

NO. 41323-0-II

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

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CLM

TIMBERLAND BANK, a Washington corporation,

Respondent,

v.

SUE LEVINE, a single woman;

Appellant,

RORY NAVIS, a single man; and OCEAN SHORES COMMUNITY
CLUB INC., a corporation,

Defendants.

BRIEF OF RESPONDENT

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INTRODUCTION

The Timberland Bank purchased the property at issue at a Sheriff's sale on July 17, 2009. Timberland paid \$720,000 – the highest appraised-value taking into account that only five of the nine condominiums could be sold due to insufficient parking. Sue Levine did not object to any aspect of the foreclosure sale or to the Sheriff's return.

Ten months after the foreclosure sale – just five days before the one-year redemption period expired – Levine noted a motion for a hearing to establish an “upset price,” the minimum bid at a foreclosure sale before the court will confirm the sale. Although Levine filed her original motion before the sale, she did not note it, was unprepared to argue it, and actually asked the court to determine fair value, not to set an upset price. Under RCW 61.12.060, the only issue properly before the court after the foreclosure sale was fair value, not an upset price, regardless of what Levine called her motion.

The court correctly denied Levine's motion for an upset price, ruling instead that she received fair value. Substantial evidence supports the court's highly discretionary ruling. This Court should affirm and award Timberland fees.

RESTATEMENT OF ISSUES

1. Did the trial court have discretion not to set an upset price 10 months after the Property sold, where RCW 61.12.060 gives the trial court discretion to set an upset price, if at all, only before the foreclosure sale?¹

2. Did Levine get fair value, where the Timberland Bank paid \$720,000, the highest – and only – appraisal accounting for parking and other deficiencies?

3. In addition to the fact that Levine received fair value, does the following also support the trial court's decision to deny an upset price: (a) Levine did not bring her motion until five days before the redemption period was to expire; and (b) it is extremely unusual to have multiple bidders at foreclosure sales in Grays Harbor, undermining the underlying premise of the upset-price rule?

4. Should this Court award Timberland appellate fees?

¹ All relevant statutes are attached as Appendix A.

STATEMENT OF PROCEDURE

Sue Levine's entire appeal is about the trial court's denial of her motion to set an upset price. Timberland provides this statement of procedure to give this Court a clear timeline relevant to this issue. In brief sum, Levine was not prepared to address upset price before the foreclosure sale, finally noting her motion over 10 months after the foreclosure sale, just five days before the redemption period expired. RP 21-22; CP 202-04, 305. The trial court denied Levine's motion for an upset price, but ruled that Levine had received fair value. RP 41; CP 613-17.

Levine and her business partner, Rory Navis,² borrowed \$1.385 million from Timberland Bank to build a nine-unit condominium complex in Ocean Shores, Grays Harbor County. CP 23, 29-30. The loan was secured by a promissory note, executed on April 21, 2006. CP 29. As security for the note, Levine signed a construction deed of trust, granting Timberland a security interest in the Property. CP 30.

Levine failed to pay the loan according to its terms, and after several extensions the full sum was due on July 1, 2008. *Id.*

² Since Navis is not a party to the appeal, this brief refers only to Levine.

Timberland sent Levine a default notice in October 2008. *Id.* When Levine still did not make any payment or offer any defense, Timberland initiated judicial foreclosure proceedings in December 2008. CP 1-16, 30.

Timberland moved for summary judgment on February 9, 2009, arguing that it was entitled to a foreclosure decree as a matter of law. CP 33-35. Over one month later, Levine responded to Timberland's summary judgment motion, but did not ask the court to set an upset price. CP 44-50. The court granted Timberland's motion on April 13, but postponed entering an order until April 20. CP 108.

On April 20, Levine filed her first "motion for a hearing to establish an upset price." CP 115 (title case omitted).³ Despite her motion's title, the content is a single sentence asking the court to conduct a hearing to determine "fair value":

Levine . . . moves this honorable court to enter an order [to] *conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment.*

³ Levine filed a memorandum supporting her motion, also referring both to fair value and to upset price, but never distinguishing between the two. CP 110-14.

Id. (italics added). Levine's motion repeats verbatim RCW 61.12.060's provision allowing the court to establish fair value during the confirmation-of-sale process "if it has not theretofore fixed an upset price":

The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, *establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment.*

RCW 61.12.060 (italics added). The summary judgment order includes a handwritten notation that the court would determine Levine's motion and her counterclaims at trial. CP 134.

