by allotting to him the parcel so enhanced in value or so much thereof as represents his share of the whole tract," *Cummings v. Anderson*, 94 Wn.2d 135, 141, 614 P.2d 1283 (1980), no authority supports taking into account speculative future improvements. *See also*, *Bishop v. Lynch*, 8 Wn.2d 278, 294, 111 P.2d 996 (1941) (court properly took into account improvements to property in partition action).

The Referees also reported that, "absent agreement between the parties, . . . the party constructing the sewer extension must bear the entire cost of that extension as an up-front cost" (CP 944, ¶61) – an *assumption* (not a finding) that is contravened by Judge Yu's

finding that there *was* an agreement. (FF 7, CP 230) It was undisputed that the Kapelas agreed with the Sferras to pay their respective share, secured by imposition of a lien on their partitioned property (the value of which far exceeded any anticipated cost). The Referees' finding that the Sferras would suffer "great prejudice" also ignores the significant increase in value should the Sferras' property obtain sanitary sewer.

Moreover, to the extent Judge Chung relied upon disagreement over details of the proposed encumbrance, the Referees never gave the parties the opportunity to reach an agreement on the mechanics of the sewer covenant, as they filed their Final Report based solely on the parties' comments that the Referees had solicited to their draft recommendations. Their report that these cotenants could *never* cooperate, ignores the myriad of other properties cooperatively and jointly owned by the Kapelas and Sferras. (2/19 RP 74)

The Referees' Final Report, adopted by the Judge Chung, does not support the order of sale because their reported findings are not supported by substantial evidence. This Court should reverse for this reason as well.

5. The court erred in abdicating its equitable authority to establish the terms of a cost-sharing covenant to which both parties consented but could not reach agreement as to specific terms.

The court additionally erred in failing to exercise its full equitable authority to impose upon the parties the terms of the covenant to which they both consented. That failure to exercise discretion is itself, an abuse of discretion requiring reversal and remand.

The superior court is charged to exercise its broad equitable authority in a partition action precisely because the co-tenants are deadlocked and cannot themselves agree on how to divide the property. A partition action is a flexible equitable remedy that calls upon the court to exercise its broad discretion. *Friend v. Friend,* 92 Wn. App. at 803. That discretion includes the power to impose easements or other servitudes on property to facilitate future subdivision. In *Carson v. Willstadter*, 65 Wn. App. at 886, for instance, this Court held that, if the property were subdividable, the trial court could impose easements on partitioned property to facilitate future development.

Here, the Kapelas agreed with the Sferras to fund a sewer extension if it was a necessary condition to future subdivision, and

agreed that the court should impose a covenant as a burden running with the land. They disagreed only on the precise terms of such a covenant – whether it should require an application for a septic variance as a condition precedent, and whether the Kapelas should be forced to tie up over $1 million in cash indefinitely for an expenditure that may never be required and that they could not control.

To the extent the Court affirms the finding that a sewer covenant is a necessary condition of a partition in kind, the trial court abused its discretion in failing to impose one. "[W]here, as here, we are at the threshold of a permanent division of realty and the opportunity is at hand to particularize the rights of the respective parties, that opportunity should be used to spell out those rights so that the parties as well as their successors in interest know the extent of their fee and its burdens." *Lombardi v. Lombardi*, 63 A.D.2d 1111, 406 N.Y.S.2d 396, 397 (1978) (reversing and remanding with instructions to impose easements with particularity); *see also Dewrell,* 58 P.3d at 227 (remanding to consider unequal partition with payment of owelty where trial court failed to do so before ordering sale).

The trial court's failure to exercise its broad equitable authority to impose the precise terms of a sewer covenant was itself an abuse of discretion. This Court should remand with instructions to impose upon the parties and their partitioned property a reasonable cost-sharing covenant for sewer extension and related easements upon subdivision of their respective shares. It is not a difficult task to draft a sewer covenant. The court could solicit the parties' competing proposals, write the covenant itself, delegate the task to a special master, or as the Referees proposed, require the parties to submit to binding arbitration. No purpose is served by reappointing these Referees, who have not only abdicated their assigned duty, but as the Kapelas warned in their objection (CP 708-10), relinquished their neutrality by favoring a sale of Overlake Farm in derogation of the statutory presumption for a partition in kind and in contravention of Judge Yu's findings.

VI. CONCLUSION

This Court should reverse the trial court's order of sale and remand with directions to partition the property in kind. To the extent this Court holds that consideration of future infrastructure improvements is a proper consideration, it should instruct the court on remand to dictate the terms of a covenant for future

improvements or appoint a special master to assist the court in crafting such a covenant.

Dated this 5th day of October, 2015.

SMITH GOODFRIEND, P.S.

By: _____
Howard M. Goodfriend
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Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 5, 2015, I arranged for service of the foregoing Opening Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ✓ U.S. Mail ___ E-File
Brian Lawler Denise M. Hamel Jameson Babbitt Stites & Lombard PLLC 801 Second Avenue, Ste. 1000 Seattle, WA 98104	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail
Arthur W. Harrigan, Jr. Tyler L. Farmer Theresa DeMonte Calfo Harrigan Leyh & Eakes 999 3rd Avenue, Suite 4400 Seattle, WA 98104	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 5th day of October, 2015.

Tara D. Friesen

APPENDIX A

HONORABLE SAMUEL CHUNG

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

OVERLAKE FARMS B.L.K. III LLC, a Washington limited liability company,

Plaintiff,

vs.

BELLEVUE – OVERLAKE FARM, LLC, a Washington limited liability company,

Defendant.

NO. 11-2-25877-7 SEA

ORDER CONFIRMING IN PART THE COURT APPOINTED REFEREES' FINAL REPORT AND RECOMMENDATION ~~[PROPOSED]~~

This matter came before the Court on the Plaintiff's motion for an order confirming in part and setting aside in part the Referees' Final Report and Recommendation dated October 13, 2014 (the "Final Report") and Defendant's Brief in Support of Confirmation of the Referees' Final Report and Recommendation. Having heard the oral argument of counsel for Plaintiff, Brian E. Lawler and Denise M. Hamel, and counsel for Defendant, Arthur W. Harrigan, Jr. and Tyler L. Farmer, and having considered the pleadings, supporting declarations and exhibits thereto, the record in this matter, and the Final Report, the Court deems itself fully advised and finds as follows:

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1. Except as stated in paragraph 2, the Court hereby adopts and confirms the Final Report, including the Referees' unanimous determination that a partition-in-kind would cause great prejudice to the one-fourth owner, and adopts and confirms the Referees' recommendation that the Property be partitioned by sale pursuant to RCW 7.52.130. A copy of the Final Report is attached as Exhibit 1 to this Order.

2. The Court sets aside the recommendations in Paragraph Nos. 2 and 5 of Recommendation C of the Final Report, on the basis of the requirements of sale of RCW 7.52.270.

3. The Court hereby directs the Referees to proceed with the sale of the Property in accordance with this Order.

DATED this 6th day of May, 2015.

THE HONORABLE SAMUEL CHUNG
Superior Court Judge

Presented by:

CALFO HARRIGAN LEYH & EAKES LLP

By s/ Tyler L. Farmer
Arthur W. Harrigan, Jr., WSBA #1751
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APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

OVERLAKE FARMS B.L.K. III LLC, A Washington limited liability company, Plaintiff, vs. BELLEVUE – OVERLAKE FARM, LLC, A Washington limited liability company, Defendant.	**No. 11-2-25877-7 SEA** ORDER DENYING MOTION FOR RECONSIDERATION, AMENDING MARCH 25, 2015 ORDER **[Clerk's Action Required]**

THIS MATTER is before the Court on Plaintiff's Motion for Reconsideration.