The trial court entered a foreclosure decree the same day, foreclosing Timberland's lien, ordering the Property sold at a Sheriff's sale, and ordering that the proceeds be applied toward the judgment, interest, attorney fees, costs, increased costs, and interest. CP 135-38. The court also awarded Timberland a deficiency judgment to the extent that the proceeds did not satisfy the judgment. *Id.*

Timberland's appraiser, David Pollock, completed his first appraisal for the Property on April 21, and completed an updated

appraisal on June 4. CP 436.⁴ The court appointed a receiver on July 13, and on July 17, Timberland purchased the Property at a Sheriff's sale. CP 173-74. Although three months had passed since the court reserved ruling on Levine's motion, she did not re-raise the issue before the foreclosure sale.

Levine's appraiser, Paul Bowen, completed his appraisal on August 7, 2009, three weeks after the foreclosure sale. CP 174, 213. On August 24, 2009, the trial court entered an order confirming the sale. CP 173-74. Although Bowen's appraisal was complete, Levine still was not ready to prove an "upset price," so she asked to include language in the order confirming sale providing that she could still raise upset price before the redemption

⁴ There are four appraisals: Fred Strickland, March 9, 2006, \$1,985,000: this figure is based on the 2006 boom economy and assumes that the Property would be marketable as a nine-unit condominium complex. CP 327-30, 341-48. David Pollock, April 21, 2009, \$1,060,000: this figure assumes, among other things, that the parking deficiency is cured, and estimates a \$720,000 "as is" value in the event that the parking deficiency was not cured. CP 440, 492, 528. Pollock Update, June 4, 2009, \$645,000: this figure values the Property "as is" – as an apartment complex – where only 5 of the 9 units can be sold given the parking deficiency. CP 575-78. Paul Bowen, August 7, 2009, \$1,350,000: this figure assumes that the parking deficiency is cured and that the Property is marketable as a nine-unit condominium complex. CP 217, 221, 584.

period expired. RP 21-22. The order does so, instructing Levine to schedule the hearing. CP 203-04.⁵

Although Levine states that Timberland “orchestrated” the foreclosure sale, Levine had proper notice and did not object to the Sheriff’s return. *Compare* BA 6; *with* CP 202-03. Timberland purchased the Property for \$720,000, leaving a \$1,001,644.49 deficiency. CP 203. The one-year redemption period commenced on July 17, 2009. CP 203; RCW 6.23.020(1)(b).⁶

There was no activity in the litigation for more than seven months. On April 2, 2010, the court set trial for September 28, 2010. CP 208. On May 20, 2010, Timberland provided Levine notice that the redemption period was about to expire. CP 209-12.

Finally on July 6, 2010, more than 10 months after the trial court confirmed the sale, Levine filed a motion for an order setting an upset price. CP 305. Levine noted her motion for July 12, 2011, just five days before the redemption period expired. CP 320.

Under RCW 61.12.060, the court “may in its discretion” set a minimum bid, or “upset price,” when ordering a foreclosure sale. If

⁵ Levine argues that the trial court “created ambiguity” by including this language in the order confirming sale. BA 7. Levine asked the court to do so. RP 21-22.

⁶ The redemption period commences on the sale date. RCW 6.23.020(1).

the court does so, then it will confirm the sale only if a bidder hits the minimum price:

The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.

If the court does not set an upset price, then after the foreclosure sale it “may” establish the property’s fair value and require that the fair value be credited upon the foreclosure judgment as a condition to confirmation:

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

RCW 61.12.060. As further discussed below, this unambiguous language plainly anticipates that an upset price, if any, is set only before the foreclosure sale. See *Infra*, Argument § A.

At the hearing, Levine took the position that she was indeed asking the court to set an upset price – 10 months after the property had sold. RP 4-5. She also stated, however, that there was no real “distinction between upset price and fair value.” *Id.*

"[U]pset price is fair value," she said, "they're very similar numbers."

RP 5.

The trial court denied Levine's motion to enter an upset price, but ruled that she received fair value at the foreclosure sale. RP 41; CP 613-17. The court subsequently granted summary judgment, dismissing Levine's counterclaims. CP 660-64.

RESTATEMENT OF THE CASE

Levine's statement of the case is extremely argumentative and often fails to cite the record. *Contra* RAP 10.3(a)(5). For example, she accuses Timberland of "paper[ing] its file [to] justify the rock-bottom price it planned to bid at the sheriff's sale." BA 12. She argues that the court was "intent on following its own personal views of foreclosure sales instead of the law," and "did little to hide her disdain for Levine and her position." BA 12, 16. This plainly is not a "fair statement of the facts . . . without argument." RAP 10.3(a)(5). Timberland provides the following background relevant to the trial court's correct decision that Timberland paid fair value for the Property.

A. Levine intended to build a nine-unit condominium complex, but neglected to provide adequate parking, among other shortcomings.

Levine bought the Property, Lot 106, as an undeveloped parcel, planning to build a nine-unit condominium complex. CP 10, 45, 322.⁷ Levine subsequently purchased the adjacent parcel, Lot 105, intending to build an additional six units and additional parking for the Property. CP 627; BA 5. Without Lot 105, the Property would not have enough parking. CP 627-28.

The City approved Levine's project as a nine-unit condominium complex on the Property and a six-unit complex with the required additional parking on Lot 105. CP 445. Levine ended up having room for only eight parking spaces on the Property, although City Municipal Code requires 15. *Id.* The City issued an occupancy permit with the stipulation that Levine would build the remaining parking spaces on Lot 105. *Id.* The City subsequently concluded that a boundary-line adjustment would also be required. *Id.*

Levine never improved Lot 105. *Id.* When she defaulted, the Property had parking for only five units. *Id.*

⁷ A map is attached as Appendix B. CP 475.

B. Timberland purchased the property for \$720,000, the highest-appraised value taking into account that only five of the nine units could be sold.

Timberland's appraiser, David Pollock, originally appraised the Property based on three "extraordinary assumptions," a presumption which assumes uncertain information, which, "if found to be false, could alter the appraiser's opinions or conclusions":

- ◆ "Lot 104 is purchased with the intent to use [it] as parking for the [Property]";
- ◆ "The City of Ocean Shores allows the conditional use of Lot 104 for parking for the [Property]; and"
- ◆ "All surveys and permits required to convert the [Property] to condominium use are initiated and approved in a timely manner."

CP 458-59. Pollock used Lot 104, one lot removed from the Property, concluding that Levine's Lot 105 was "not reasonably available." CP 494. Pollock concluded that with adequate parking, the Property would be worth \$1,060,000. CP 492, 528. But if the conditions were not satisfied and only five units could be sold, then the Property was worth \$720,000 "as is." CP 492.⁸

Leading up to the foreclosure sale, Pollock's extraordinary assumptions had not been satisfied:

⁸ "As is" market value is defined as the estimate of the market value of real property in its current physical condition, use, and zoning as of the appraisal date.

As valued, the subject available on-site parking did not meet the City of Ocean Shores Ordinance pertaining to the number of parking space[s] for a nine unit structure. As valued, off street parking on Point Brown Boulevard SE was not permitted. Information provided by the City of Ocean Shores indicated that the parking requirement would permit occupying five of the nine units. Should more than five units become occupied, the city would “red tag” the property meaning the other four units could not be occupied.

CP 582. Accordingly, Pollock issued an updated appraisal, valuing the Property – if used as a nine-unit apartment complex – at \$645,000. CP 436, 578.

Levine argues (in her facts) that appraising the Property as an apartment complex is “arbitrary and utterly unexplained and unsubstantiated.” BA 11. It is not arbitrary to appraise the building as an apartment complex when it cannot be used – in full – as a condominium complex. CP 575. It is irrelevant in any event – Timberland bid \$720,000 at the foreclosure sale – Pollock’s estimate (from his first appraisal) of the Property’s value if used as a five-unit condominium complex. CP 492, 594-95.

Timberland faced “[s]ignificant uncertainty” as to whether it could acquire a suitable lot to provide additional parking and as to whether the City would allow a non-adjacent lot to fulfill the parking requirement. CP 595. Even if a lot were available, no other condominium projects in the area have “parking at a distance.” *Id.*

Timberland would have to heavily discount the condominiums to entice prospective buyers to park at a distance and get an “umbrella.” *Id.*; RP 28.

Levine takes issue with Pollock’s appraisal, noting that he did not question the quality of the condominiums. BA 9. Pollock’s reduced figure is based on the undisputed fact that only five of the nine condos could be occupied because there was not sufficient parking. CP 594-95. It does not matter how nice the condos are if no one can live in them.

While Levine acknowledges that she did not build sufficient parking, she claims that she “addressed” the parking issue by acquiring the adjacent Lot 105. BA 9. There is no reason to think that the Levine would sell the lot to Timberland for a fair price – and every reason to think that she would not. RP 18. And while Levine argues that Timberland should have had only “slight concern” about securing parking given its judgment lien, there are always many uncertainties surrounding enforcing a judgment lien. BA 9-10, 11.