The Court DENIES the motion for reconsideration. The March 25, 2015 Order is modified to change Paragraph 2 to read: "The Court sets aside the recommendations in Paragraph Nos. 2 and 5 of Recommendation C of the Final Report, on the basis of the requirements of sale of RCW 7.52.270." The amended order is filed separately.

ENTERED this 6th day of May, 2015.

Hon. Samuel S. Chung,
Judge, King County Superior Court

Judge Samuel S. Chung
King County Superior Court
516 Third Avenue
Seattle, WA 98104
(206) 477-1417

APPENDIX C

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

OVERLAKE FARMS B.L.K. III, LLC, a Washington limited liability company, Plaintiff, v. BELLEVUE - OVERLAKE FARM, LLC, a Washington limited liability company, Defendant.	NO. 11-2-25877-7 SEA REFEREES' FINAL REPORT AND RECOMMENDATION

THIS MATTER came before the undersigned Referees upon appointment by the Court in an Order dated June 6, 2013, pursuant to RCW 7.52.080 to engage in an evaluation of a 39.25-acre parcel of undeveloped land at 5500-5900 140th Avenue Northeast, Bellevue, Washington, Tax Parcel Nos. 152505-9269 and 152505-9247, King County ("the Property") for the purpose of providing a recommendation to the Court as to whether and how the Property can be equitably partitioned, subject to any owelty payment under RCW 7.52.440, and without great prejudice.

Throughout these proceedings the Plaintiff has been represented by Brian E. Lawler and Denise M. Hamel of Jameson Babbitt Stites and Lombard, PLLC, and the Defendant by Arthur W. Harrigan, Jr. and Tyler L. Farmer of Calfo Harrigan Leyh and Eakes, LLP.

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App. C

In executing its duties and responsibilities as outlined by the Court in the above-referenced Order and RCW 7.52.080, 090, the Referees (i) reviewed Partition Dossiers prepared by both Plaintiff and Defendant; (ii) interviewed in an open session on October 30, 2013, certain of the parties' respective experts, including Plaintiff's experts, The Watershed Company (Ryan Kahlo and Kenny Booth), Steven Greso of S.V. Greso, Inc., Craig Krueger and Jon Nelson of Community Land Planning/Land Development Advisors, LLP, and Anthony Gibbons of Re*Solve, and Defendant's experts, C. Gary Shulz, Carl Buchan of William Buchan Homes, and Bates McKee of McKee & Schalka Real Estate Appraisal Services and Consultants, Inc.; and (iii) interviewed, with the parties available to listen, David Pyle (Development Services), and Sean Wells and Mark Dewey (Utility Department), from the City of Bellevue.

The Referees also performed a site visit and walked the subject Property. Further, the Referees, in conformance with the Court's Order provided the parties and their counsel with periodic status reports, either in person or telephonically.

The Referees have also conducted their own research and independent investigation of issues germane to the engagement and have relied on their own professional judgment and expertise in executing their responsibilities. The Referees have not engaged any other experts or third parties in the conduct of their work.

The Referees issued their Draft Referees' Report and Recommendation, including Findings and Conclusions, on February 5, 2014 (the "Draft Report"). Subsequently, the Parties submitted written comments and responses to the Draft Report and on May 14, 2014 the Referees conducted an open session with the Parties at which the Parties were permitted an opportunity to present their comments and responses to the Draft Report directly to the Referees.

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The Referees, having conferred amongst themselves, now issue this Final Referees' Report and Recommendation, including the following Findings and Conclusions.

I. FINDINGS

A. The Parties

1. Overlake Farms B.L.K. III, Inc., is a Washington limited liability company and owns, as a tenant-in-common, a 75 percent interest in the Property. The sole member of Plaintiff Overlake Farms is Davis Property Management, LLC. The Plaintiff is also known as the "Kapela Group" composed of Betty Lou Kapela and her husband, Robert Kapela, and their children, Cristina, Dana and Robert. (In this report, the Plaintiffs will be referred to as either "Plaintiffs" or "Overlake Farms.")

2. The Defendant is Bellevue-Overlake Farm, LLC, a Washington limited liability company ("Defendant" or "Bellevue"). Lisa Sferra and Linda Sferra and their children are the members of the Bellevue-Overlake Farm, LLC. The Defendant owns, as a tenant-in-common, an undivided 25 percent interest in the Property. The Defendant is also known as the "Sferra Group" composed of Gloria Sferra's daughters, Lisa Sferra and Linda Sferra.

B. Engagement of Referees

3. Following the filing of a Complaint for Partition in Kind, a trial was held before the Court resulting in the Court entering certain Findings of Fact and Conclusions of Law dated June 6, 2013. As part of the Court's Conclusions of Law, the Court ordered the matter submitted to three Referees pursuant to its equitable powers under RCW 7.52.080 to consider and prepare a

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report "on whether and how the Property can be equitably partitioned, subject to any owelty payment under RCW 7.52.440, and without great prejudice."

4. Land partition is governed by RCW 7.52.010, *et seq.* Partition is an equitable remedy and the Court is afforded great flexibility in fashioning relief under its equitable powers. There is, however, a presumption that land held by tenants-in-common can be equitably divided according to the interests of the parties. This presumption can be overcome only if the party advocating for sale provides substantial evidence demonstrating the Property cannot be divided in kind without "great prejudice" to the owners. "Great prejudice" has been defined to mean "material pecuniary loss" or "material economic loss." Some loss in value is not "great prejudice."

5. To the extent a partition in kind results in a modest discrepancy in economic allocation, the discrepancy can be settled through owelty pursuant to RCW 4.52.440.

6. RCW 7.52.090 prescribes the manner in which the Property is to be divided, with identification of the shares allotted to each party.

C. History of the Property

7. The Property is 39.25 acres of undeveloped land located within the city limits of the City of Bellevue with parcel identification numbers as above-described.

8. The Property was originally part of a 60-acre horse farm ("Overlake Farm") acquired in 1947 by the parties' common predecessor. A member of the Kapela Group owns the adjoining property to the west and has resided at that location since 1971. Overlake Farms has managed and maintained the Property primarily for horse grazing, as part of a family-run horse boarding business. The Plaintiff has also operated outdoor camps for children on the Property.

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9. The Property was owned as a partnership formed in 1980, dissolved in 1999 with creation of the resulting tenancy-in-common. There has not been a written document governing use and disposition of the Property since the late 1990s.

10. Beginning in about 2001, the parties periodically explored both physical partition of the Property as well as a purchase by Plaintiff of Defendant's 25 percent interest, all without success.

11. On July 27, 2011, the Plaintiff filed an action seeking an Order of Partition in Kind for the purpose of segregating a 10-acre strip along the northern border as an allotment to the Defendant. The Defendant counterclaimed for a partition of the entire Property by sale.

12. Trial commenced February 1, 2013, lasting six days, and concluded February 27, 2013. The trial court found as a fact that the Property is physically capable of segregation into smaller parcels for residential development. The Court also held the Defendant did not carry its burden of proving there was no partition scenario that would yield an equitable result, and further held the Plaintiff failed to produce sufficient evidence to corroborate its assertion that Defendant has historically agreed to accept a 10-acre strip along the northern border as a basis for a partition in kind.

D. Surrounding Neighborhood/Site Access

13. The Property is located at the northern border of the City of Bellevue's Bridle Trails neighborhood. To the south, the Property is bordered by low density, large lot developments generally consistent with typical land use pattern in Bridle Trails. To the west, the property is bordered by a power line and natural gas pipeline easement and Plaintiff's adjoining 20-acre property, to the north by the city limit between Bellevue and Kirkland with the 60-01

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Condo Development Project located on the Kirkland side of the northern border. To the east is 140th Avenue Northeast and an adjacent golf course. The golf course is on property originally owned by the parties' common predecessor.