C. Levine’s appraisals were outdated and based on an inaccurate “hypothetical” that never happened.

Fred Strickland completed his appraisal in March 2006, just before Levine purchased the Property. CP 327-28; BA 8.

Strickland estimated the value of the completed project. *Id.* Much has changed since then – the economy crashed and the Project is not complete. Even Levine spends little time arguing that Strickland’s appraisal sheds any light on the Property’s current value. BA 8.

Levine ordered an appraisal, from Paul Bowen, three weeks after the Sheriff’s sale. CP 213-71. But like Pollock’s first appraisal, Bowen also assumed that parking would be remedied, so he valued the Property as a nine-unit condominium complex. CP 221, 224, 225, 249-50, 584. This is a “Hypothetical Value” based on the “Hypothetical Condition that the property was a legal condominium development.” CP 584.

Aside from the obvious parking deficiency, Pollock found many additional problems with Bowen’s appraisal:

- ◆ There was no recorded Declaration of Condominium or survey identifying the airspace for each unit;
- ◆ Bowen’s estimated construction costs are too high;
- ◆ Typical market convention is to compare price per unit, not per square foot. Bowen relied on sales of properties that are smaller than the Property, increasing the cost per unit;
- ◆ Bowen appraised the units at an average of \$166,666 each, almost double comparable sales. None of the sales comparables are similar to the subject property;
- ◆ Bowen estimated potential monthly rental income at \$700 to \$900 per unit, but did not include any specific comparables.

Bowen adjusted the rental rate up to \$1,275 per month for the units with canal frontage. The Ocean Shores economy does not support that monthly living cost for rental housing; and

- ◆ Bowen used and unacceptably low discount rate, given the market's uncertainty.⁹

CP 581, 583-86. For these reasons, Pollock opined that Bowen did “not provide an accurate estimate of value.” CP 587.

Levine takes issue with Pollock's “criticisms of Bowen,” arguing that Pollock's original appraisal also assumed that the parking deficiency would be remedied. BA 12. But Pollock's original appraisal also estimated the Property's value if the parking deficiency was not remedied. CP 492. And Pollock's Update removed the extraordinary assumptions about parking – and other things – that had not been cured. CP 575-78.

D. The trial court denied Levine's motion for an “upset price,” but nonetheless ruled that Timberland paid fair value for the Property.

The court concluded that Bowen's appraisal and Pollock's two appraisals were “[t]he most reliable appraisal reports on the property,” with a range from \$645,000 to \$1,350,000. CP 616. But

⁹ The discount rate accounts for the risk associated with the Property and the perceived return a potential investor must realize to entice him to purchase the property. CP 585. Using a low discount rate drives up the estimated value. *Id.*

the court rejected the higher appraisals, where they valued the Property as it was supposed to be, not as it was:

[T]he higher appraisals assume that the conditions necessary to marketing the building and to comply with applicable codes and zoning (including acquisition of additional real property for parking) have been satisfied which is not the case.

CP 616. The court concluded that nothing in the record indicated that Timberland's \$720,000 bid was unfair. *Id.*

Levine complains at length about the trial court's oral ruling, charging that the court "ignored the appraisal evidence as to fair value . . . and instead drew from its own personal experience as to what constituted a fair sheriff's sale." BA 17. The court relied on her experience witnessing many foreclosure sales, which occur on the courthouse steps. RP 38. The court questioned Levine's argument that Timberland's bid could not have been fair because it was the only bidder. *Id.*

The court also discussed the market in Grays Harbor, noting that it has been speculative since the 1960s. RP 41. They have foreclosures every day, and it is extremely uncommon to see multiple bidders at a sale. RP 38, 41. The "normal" economy in Grays Harbor is "Scary." RP 41. The court did not see a way to predict the economic future for the area, and nothing indicated that

the economy would return to what it was in 2006. *Id.* The court concluded that the current economy is “the norm right now.” *Id.*

ARGUMENT

A. Levine got exactly what she asked for – “a hearing [to] establish the value of the property.”¹⁰

RCW 61.12.060 permits a trial court – in its discretion – to set an upset price before a foreclosure sale, or to establish fair value after a foreclosure sale. Levine moved the court to establish fair value, and the court did so when Levine finally noted her motion just five days before the redemption period expired. Levine was not entitled to an upset price 10 months after the foreclosure sale. This Court should affirm.

When a court orders a foreclosure sale, it has discretion to set an “upset price”: the minimum bid at the sale before the court will confirm the sale:

The court, in ordering the sale, may in its discretion, . . . fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.

RCW 61.12.060. If the court does not set an upset price before the foreclosure sale, then it may, “upon application for the confirmation

¹⁰ CP 115; RCW 61.12.060.

of a sale,” establish the property’s “fair value” and require that it be credited upon the foreclosure judgment. RCW 61.12.060.

Consistent with the statute’s plain language, this Court held that a trial court may set an upset price, if at all, before the sale, and that a trial court may establish fair value, if at all, after the sale:

This statute gives the court discretion to make one of two alternative decisions: first, *before* sale, whether to set a minimum bid, or upset price; second, *after* sale, whether to set a fair market value.

McClure v. Delguzzi, 53 Wn. App. 404, 406-07, 767 P.2d 146 (1989) (emphasis in original). There, appellant Delguzzi twice moved the trial court to set an “upset price,” once before the foreclosure sale, and a second time upon McClure’s motion to confirm the sale. 53 Wn. App. at 405. Although Delguzzi sought an upset price, and although the trial court refused to set an upset price (confirming the sale), this Court ruled that fair value was the only issue properly before the trial court after the foreclosure sale:

Notwithstanding the form of Delguzzi’s second motion, the only issue properly before the court was not whether an upset price should be set, but whether a fair market value should be placed on the property.

53 Wn. App. at 407. This Court reversed, holding that the trial court had improperly relied exclusively on the property’s assessed value

in establishing fair value, remanding for the trial court to determine “whether a fair market value should be set.” *Id.* at 408.

Levine originally asked the trial court to establish fair value. CP 115. Although Levine titled her motion “motion for hearing to establish an upset price” (CP 115, title case omitted), the body of the motion is a single sentence repeating verbatim the statutory language authorizing the court to establish fair value after the foreclosure sale:

Levine . . . moves this honorable court to enter an order [to] *conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment.*

Compare CP 115 (italics added) *with* RCW 61.12.060 (same).

Notwithstanding the title of her motion referring to an “upset price,” Levine moved the court to establish “fair value” the same day that the court entered the foreclosure decree, but never even noted the motion. CP 115, 135-37.

Three months passed before the foreclosure sale, but Levine did not note her motion. Once the Property sold, the statute permitted the trial court to establish fair value, but not to set an upset price. RCW 61.12.060. Again, Levine asked the court to establish fair value. CP 115.

Yet when Levine finally noted her motion 10 months after the Property sold, and 8 months after the trial court confirmed the sale, she insisted that the court set an upset price. RP 4-5. Levine acknowledged that an upset price would “usually” be set before the foreclosure sale, but her new attorney could not explain why Levine had failed to timely deal with the issue. RP 13-15, 32. Her only excuse was that the orders reserving ruling referred to “upset price,” not fair value. RP 4-5.

It is unclear why the court’s orders use the term “upset price,” as opposed to “fair value.” It is entirely likely the court followed the title of Levine’s motion, even though the content of her motion plainly asked the court to establish fair value.

It also appears that “upset price” and “fair value” often are used interchangeably, although the statute plainly refers to two “alternative decisions,” as this Court recognized. *McClure*, 53 Wn. App. at 406-07. In *Nat’l Bank of Wash. v. Equity Investors*, for example, the trial court fixed an “upset price” at the hearing on the motion to confirm the foreclosure sale, refusing to confirm the sale. 81 Wn.2d 886, 888, 924, 506 P.2d 20 (1973). Although *National Bank* noted that the trial court could establish fair value at the

confirmation hearing if it had not already set an upset price, the decision elides any distinction between upset price and fair value:

We think that the statute means that the upset price should reflect “the fair value of the property,” for the term “fair value” appears twice and the term “value” once in the statute. The court thus, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, may conduct a hearing, establish the value of the property, and, as a condition to the confirmation, require that the fair value of the property be credited upon the foreclosure judgment.

81 Wn.2d at 926. But “the only issue properly before the court” after a foreclosure sale is fair value. **McClure**, 53 Wn. App. at 407.

As discussed below, the trial court correctly ruled that Timberland paid fair value. See *Infra*, Argument § B. This is the only remedy available under RCW 61.12.060. Loose language in the trial court’s orders cannot give rise to a remedy the statute does not allow.

To the extent that Levine argues that she was entitled to a true upset price – as opposed to fair value – she is waging an impermissible collateral attack on the foreclosure. **Valentine v. Portland Timber & Land Holding Co.**, 15 Wn. App. 124, 132, 547 P.2d 912 (1976). Levine did not object to the foreclosure decree, and has not appealed from the decree or challenged any aspect of the foreclosure sale. CP 665. Setting an upset price would be

pointless unless the court also vacated the foreclosure decree and either altered the deficiency judgment or started the foreclosure process all over again. But Levine did not appeal from the foreclosure decree and did not preserve a challenge to the decree in any event. She cannot challenge the decree now.