14. Vehicular access to the Property is available from 140th Avenue Northeast. It appears driveway access to the Property from 140th Avenue Northeast could be provided at several locations on the Property's easterly frontage. The Referees observed that the current use of the Property sometimes relies on vehicle access from 140th Avenue Northeast across a portion of the southeast quadrant of the Property.

E. Regulatory Background

15. The Property is zoned R-1. The zoning allows base residential density of one unit per acre. While the Property is 39.25 acres in area, the parties have mutually adopted, or at least acceded to, a 38-unit density target for the Property. The Referees have similarly adopted this unit count for purposes of this report.

16. The Property will need to be platted to provide for the eventual sale of individual lots. Under the City of Bellevue's subdivision ordinance, the Property is eligible for segregation through a Conservation Subdivision. This process is available to the parties and allows areas of wetlands to be counted towards density, requires wetland and open space tracts, and allows a reduction in minimum lot size to 22,750 square feet. Under the Bellevue City Code, where, as here, a site is eligible for segregation by Conservation Subdivision, its use is mandatory.

17. The Property may also be eligible for development under a Planned Unit Development ("PUD") approval, under which density bonuses are available. The Referees acknowledge the parties investigated a PUD and determined a PUD was inappropriate for

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development of the Property. In light of the parties' assessment and rejection of a PUD, the Referees believe the Conservation Subdivision method of segregation provides a reasonable and conservative case for analysis.

18. The use of a "Short Subdivision" (Conservation Subdivision or otherwise) is permitted for segregation of up to nine lots. A Short Subdivision process is an administrative one, more abbreviated that the full subdivision process required to segregate a site into ten or more lots, and would therefore be appropriate for development of a smaller parcel following a partition in kind.

F. Easements and Critical Areas

19. The northern boundary of the Property is burdened with a utility easement for a feeder line, and the western boundary of the Property is encumbered by a 100-foot wide Puget Sound Power transmission line easement and the Olympic pipeline easement. These easements pose some limitations on site development and may impact the final sale value of individual parcels. However, the flexibility provided by the smaller minimum lot size under the Conservation Subdivision should serve to minimize the impact of these easements on any future property development.

20. Because of the width and length of the respective easements, and their negative impact on lot layout and developments, lots encumbered with these easements will require a greater area than the one-half acre minimum lot size allowed under the Conservation Subdivision in order to accommodate typical single-family development and the encumbered easement areas.

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21. The Property also includes a variety of critical areas, including wetlands and steep slopes. These areas appear to have been surveyed by the parties and are accounted for in the various site plans proposed by the parties.

22. Although the parties disagree as to the precise boundaries of the wetland areas, even under the more conservative analysis provided by the Defendant's expert, there is adequate area to accommodate the allowable lot density on the Property. Further, the wetland area should not prevent the provision of adequate street and utility service to any of the possible development locations on the Property. The Referees agree, therefore, that the difference between the parties' experts on the wetland delineation is not a matter deemed material.

23. The parties also presented evidence relating to the potential value impact due to the easterly portion of the Property fronting on 140th Avenue Northeast. While there was some suggestion that frontage along 140th Avenue Northeast may compromise the value of those lots, it is noted that there are numerous lots in the area fronting on 140th Avenue Northeast. The Referees therefore do not assign any significant value implications to lots fronting 140th Avenue Northeast; rather, appropriate frontage for a smaller parcel carved out of the whole will depend upon issues of access and storm water management. In addition, the Referees believe the evidence supports that lots on the westerly and northerly boundaries of the Property, both locations of which are impacted with utility easements, will result in a higher reduction in average price per lot value than those bordering 140th Avenue Northeast.

G. Utilities

24. Water: Water service is available from the City of Bellevue's systems along 140th Avenue Northeast and/or 132nd Avenue Northeast as well as at the end of Northeast 55th Place

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and Northeast 54th Place. Because of different pressure zones on the systems and the presence of the Valley Creek depression on the Property, there may be some technical issues with the water design that would preclude the ability for a looped system, but would not appear to restrict capacity or involve a significant offsite cost requirement.

25. Storm Water: Analysis by the parties considered both infiltration and detention and discharge methods of storm water management. Neither party presented any evidence to suggest that storm water management would be a limiting factor in development of the Property. As schematically diagrammed by the parties, with the aid of their expert analysis, it appears the most logical general location for storm water detention/infiltration facilities and discharge points would be along the eastern boundary of the Property, most likely incorporating the southern half of that boundary. The parties also considered both separate and commingled storm water facilities in their various development scenarios and the Referees agree both approaches appear feasible based on available information.

26. As a general matter, it is assumed that storm water discharged into wetlands, while technically allowed by code under some circumstances, may be difficult to accomplish since viable storm water management alternatives exist. In view of the acreage of the Property, it is assumed that there is adequate area for storm water management separate from the wetland systems, and that such a separate system will be required.

27. Potential partition in kind resulting in an allotment of one-quarter of the Property in the northeast area would impose challenges in conveying storm water to low points on the Property, which generally appear to be along the southern half of the eastern border of the

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Property (near 140th Avenue Northeast). Storm water management thus favors the southeast Quadrant for a 25 percent allotment if a partition in kind is selected.

28. Sanitary Sewer/On-site Septic: The development scenarios of both parties assume the use of individual on-site septic systems. It appears to the Referees this assumption was based on: (a) lower costs for on-site systems as compared to sanitary sewer; (b) the historic use of on-site systems in the Bridle Trails area; (c) a concern that sanitary sewer extension would be opposed by the neighborhood; and (d) some communication from the City of Bellevue utilities department suggesting the City would support a variance from the Code requirement to provide sanitary sewer service in connection with development of the Property. It is clear, however, to the Referees that development of the Property would require a variance in order to allow on-site septic systems.

29. Based on the testimony of Steven Greso, septic systems are possible on the smaller Conservation Subdivision parcels through use of a drip irrigation system. The drip irrigation system is a somewhat more costly system to install when compared with a drain field system, and imposes higher long-term costs with its maintenance obligations.

30. The Referees note that no application for a sewer variance has been submitted to the City of Bellevue and, as a result, neither the parties nor the City undertook a careful analysis of whether a variance to a sanitary sewer service requirement would be possible. The City has not acted on a variance application and, for the reasons noted below, the prior suggestion by City staff that a variance might be supported in this case appears to be inconsistent with City Code. BCC 24.04.100 requires all structures which contain facilities for the disposal of sewage to connect to the public sewer system, unless a variance is granted. Development of the Property

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would be subject to this requirement. Under BCC 24.04.130, it is further the responsibility of the property owner to install sewer facilities that provide adequate capacity and meet all City engineering standards. BCC 24.04.140 provides that all costs associated with such work shall be borne by the property owner. If sanitary sewer service is required and is not available, the City may require the property owner to install a sewer main extension. *Id.*

31. Under BCC 24.04.100.2.B, the City may approve a variance from the sewer connection requirement of the Code only if ***all*** of the following decision criteria are met:

a. The property is more than 200 feet or such other distance as may be required by King County board of health on-site sewage regulations, via dedicated easements and/or right-of-way from the existing public sewer system or, in the case of subdivisions, the exterior boundary of the subdivision is more than 660 feet, measured in the same manner, from the existing public sewer system;

b. The proposed septic system will not have an adverse environmental effect on potable water wells, ground water, streams or other surface bodies of water;

c. The proposed septic system is in compliance with all applicable federal, state and local health and environmental regulations; and

d. The cost of providing sewer service to the structure will result in an economic hardship. Economic hardship is defined as an unrecoverable cost equal to or exceeding 20 percent of the fair market value of a building site with utilities in place on which the structure is to be located.