In sum, RCW 61.12.060 does not permit a trial court to set an upset price after a foreclosure sale. The appropriate post-sale remedy is establishing fair value, which the trial court did. As discussed below, the court was well within its broad discretion.

B. Levine received fair value for the Property.

The trial court ruled that Timberland's \$720,000 bid was fair value, based on Pollock's opinion that the most the Property is worth – as is, without sufficient parking – is \$720,000. This is the only evidence of the Property's value as the Property is – not as it could be if all deficiencies were cured. This Court should affirm.

This Court will not reverse a trial court's decision establishing fair value absent an abuse of discretion. *McClure*, 53 Wn. App. at 407. "Discretion is abused only if no reasonable judge could have made the decision." 53 Wn. App. at 407.

The trial court ruled that Timberland's \$720,000 bid was fair, based on Pollock's estimate that the Property's highest value "as is"

was \$720,000. CP 616. Pollock's figure accounted for the fact that only five of nine units could be sold, where Levine failed to build sufficient parking. CP 492. This was the only evidence of the property's "as is" value, and was sufficient to support the trial court's decision.

Although the trial court found that Pollock's higher appraisal and Bowen's appraisal were also "reliable," the court rejected the higher appraisals because they incorrectly assumed that the parking and other deficiencies were remedied:

The most reliable appraisal reports on the property place its fair value in a range from \$645,000 to \$1,350,000 however it appears that the higher appraisals assume that the conditions necessary to marketing the building and to comply with applicable codes and zoning (including acquisition of additional real property for parking) have been satisfied which is not the case[.]

CP 616. These figures were a "hypothetical value," estimating the Property's value if all nine units could be sold as individual condominiums. CP 492, 582. The trial court plainly has discretion to reject a hypothetical value, based not on what the Property is, but on what it might be someday.

Levine is critical of Pollock's Update, arguing that Pollock "inexplicably" used a 20% discount rate and "arbitrar[ily]" appraised the Property as apartments, not condominiums. BA 10-12, 14, 29.

But the Update values the Property at \$645,000, which is not what Timberland bid, nor what the court ruled was fair. The \$720,000 value is from Pollock's first appraisal, in which he used a 15% discount rate. CP 492, 527.¹¹ Timberland paid nearly 15% more than Pollock's Update.

And Pollock did not select a 15% discount rate "out of thin air." BA 14. Pollock used a 15% discount rate to account for "extremely high" market uncertainty. CP 585-86. He opined that Bowen's discount rate was below the acceptable standard and that the rate he used was "much more representative" of the industry standard. CP 585-86. Neither Bowen, nor any other appraiser questioned Pollock's discount rate or any other aspect of Pollock's original appraisal or Update. CP 213-14.

Levine argues that the trial court erroneously rejected Bowen's appraisal, even arguing that it is too low, where it is based on a "depressed econom[y]." BA 30. She asserts that the trial court should have set a \$1.7 million upset price – halfway between Bowen's appraisal and Strickland's 2006 appraisal. *Id.*

¹¹ Pollock used a 15% discount rate plus a 5% "line item expense for profit." CP 586. His figure was "much more representative of the market" than the rate Bowen used. *Id.* 20% is "standard" in the appraisal business. *Id.*

Levine's argument that Bowen's appraisal is too low is rank speculation about the future real-estate market. BA 30. Levine did not present evidence of the "normal" Grays Harbor economy, instead inviting the court to take "judicial notice of economic conditions." RCW 61.12.060; RP 12. The trial court noticed that the "normal" economy in Grays Harbor is "Scary." RP 41. It has long been a "speculative market," and lags behind other areas. *Id.* In other words, the record indicates that the "depressed" economy Bowen considered is the "norm," at least for the foreseeable future. *Compare* BA 30 *with* RP 41.

Levine virtually ignores that Bowen's appraisal is based on the fiction that parking and other deficiencies were cured. BA 7-8, 30. Levine blithely dismisses the parking deficiency, arguing that it could be resolved inexpensively. BA 10. But Levine owns the adjacent lot and there is every reason to think that she would not sell it to Timberland for a fair price. Timberland faces the very real possibility of trying to sell condominiums with parking 3-to-4 blocks away, decreasing the condos' value and making them harder to sell. CP 595; RP 28.