The record in this proceeding reflects, and the interview with the City Utility Department representatives confirmed, that decision criterion (a) above cannot be met for a subdivision of the Property, since (as the parties agree) the public sewer system is in fact located within 660 feet of the boundary of the Property. As is noted in the record, this nearby line suffers from a lack of capacity, and a new, larger sewer line would need to be installed north to the Property from the vicinity of N.E. 40th Street (a distance of approximately one-half mile) in order to provide

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adequate sewer service to the Property. As noted above, the Code imposes the responsibility for this cost on the property owner, and variance decision criterion (a) does not provide an exception in a case where the nearby sewer line lacks capacity.

It appears that the parties (and the City in its preliminary suggestion that a variance might be supported) treated the decision criteria of BCC 24.04.100.B as being *alternative* criteria, rather than *mandatory* ones. Therefore, the parties' and the City's preliminary conclusion that a variance would be possible was based solely on satisfaction of criterion (d) above. This interpretation may have been driven by a mutual perception that the neighborhood might oppose a sanitary sewer extension, and if so, a collective reluctance to invest capital to construct a new sewer extension into an area in which on-site systems are commonplace. Regardless, the satisfaction of a single variance criterion is not sufficient under the Code to support approval of a variance; all four criteria must be satisfied, and it is clear that, at a minimum, criterion (a) cannot be satisfied. The Referees note that it is also unclear whether criterion (d) can be satisfied. The record before the Referees suggests that lots with sanitary sewer would command a premium to those on septic, for reasons described in Finding 33 below. Whether this premium would be equal to or greater than the cost of the sanitary sewer extension is unclear. In any event, the Code reflects that compliance with all four decision criteria is mandatory to permit approval of a variance, and the information and evidence presently before the Referees indicates that this is not possible.

32. After studying the variance criteria, reviewing information in the record, and speaking with the City, the Referees do not believe the Property (either as a whole parcel or in part) can meet all four mandatory variance criteria, and therefore assume that sanitary sewer

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service would be required in connection with development of all or a part of the Property. Since the existing sewer main in 140th Avenue N.E. is at capacity, a new sewer extension from the south will be required to provide sanitary sewer service for subdivision of the Property.

33. In addition, the testimony of pertinent witnesses suggests that the use of on-site septic systems is inconsistent with high-end, large lot developments as would be proposed with development of the Property. On-site systems can interfere with an owner's desire to locate patios, sports courts, pools, and other site amenities typically associated with this type of development. Furthermore, on-site disposal of domestic sewage may be perceived as inconsistent with the high-end nature of any proposed development of the Property.

34. Evidence in the record as well as Finding No. 7 of the Court's Findings of Fact and Conclusions of Law indicate the extension of off-site sanitary sewer service, estimated by the parties to be in the range of 2,700 lineal feet, would cost an estimated $1.2 million. Additional estimates from trial have placed this number at $1.4 million. This cost is independent of any on-site sewer-related development costs within the Property.

35. At trial (and Finding No. 7 of the Court's Findings of Fact and Conclusions of Law), Plaintiff's representative, Cristina Dugoni, testified that Plaintiff would fund, or would enter into a covenant for future funding, of its 75 percent share of the sanitary sewer improvement expense if sanitary sewer extension was necessary to develop the Property.

36. There does not appear to the Referees to be any apparent opportunity to share the cost of extending the sewer with other properties. The Property lies at the northern boundary of the Bellevue city limits, and any late comer opportunities would be limited to properties within 200 feet of 140th that are not already on sanitary sewer.

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H. Ascertainment of Value

37. Assemblage Premium vs. Small Parcel Premium: The Defendant has asserted the highest and best use of similar property in this location is "assemblage with adjacent property to create a larger, more efficient, and more unique larger parcel. Assemblage is common in the market. Anything that dis-assembles a larger property is detrimental to the overall value." (Letter, December 28, 2012, Bates McKee to Art Harrigan, pg. 10.) The Defendant has therefore asserted the Property should be sold as a single parcel at auction, allowing the Plaintiff the ability to buy the Defendant's 25 percent share at the pro-rated equivalent of the highest offer. The Referees do not believe such a staged public auction – in which Plaintiff could "trump" any other offer – would authentically test the market for the entire property. Market awareness of the existence of such a "right of first refusal" will tend to deter legitimate purchasers who are in fact interested in acquiring the entire Property.

38. The parties' appraisers have disagreed in their submittals and interviews whether there is a value premium resulting from assembling the 25 percent and 75 percent shares of the Property, or if the opposite is true. Defendant has argued there exists a value premium through assemblage. Plaintiff has argued that a short plat of 25 percent of the Property would command a premium to that of the whole under a bulk discount hypothesis.

39. Recognizing there are no perfect comparable sales to compare with the Property, the Referees endeavored to test whether the Defendant's argument for an "assemblage premium" found any support in subdivisions located on the eastside of Lake Washington that are similar as to sale date, location, average lot size, amenities or lack thereof. The Referees reviewed available data, including that from New Home Trends, to discern whether there was evidence to

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support either the Defendant's assertion of an "assemblage premium" or the Plaintiff's assertion of a "small parcel premium" by looking at the price paid for land on a per-lot basis across a range of project sizes while controlling for subdivided lot size.

40. The table contained on the following page illustrates the difficulty in empirically supporting either party's claim of a premium.

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Name	PIN	Size	Price/Lot	Zoning	Lots	Sale Price
Dandelion Meadows	3888100190	1.30	$121,429	RS7.2	7	$850,000
Laurel Ridge	3346300260	3.65	$118,182	R4	11	$1,300,000
Overlook The	8135000190	1.50	$160,000	R6	7	$1,120,000
Park Place at Pine Lake	6795100785	1.70	$79,429		7	$556,000
Beclan Place	1523059090	7.08	$108,226	R4	31	$3,355,000
Brauerwood	1240700045	7.20	$88,303	R4	33	$2,914,000
Countrycraft Site	2025059161	2.48	$356,250	R3.5	8	$2,850,000
Federspiel Property	2526059179	3.80	$74,917	R4	12	$899,000
Preserve	2725059336	4.37	$428,571	R2.5	7	$3,000,000
Brookside Meadows	2525059019	4.38	$110,556	R3.5	9	$995,000
Monabel	1233100915	1.60	$86,667	RS7.2	6	$520,000
Caulfield	1726059049	9.66	$56,375	R9600	32	$1,804,000
Laurel Hills 2 3 4	1123059065	6.72	$47,364	R4	11	$521,000
Newcastle Vista II	3424059085	17.50	$220,216	R4	13	$2,862,810
Piper's Glen	1826059078	37.34	$105,181	R9600	83	$8,730,000
Bellevue Estates	2077700060	2.80	$160,000	R1.8	5	$800,000
Sorrento	1524069077	5.00	$140,000	R6	10	$1,400,000
Tamarack Assessors	8562901480	1.30	$53,600		5	$268,000
Highland Glen	3226059026	3.35	$225,000	RS8.5	6	$1,350,000
Lake WA School Site	3982701130 et al	3.58	$289,334	RS 7.2	9	$2,604,010
Mercer Landing	6073410000	10.83	$140,400	R2.5	5	$702,000
Cougar Mountain (BSB Enterprises)	2424059017 and 27	12.60	$299,889	R1.0	9	$2,699,000
Belvedere Phase 2	0715010020 - 0060	17.40	$269,492	R1.8	59	$15,900,000
Corbin East & West	225069084 0225059084	30.08	$192,000	RA5	8	$1,536,000
Blue Dog Properties	225069083 et al	20.29	$192,000	RA5	8	$1,536,000
All	25	8.70	$152,299		401	$61,071,820

Category	Count	Acreage	Price/Lot	Lots	Sale Price
Lots <= 8K	6	3.74	$105,156	96	$10,095,000
Small Project Size (<= 5 ac)	4	2.04	$119,563	32	$3,826,000
Med Project Size (5 - 10 ac)	2	7.14	$97,953	64	$6,269,000
Large Project Size (>10 ac)	0	0	$0	0	$0
Lots 8K - 12.5K	9	9.76	$122,551	181	$22,181,810
Small Project Size (<= 5 ac)	5	3.33	$196,762	42	$8,264,000
Med Project Size (5 - 10 ac)	2	8.19	$54,070	43	$2,325,000
Large Project Size (>10 ac)	2	27.42	$120,758	96	$11,592,810
Lots 12.5K < x < 25K	8	7.11	$238,176	108	$25,723,010
Small Project Size (<= 5 ac)	5	3.21	$183,486	35	$6,422,010
Med Project Size (5 - 10 ac)	0	0.00	$0	0	$0
Large Project Size (>10 ac)	3	13.61	$264,397	73	$19,301,000
Lots > 25K	2	25.19	$192,000	16	$3,072,000
Small Project Size (<= 5 ac)	0	0.00	$0	0	$0
Med Project Size (5 - 10 ac)	0	0.00	$0	0	$0
Large Project Size (>10 ac)	2	25.19	$192,000	16	$3,072,000

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Data from New Home Trends produced 25 subdivisions with associated land sales. These sales were segmented first by planned lot size (lot size under 8,000 square feet; lot size 8,001 square feet to 12,500 square feet; lot size 12,501 square feet to 25,000 square feet; and lot size greater than 25,000 square feet). Within these segmentations, sales were then grouped by overall project size, with "small project size" defined as those projects five acres in size or less; "medium project size" defined as those projects 5.01 acres to 10.00 acres in size; and "large project size" defined as those projects larger than 10 acres in size.

41. In analyzing this data, there was no clear trend supporting either the "assemblage premium" or the "small parcel premium."

For projects with lots greater than 25,000 square feet, there were only two land sales, both for projects more than 10 acres in size, thus not allowing for a comparison between large and small project sizes. In lots averaging 12,500 square feet to 25,000 square feet, larger projects (13 acres on average) sold for $264,397 per lot, while smaller projects (3.2 acres are average) sold for $183,486 per lot, indicating evidence of an assemblage premium.

For projects with lots average 8,000 square feet to 12,500 square feet, the opposite trend persisted. Larger projects (27.42 acres on average) sold for $120,758 per lot, while small projects (3.33 acres on average) sold for $196,762 per lot, indicating evidence of a small parcel premium. Finally, for projects with lots between 7,000 and 8,000 square feet, medium-sized projects sold for an average of $97,563 per lot while small size projects experienced an average price per lot was $119,563.

42. Based on information provided by the parties, together with the Referees' independent analysis, the Referees have concluded there is no evidence to support either party's

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or their appraisers' claims for a premium associated with either a large or small parcel. Additional analysis would be required in order to substantiate either claim. Inclusion of finished price point for each subdivision would better control for similarity and differences among comparable sales, including those accruing to view premiums or lack thereof. Even so, there would not exist the perfect pair of sales that are identical in every way but for overall project size. The closest among the comp set are the "Belvedere Phase 2" and "Cougar Mountain (BSB Enterprises)" subdivisions. At first glance, these appear to be a good paired sale set, as the properties are located in close proximity on Cougar Mountain and both offer favorable views. Based on price / lot for each, there would appear to be about a 10% small lot premium. There are, however, key differences between the sales that challenge their comparability. The Belvedere property was a distressed sale, being purchased by CamWest (now Toll Brothers) out of foreclosure in March 2012 as a partially finished plat. The BSB property, in contrast, is an entitled project that was listed as a pending sale at the time of this report. The lot size also varies considerably between the two projects; Belvederes features lots of approximately 12,000 – 15,000 square feet, while the lots in the BSB project are roughly double that at approximately 23,000 square feet, on average. Overall, these differences as to seller motivation, property condition at sale, date of sale, and lot size make meaningful comparisons between these two subdivisions challenging.

Therefore, the Referees conclude that the value per lot between large and small projects is roughly equal, with developers paying the same pro rata value for 25 percent of the Property as they would for the entire Property. The lack of evidence to support "an assemblage premium,"

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along with a relative equivalency of value, regardless of parcel size, therefore suggests there is no value penalty associated with a partition in kind.

I. Discussion Relating to Partition in Kind

43. Property Characteristics: The Property is a large well-configured parcel with excellent street access. While easements and critical areas encumber various portions of the Property, those limitations are distributed across the Property and do not render large contiguous areas of the property undevelopable. The City of Bellevue's Conservation Subdivision is a tool that should readily allow development of the Property in a manner that realizes the allowed development density of 38 lots. The Referees have concluded the characteristics of the Property will accommodate a partition in kind.

44. Yield: The Referees' focus is on creation of a partition allotment of the Property yielding approximately 25 percent of the available lot yield. While exactitude is not required, it is clear that 38 achievable lots in the total of 39.25 acres results in 25 percent of the Property, allowing for 9.5 lots. To the extent one-half of a lot is unachievable, the concept of owelty would play a role in a partition-in-kind scenario.

II. CONCLUSION AND RECOMMENDATION

A. Partition in Kind

45. A nine lot segregation or allotment is the maximum allowable for a short plat, and has the advantage of streamlined permitting, and thus provides a quicker avenue to the marketplace for the Defendant.

46. The Referees have concluded there is no basis to assert that lots in a nine lot subdivision would sell at any different pace than a 38 lot subdivision.

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47. Moreover, given the data outlined above on the equivalency of value between a larger parcel and a smaller parcel, the Referees conclude there is little difference, if any, between the value of a nine-lot short plat and the first nine-lot phase of a broader subdivision of the entire Property.

B. Location of Possible Partition in Kind

48. The Referees have concluded the southeast Quadrant is the most logical area for partition, if one were to occur. The southeast Quadrant enjoys adjacency to complimentary uses and natural wetland buffers, and provides convenient access to 140th Avenue Northeast.

49. While a partition of a smaller segment in the southeast Quadrant fails to capture a portion of the so-called "valuable center" of the Property, it is not burdened by the negatives found at the northern border of the Property with small feeder power lines, and adjacency to a condo project, or, to the west, with large overhead 500 KV lines and a pipeline easement. Moreover, the southeast Quadrant provides easier accommodation of a storm water maintenance pond in contrast to, for example, the northeast Quadrant. The southeast Quadrant is closer to sewer and water services, thus minimizing the cost of utility extensions.

50. During the interview process, both Plaintiff's and Defendant's experts concluded the southeast Quadrant to be the most logical for partition. Land planners for each party produced partitions for the southeast quadrant that were similar as to road section, location of storm water, and configuration of six of the nine lots being created. The main difference is Plaintiff's expert used wetlands as amenities to situate lots between them, while Defendant's expert avoided siting homes between wetlands. Defendant's expert instead pushed three of the lots toward the middle of the Property.

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51. The Plaintiff's contention that a partition carving off a portion of the northeast quadrant is more favorable to continued horse farm operations is not, to the Referees, material to the task at hand.

52. For purposes of this Draft Report and Recommendations, the Referees are unanimous that the Land Development Advisors, LLC, Shulz SE 1 Conceptual Site Plan, accounting for a nine-lot short plat on 9.23 acres, is the preferred allotment to the Defendant's in the event of a partition in kind of the entire Property.

C. Owelty

53. Twenty-five percent of a 38 lot allotment equals 9.5 lots. It is not possible to allot a party one-half of a lot, so owelty is required from one party to the other in order to compensate the receiving party for the half lot difference. The Referees have considered the form in which to manage equivalency of value in the partition-in-kind scenario. One option would be to grant the Defendant a 10 lot portion of land, in which case the owelty would flow from the Defendant to the Plaintiff. Alternatively, selection of a southeast quadrant parcel as noted in paragraph 51 above, grants the Defendant a nine lot allotment, and owelty would flow from the Plaintiff to the Defendant.