Bowen did not provide an "as is" value – he predicted what the Property could be worth at some unforeseeable time in the

future. *Compare* BA 7-8 *with* CP 603-06. The trial court does not have to value the Property at what it hypothetically could be worth if and when all problems are resolved in the future. The court certainly has the discretion to value the Property as it existed when purchased.

Strickland's appraisal is based on the 2006 real-estate boom, which does not remotely resemble "normal economic conditions." *Compare* BA 27 *with* RP 41. Levine did not present any evidence that the real-estate market will return to its 2006-level. RP 41. There is simply no basis for valuing the Property based on the 2006 "balloon" that has long since "burst." *Id.*

Finally, the court's order contradicts Levine's argument that the court focused exclusively on procedural fairness, rather than "fair value." BA 20, 21, 29. The court's written ruling states that the court considered, among other things, general and local economic conditions when the case originated and at the Sheriff's sale; Levine's investment in the Property; the Property's usefulness and potential future value; and the need to invest money to bring the Property into compliance with existing codes and zoning regulations, and to make it marketable. CP 615. The court plainly considered the appraisals, making specific findings about why it

adopted Pollock's \$720,000 figure and rejected higher numbers. CP 616. The court's oral ruling also does not address "whether the sheriff's sale was 'fair' from a procedural standpoint." BA 20. The Court should ignore this meritless argument.

In short, Pollock provided the only evidence of the Property's value as is – not as it could be. This is sufficient evidence to support the trial court's decision that Timberland paid fair value.

C. The trial court correctly denied Levine's motion to set an upset price 10 months after the Property sold.

The trial court correctly refused to set an upset price for at least three reasons: (1) Levine received fair value at the foreclosure sale; (2) Levine noted her motion just five days before the redemption period expired; and (3) it would be extremely uncommon to have multiple bidders in Grays Harbor, so it makes no sense to set an upset price whose underlying premise is that multiple bidders are the norm. Levine essentially argues that the trial court should have ignored that only five of the nine condominiums could be sold, that she was effectively challenging the entire foreclosure process just five days before it was over, and that the normal real-estate market in Grays Harbor is not strong. The court correctly refused to ignore reality.

As discussed above, the trial court correctly found that Timberland paid fair value. *Supra*, Argument § B. Before the trial court, Levine argued that upset price and fair value are no different, stating that “upset price is fair value. It seems that they are two very similar numbers.” RP 4-5.¹² Accepting her position for the sake of argument, the trial court effectively set an upset price in establishing fair value, albeit after the foreclosure sale. To the extent that Levine now asserts that she is entitled to something other than “fair value,” she impermissibly raises that argument for the first time on appeal. RAP 2.5. To the extent that she claims the trial court could not use “fair value” interchangeably with “upset price,” she invited that “error” below and cannot raise it here. See, e.g., *In re Estate of Stalkup*, 145 Wn. App. 572, 584, 187 P.3d 291 (2008); *Cotton v. City of Elma*, 100 Wn. App. 685, 691, 998 P.2d 339 (2000).

As discussed above, since the foreclosure sale had long since come and gone, “the only issue properly before the court was not whether an upset price should be set, but whether a fair market

¹² Although this Court stated in *McClure* that upset price and fair value are alternative determinations, it did not explain other than noting the different timing – an upset price is set (if at all) before a foreclosure sale and fair value is established (if at all) at the confirmation of sale. *McClure*, 53 Wn. App. at 407-08.

value should be placed on the property.” **McClure**, 53 Wn. App. at 407. But even assuming *arguendo* that the court could have set an upset price so late in the foreclosure process, it certainly did not have to. Levine was not prepared to timely argue this issue. RP 21-22. She has never explained why she waited until five days before the redemption period expired, then rushing around and suggesting she should have even more time. RP 15, 39-40; BA 25 n.12.

Levine claims that the court thought her motion was untimely, which allegedly “infected” the court’s opinion. BA 16. The court was well aware that Levine’s motion was timely according to the court’s order (although not under RCW 61.12.060). RP 14, 39-40. The court simply questioned why Levine failed to address the issue until a few days before it was too late. *Id.* Levine cannot complain that the court refused to start the foreclosure process all over again, just days away from wrapping it up.

Levine suggests that the trial court decided to set an upset price when she originally filed – but did not note – her motion, and reserved only as to what the amount would be. BA 19. She does not explain or support this meritless assertion. *Id.* There is no

indication that the court even considered Levine's motion other than to afford her the opportunity to make her arguments later.