54. In considering both options, it is most logical to assume the Defendant will be granted a nine lot portion of the land, consistent with the approach both parties and their land planners took at trial, and in materials provided in the Referee Dossiers. Thus, owelty equal to the value of one-half of a lot, flowing from the Plaintiff to Defendant, is the most reasonable and expedient.

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55. The issue is value of one-half of a lot. Referees previously concluded the value per lot between large and small projects is roughly equal. Due to the absence of any comparable sales in the Bridle Trails market, the Referees have relied on the data produced by the appraisers. The Plaintiff's appraisal, concludes a total "as-is" property value of $8.5 million under a scenario where nine lots are afforded to the Defendant in the southeast quadrant and the remaining 29 lots afforded the Plaintiff, all according to the Schulz wetland delineation. This results in an average lot value of $225,000 per lot (Summary Table of Conclusions, p. 10). Under the Defendant's appraisal, the "as-is" lot value was $300,000 (Land Sale Comparison Summary Table, p. 6). Averaging the two figures results in a rounded lot value of $262,500, with one-half lot equaling $131,250, as shown in the following table.

	Proportion	Partition	Owelty
Common Assumptions			
Total Lots	38	38	0
Lot Value	$262,500	$262,500	0
Defendant			
% Owned	25.00%	23.68%	1.32%
% as Lots	9.5	9	0.5
% as Value	$2,493,750	$2,362,500	$131,250
Plaintiff			
% Owned	75.00%	76.32%	-1.32%
% as Lots	28.5	29	-0.5
% as Value	$7,481,250	$7,612,500	($131,250)

56. The Referees, therefore, would recommend owelty be paid by Plaintiff to Defendant in the amount of $131,250 as part of a partition in kind of the Property, employing the Land Development Advisors, LLC, Shulz SE No. 1 Conceptual Site Plan.

D. Effect of On and Off-Site Development Costs on Partition in Kind and Recommendation

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57. Development costs consist of two categories: (a) the cost of on-site development, and (b) the cost of off-site amenities necessary for on-site development.

58. On-Site: The record does not reflect any on-site development cost considerations that would prevent partition of the Property in kind. The Referees have concluded the Property can be partitioned in kind in a manner that does not impose great prejudice on either resulting parcel for on-site development costs.

59. Off-Site: Off-site development costs are a different matter. It does not appear to the Referees that a nine-acre parcel eligible for subdivision will meet the four criteria necessary for the City to grant it variance to allow on-site septic systems. Rather, after interviews with members of the City of Bellevue's utility division, and study of the City of Bellevue's ordinance relating to securing a variance from extension of, and connection to, a sanitary sewer, the Referees conclude that connection to a sanitary sewer is actually required and the smaller parcel cannot be subdivided without provision for sanitary sewer service.

60. The parties presented evidence to the Court, and the Court included as part of Finding of Fact No. 7, bringing sanitary sewer service to the southeast quadrant would impose a cost of approximately $1.4 million on the first allotment of the property to seek a Conservation Subdivision. The Referees recognize that the final cost of the sewer extension may be greater or lesser than this amount, but the $1.4 million figure serves as a reasonable initial estimate of cost.

61. In the event of a partition in kind, it is not known which of the two resulting parcels would develop first. Plaintiff has expressed an interest in retaining use of the Property for current horse-related operations, and does not appear to be interested in the near-term development of the Property. Defendant, on the other hand, does appear interested in monetizing

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the value of its tenancy-in-common interest in the Property. Thus it is reasonable to assume for this analysis that the smaller parcel would develop first. Assuming the smaller nine-lot parcel in the southeast Quadrant were platted first, the upfront cost of sewer extension – approximately $1.4 million, or $155,555 per lot – would impose great prejudice on the value of the smaller parcel by almost any definition. If the smaller parcel was required to carry the entire sanitary sewer service burden as an up-front cost, not only would it sustain great prejudice, but provision of sanitary sewer service to the Property as a whole would provide a disproportionate benefit to the remaining parcel. While latecomer agreements are authorized under BCC 24.04.150 in a case such as this one, where one property owner constructs sewer facilities that benefit other properties, a latecomer agreement only provides the *potential* for cost reimbursement. There is no certainty under a latecomer agreement whether or when such reimbursement might occur. Therefore, absent agreement between the parties, it must be assumed that the party constructing the sewer extension must bear the entire cost of that extension as an up-front cost.

62. The great prejudice resulting from the imposition of the entire cost of sanitary sewer service on the smaller parcel can be mitigated only by an appropriate upfront cost-sharing agreement between the Plaintiff and Defendant. The Court's Finding of Fact No. 7, in part, finds that Plaintiff's representative, Cristina Dugoni, testified that Plaintiff would fund or enter into a covenant for future funding of its share (75 percent) of providing sanitary sewer service to the Property if it were necessary to develop any portion of the Property. In order to be effective in mitigating great prejudice to the smaller parcel, such an agreement would need be structured so that costs of the sewer extension are funded pro rata at the time they are incurred.

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63. In the Draft Report, the Referees recommended that, in order to mitigate the great prejudice resulting to the smaller parcel from a partition in kind resulting from the cost of required sanitary sewer in this case, the parties be required to enter into a reciprocal covenant. The covenant would benefit and burden both the larger parcel and the smaller parcel, and would run with the land. As suggested in the Draft Report, the provisions of the covenant would include the following:

a. Establishment of an escrow account to cover the estimated cost of the sanitary sewer extension. The escrow would be funded in cash upon partition of the Property, with Plaintiff contributing $1,050,000.00 and Defendant contributing $350,000.00. The escrow funds would be available solely for the payment and/or reimbursement of the cost of the sanitary sewer extension. The parties would share the cost of the escrow services on a 75/25 basis.

b. The escrow would be available to the party constructing the sewer extension to underwrite the cost of the sewer extension. Disbursement from the escrow would be addressed in the manner typical of construction-loan draws, based on percentage completion of the sewer extension project, with draw requests supported by certification by the project consulting engineer and partial lien releases as applicable. The first draw (for design and other "soft" costs) would be payable upon preliminary plat approval. A 10 percent holdback would be imposed, and would be released only upon final approval and acceptance by the City of the sewer line extension.

c. The party constructing the sewer line extension would be responsible for the cost of design, permitting, inspection and other typical "soft" costs for the project, subject to reimbursement from the escrow. The party constructing the sewer line extension would also obtain three guaranteed-maximum-cost bids for the construction of the extension. If the lowest responsible bid amount, together with estimated soft costs, exceeds $1.4 million, then within 30 days each party would fund its share of the excess cost in cash into the escrow, based on the 75/25 cost allocation. If the constructing party desired to use a contractor other than the contractor who provided the lowest responsible bid, then the constructing party would additionally fund into escrow in cash 100 percent of the amount by which the selected contractor's bid exceeded the lowest bid.

d. If the final cost of the sewer extension (hard and soft costs) exceeded the funds in escrow, then each party would fund its share of the excess cost in

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cash into the escrow within 30 days of substantial completion of the construction of the sewer extension. Upon final payment from escrow of all amounts due for the sewer extension, and approval and acceptance of the sewer extension by the City, the payment obligations under the covenant would terminate. Any funds due under the covenant but unpaid would bear interest at the maximum amount permitted by law, and would constitute a lien on the respective party's property, which lien (including attorneys fees and costs) would be foreclosable in accordance with law. Any funds remaining in the escrow upon termination would be reimbursed to the parties based on the 75/25 allocation.

e. The parties would grant each other appropriate easements for sanitary sewer, natural gas, domestic water, telephone and cable TV, power and storm water (conveyance, but not detention, infiltration or water quality treatment). The preferred location for all such easements would be on the 140th Avenue N.E. frontage of the parcels. No access easements would be required between the two parcels. The party first subdividing would propose to the other party locations for any such easements, and the other party would provide comments within 30 days.

f. The parties would reasonably cooperate in the sewer line extension and the approval of the subdivision of the properties, including executing such applications and other instruments as may be required, without additional cost or liabilities to the parties.

g. Any disputes arising under the covenant would be resolved by binding arbitration before an arbitrator identified by the Court. Arbitration would be scheduled to conclude within 60 days of demand, with the prevailing party entitled to its attorneys' fees and costs.

h. The covenant would include provisions typically included in real property covenants, including an obligation of the parties to provide estoppel statements upon request.

64. In their responses to the Draft Report, both parties took issue with this approach. Plaintiff suggested that its share of the sewer cost be provided not in cash, but in an alternative form of some kind, and that more work would be required to define the compatibility of single-family uses (on the smaller parcel) and horse-farm uses (on the larger parcel). Defendant agreed that more work would be required to define use compatibility, but disagreed with Plaintiff's

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comments in that regard; and Defendant insisted on the availability of a cash escrow for the sewer costs.

65. These responses of the parties reflected their long-standing inability to agree on issues associated with the disposition of the Property. Despite the Referees' interest in fashioning a creative solution to accommodate a partition in kind in this case, the Referees are forced to acknowledge that no such solution is feasible absent the cooperation of the parties, and that it would be counter-factual to assume such cooperation. Predicating a solution on such cooperation would only place this Court in the position of having to police a difficult process of partition and land development over a long period of time.

66. Further, the Referees are convinced that, due to the cost of the required sewer extension, a partition in kind would impose great prejudice on the smaller parcel. In these circumstances, the Referees are not persuaded that a combination of owelty and a mandatory agreement between uncooperative parties can or should play a role in addressing the issue of great prejudice.

RECOMMENDATION

Therefore, the Referees recommend to the Court the following actions:

A. The Court provide the parties a period of ninety (90) days within which to attempt to reach an agreement regarding the disposition or partition of the Property.

B. Failing such an agreement, the Court order the open-market sale of the Property, and a partition of the proceeds of such sale between the parties.

C. Any such sale should be conducted under the following guidelines to ensure that the sale process elicits a fair market value for the Property in its current condition:

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1. The sale process should be conducted by a real estate professional who specializes in the sale of larger parcels and has experience in the Puget Sound region (the "Real Estate Professional"). The sale should be advertised locally, regionally and nationally by appropriate means.

2. ~~The sale should not be conducted as an auction, but instead through a process designed to maximize sale value. For example: potential parties with interest in the purchase should be identified and provided an opportunity to view the Property and information relating to it; a short period for offers to be submitted should be established; the list of initial offerees should be reduced to a short list of qualified buyers; and final bids should be accepted from the final short list of qualified buyers.~~

3. The parties should be required to cooperate in assembling the due diligence information for the Property and to respond to reasonable inquiries from prospective purchasers as to information regarding the Property. The Real Estate Professional should be authorized to hire legal counsel to prepare the Purchase and Sale Agreement and other closing documents for the sale of the Property.

4. The compensation for the Real Estate Professional and all costs incurred in connection with the documentation and closing of the transaction should be borne pro rata by the parties, in accordance with their respective interests.

5. ~~The sale should be conducted within a short time-frame, with the Property sold on an "as-is" basis. For example, the purchaser's due diligence review period should not exceed sixty (60) days, with closing no more than thirty (30) days after the conclusion of the due diligence period~~.

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6. Either party would be permitted to bid in its respective property ownership as a proportionate share of its offer, in lieu of cash. So, for example, if at sale of the Property Plaintiff were to bid $10 million, then 75% of the value of this bid would be represented by Plaintiff's property, and Plaintiff would be required to pay $2.5 million at closing, with a credit for $7.5 million representing the value of Plaintiff's property. In such a case, the party bidding in its property interest would receive no partitioned value from the sale.

DATED this 13 day of October, 2014.

Dale L. Kingman, Referee

John C. McCullough, Referee

Jim Reinhardsen, Referee

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APPENDIX D

Honorable Mary Yu
Department: 15
Trial Date: February 19, 2013

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

OVERLAKE FARMS B.L.K. III LLC, a Washington limited liability company,

Plaintiff,

v.

BELLEVUE - OVERLAKE FARM, LLC, a Washington limited liability company,

Defendant.

NO. 11-2-25877-7 SEA

FINDINGS OF FACT AND CONCLUSIONS OF LAW [PROPOSED BY PLAINTIFF]

agreed to by MJ. DJ

(Clerk's Action Required)

THIS MATTER having come before the Court for trial beginning on February 19, 2013 and concluding, after six trial days, on February 27, 2013; the Plaintiff having been represented by Brian E. Lawler and Lucy Rake Bisognano of Socius Law Group, PLLC, and the Defendant having been represented by Arthur W. Harrigan, Jr. and Tyler L. Farmer of Calfo Harrigan Leyh & Eakes LLP; and the Court having heard the testimony, reviewed the exhibits and heard the argument presented at trial; the Court hereby enters the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Plaintiff Overlake Farms B.L.K. III LLC, a Washington limited liability company owns a 75% interest in a 39.25 acre parcel of undeveloped land at 5500-5900, 140th Ave NE Bellevue, Tax Parcel Nos. 152505-9269 and 152505-9247, King County, ("the

Property"). The sole member of Plaintiff Overlake Farms B.L.K. III LLC is Davis Property Management, LLC.

2. Defendant Bellevue-Overlake Farm, LLC, a Washington limited liability company, owns a 25% interest in the Property. Lisa Sferra and Linda Sferra, and their children, are the members of Defendant Bellevue-Overlake Farm, LLC.

3. The Property was originally part of a 60 acre horse farm (known as Overlake Farm) that was acquired in 1947 by Army and Betty Seijas. Army and Betty's two daughters, Betty Lou Kapela and Gloria Sferra, came to own the Property, commonly known as the "Back 40", as tenants in common, with Betty Lou Kapela's 75% interest giving rise to Plaintiff's interest, and Gloria Sferra's 25% interest giving rise to Defendant's interest. Betty Lou Kapela, or her successor entities, is also sole owner of the approximately 20 acres, commonly known as the "Front 20," immediately adjacent to the Property to the west.

4. Although the Property is owned as a joint tenancy in common, there has not been a written governing document since the late 1990s. Plaintiff Overlake Farms B.L.K. III LLC (or its predecessors) have managed and maintained the Property. The primary use has been by Plaintiff for horse grazing as a part of a family-run horse boarding business. The Property also has been used for family recreation and includes a small area of memorial sites for past generations. Plaintiff also operates outdoor camps for children on the Property during the summer months.

5. The Property is located in the Bridle Trails area of Bellevue. It is zoned R-1 (base residential density of 1 dwelling unit per acre) with frontage along 140th Ave NE. Surrounding uses are primarily low density residential except for a condominium project with associated parking areas on the north border.

6. The Property is physically capable of segregation into smaller parcels for residential development.

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7. The Property is currently not served by public sewer. According to information received by the parties, after the preparation of expert reports, in the case of residential development of the Property, or of one-fourth of the Property, the City of Bellevue, as the governing land use jurisdiction, would require either (1) the extension of offsite sewer service, which was estimated by the parties to be in the range of 2,700 lineal feet (LF) at an estimated cost of $1.4 million, or (2) the use of onsite septic systems, approval of which the City of Bellevue has indicated it would support as an alternative to the extension of current public sewer lines. At trial, Plaintiff's representative Cristina Dugoni testified that Plaintiff would fund, or would enter into a covenant for future funding, of its 75% share of the sewer improvement expense if sewer extension were necessary to develop the Property.

8. Plaintiff Overlake Farms B.L.K. III LLC has expressed its desire to retain the Property in its current state and usage for the indefinite future. But at some point in the future, Plaintiff expects the entire 40- acre parcel to be developed, consistent with City of Bellevue planning policies and codes.

9. Since around 2001, the parties have periodically explored either (1) a physical (in kind) partition of the Property into approximate one-quarter and three-quarter parcels or (2) a purchase of Defendant Bellevue-Overlake Farm, LLC's one quarter interest. The parties have never reached a meeting of the minds on either physical partition or a buyout.

10. Plaintiff Overlake Farms B.L.K. III LLC commenced this action to seek an equitable partition in kind of the Property, so that it could continue to use its share of the Property for its current uses and to possibly expand its horse operations on the Property, and so that defendant Bellevue-Overlake Farm, LLC could use its one quarter (1/4) interest in whatever manner it saw fit. In its Complaint, Plaintiff sought an order partitioning the northern ten acre (east/west strip) of the Property to Defendant. Defendant Bellevue-Overlake Farm, LLC counterclaimed for a partition of the entire Property by sale.

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11. Both parties retained appraisers who each worked with land planning experts to consider how the property might be developed and the potential impacts of various partition scenarios. Both land planning experts assumed that the full Property development could yield at least 38 lots, although they differed in design concepts. Plaintiff's expert Craig Krueger reviewed several development options for 9 lot short plat developments. Defendant's experts offered no specific partition proposals for a possible ¼ development of the property, but testified regarding what they perceived as significant shortcomings in the plans proposed by Plaintiff's expert. These perceived shortcomings included: failure to provide for an equitable distribution of the costly sewer extension project; failure, as an alternative, to adjust lot sizes and partition size to account for the square footage lost to septic fields that would be avoided by developing the entire acreage (which could support the cost of the sewer extension); failure to properly account for actual wetland dimensions; inefficient use of square footage for a retention pond to support a partitioned piece; and failure to provide in any of the proposed partitions a share of the most valuable center of the property.

12. Defendant presented a plan for development of the entire Property that would support development of 38 residential lots averaging 26,000 square feet. At trial, following Defendant's critique of the lot sizes in Plaintiff's proposals, Plaintiff presented a conceptual development plan for the Southeast quadrant using the Defendant's wetlands survey and approximate lot sizes. Plaintiff's expert Craig Krueger testified that this plan did not create a "pinch point" problem affecting the development of the remainder of the land.

13. Both appraisal experts agreed that the Property is unique, primarily by virtue of its size (40 acres), its location (relatively close to downtown Bellevue), and its undeveloped state. However, they differed both in their opinions and their approaches to valuation of the Property and in the analysis of potential value impacts as a result of partition.

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14. Plaintiff retained MAI appraiser Anthony Gibbons of the Re-Solve company, who prepared a summary report for the Property. Mr. Gibbons considered the "highest and best use" of the Property as residential subdivision. Mr. Gibbon's appraisal considered both "before" values (i.e., the property as a whole and "as is") and "after" values (i.e. the value of resulting parcels if the Property were partitioned into approximate ¾ and ¼ parcels). Based on his analysis, Mr. Gibbons concluded that there would be no net diminution in value if the Property were partitioned in kind, which opinion he considered to be consistent with a general appraisal axiom that there is an inverse correlation on the per unit value of a parcel and its size. Mr. Gibbon's methodology consisted of two appraisal methodologies recommended by the Appraisal Institute for the valuation of raw land: (1) the use of comparable sales, to the extent comparable sales data can be found, and (2) a subdivision/discounted cash flow analysis.

15. Defendant retained MAI appraiser Bates McKee of McKee & Schalka, Inc, who prepared a preliminary report dated December 2, 2012 and a final report dated December 28, 2012. Mr. McKee's final report established a value of the Property as a whole based on comparable sales of recent transactions in the Bellevue-Kirkland area and concluded that any physical partition would result in the "probable value loss" to the entire Property of $1 million-$2 million (approximately 9-17%) plus the cost of bearing the full cost of sewer improvements. At trial, Mr. McKee testified that as an alternative to the sewer costs, the partitioned property could suffer the negative impacts of implementing onsite septic systems within the partitioned parcel, and that there could be other impacts upon the value of the specific partitioned parcels described in the proposals presented by the Plaintiff.

16. Overall, the Court finds that Defendant did not carry its burden of proving that there was no partition scenario that would yield an equitable result. Although Defendant's experts asserted that a loss of economies of scale in developing in partitioned parts would be

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a significant factor in creating loss in value, the Court finds that the "economies of scale" argument to be just one consideration. The Defendant's analysis of the specific partitions that were proposed did not convince the Court that some equitable partition cannot be carved out.

17. With respect to Plaintiff's assertion that there was an understanding that Defendant would accept the northern strip as a basis for partition, Plaintiff did not establish that any such understanding existed.

18. The land planning experts for both sides (Mr. Krueger for the Plaintiff and Carl Buchan for the Defendant) both testified that there are multiple ways to partition the Property so that Defendant could receive property yielding approximately ¼ of the lots while Plaintiff would retain property yielding approximately ¾ of the lots.

19. There were differences of opinion among the expert witnesses on several issues including (1) the actual shape and extent of wetlands and related wetland buffers, (2) the feasibility and impact of onsite septic systems as an alternative to the extension of offsite sewer main to the Property, (3) the utility of land under the power transmission line on the western border of the Property, (4) the impact of lots adjacent to 140th Ave NE, (5) the impact of lots on the Northern border across the street from the neighboring condominium; (6) the location and size of storm water retention/detention areas, and (7) the feasibility of sharing in common development burdens, such as the cost of offsite sewers, if needed, and the co-location and sharing of storm water facilities.

II. CONCLUSIONS OF LAW

1. Land partition is governed by RCW Ch. 7.52. Partition is an equitable remedy. The Court is afforded great flexibility in fashioning relief under its equitable powers.

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2. Physical partition of the Property in kind, rather than sale at auction, is required, unless partition in kind would result in "great prejudice to the owners."

3. The sole question for trial was whether or not a partition in kind could be made without great prejudice.

4. The term "great prejudice" is not defined in RCW Ch. 7.52, but case law indicates that it is essentially material economic loss.. Some loss in value is not great prejudice.

5. The burden of showing great prejudice is on the party that claims it exists, and the Court cannot order a sale unless it finds that no physical partition can be made without material economic loss to the owners..

6. Defendant did not meet its burden of proof to convince the Court that it is not possible to carve out an equitable partition without material pecuniary loss to Defendant—i.e., such that the relative value of the share would be materially less than the sum Defendant would realize from a one-fourth share of the proceeds of a sale of the whole. The Court also cannot overlook the fact that Plaintiff, as one of the co-tenants, desires to keep and utilize the Property. There is a human and family element to the Property that cannot be discounted.

7. Defendant's claim for partition by sale is thereby denied, subject to the report of the referees as set forth below.

8. As the parties are aware, this is not the final resolution of the parties' dispute since the issue—the determination of an appropriate partition and of whether such a partition will result in material economic loss—is to be submitted to three referees and is then subject to further review.

9. This Court shall use its flexible, equitable powers under the partition statute to appoint three referees under RCW 52.080 to consider and prepare a report on whether and

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how the Property can be equitably partitioned, subject to any owelty payment under RCW 7.52.440, and without great prejudice.

DATED this 6 day of June, 2013.

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Presented by:

SOCIUS LAW GROUP, PLLC

Also see Summary Decision entered on 3/7/13

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