Finally, the normal Grays Harbor real-estate market does not support setting an upset price. The trial court took exception to Levine's argument that a one-bidder foreclosure sale is evidence that the sale price is not fair. RP 38. If that were the case, then almost no foreclosure sale in Grays Harbor would be fair, as "it is a very rare day, probably equivalent to a 115-degree summer in Grays Harbor County, that you have multiple bidders." *Id.*

Levine repeatedly criticizes the court for relying on her experience (BA 12, 28, 29), but our judicial system requires our judges to rely on their experience:

Our constitutional democracy is dependent upon an independent and informed judiciary. Our judiciary benefits from and relies upon judges who have studied and become learned in the law and whose personal experiences have taught them a practical understanding of the world we live in and how people live, work, and interact with the world around them.

We do not believe the legislature intended that judges leave their knowledge and understanding of the world behind and enter the courtroom with blank minds. Judges are not expected to leave their common sense behind. Nor do we believe the legislature expected judges to hold hearings on whether fire is hot or water is wet. We prize judges for their knowledge, most of which is obtained outside of the courtroom.

State v. Grayson, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005). In particular, “[i]t is well settled that the courts take judicial notice of generally known financial and business conditions at given times.” **Ferree v. Fleetham**, 7 Wn. App. 767, 771, 502 P.2d 490 (1972) (quoting 29 Am. Jur. 2d Evidence § 78 (1967)). Nothing in the record contradicts the court’s belief that multi-bidder sales are extremely unusual in Grays Harbor.

The court had good reason not to set an upset price – the rule assumes – incorrectly here – that there would normally be multiple bidders at a foreclosure sale. The rule’s basic premise is that in “normal times” competitive bidding produces fair value at a foreclosure sale:

. . . In normal times competitive bidding is the circumstance that furnishes reasonable protection to the mortgagor, and avoids the sacrifice of the property at a grossly inadequate sale price. In the present situation the device of a judicial sale largely fails of its intended purpose because of the lack of competitive bidding, . . .

Lee v. Barnes, 61 Wn.2d 581, 584-85, 379 P.2d 362 (1963) (quoting **Suring State Bank v. Giese**, 210 Wis. 489, 246 N. W. 556, 85 A.L.R. 1477 (1933) upon which RCW 61.12.060 is based); **Ferree**, 7 Wn. App. at 772 (the “‘ordinary and usual manner’ in which a sale at fair market value is assured is by exposing the

property to knowledgeable competitive bidders at public sale.” (quoting **Suring State Bank**, 219 Wis. at 493)).

Premised on the assumption that it is “normal” to have multiple bidders, the “purpose of fixing an upset price is to assure the mortgagor of a *fair price*, as would be attained were there willing and competitive bidders available at the time of sale.” **Nat’l Bank**, 81 Wn.2d at 924-95 (quoting **Lee**, 61 Wn.2d at 586) (emphasis in **Nat’l Bank**). The rule creates fictitious “normal times,” asking the court to assume the role of a competitive bidder. **Lee**, 61 Wn. 2d at 586.

Assuming a multiple-bidder situation in Grays Harbor would not mimic the normal real-estate market, but would imagine a better-than-normal market. Grays Harbor is (at best) a single-bidder county in good markets and bad. This is not an unusual condition – it is the norm for the area Levine chose to build in. As such, the court was well within its broad discretion in refusing to set an upset price based on an incorrect assumption that there would normally be “willing and competitive bidders available at the time of sale.” BA 21.

Levine argues that the court should have set an upset price precisely because single-bidder sales are normal in Grays Harbor.

BA 22. She offers no support for her notion that she is entitled to a fictitious better-than-normal real-estate market.

In sum, the court was well within its broad discretion in denying Levine's motion to set an upset price, particularly where the court established that Timberland paid fair value.

D. This Court should deny Levine's fee request and award Timberland appellate fees.

This Court will award fees under RAP 18.1 where the contract at issue provides for a fee award. *Renfro v. Kaur*, 156 Wn. App. 655, 667, 235 P.3d 800, *rev. denied*, 170 Wn.2d 1006 (2010). The parties' loan agreement includes an attorney-fee provision. CP 4. The trial court awarded Timberland fees. CP 135-39. This Court should affirm, deny Levine's fee request, and award Timberland appellate fees. RAP 18.1.

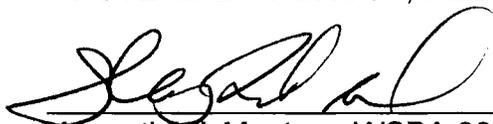
CONCLUSION

The trial court correctly ruled that Timberland paid fair value for the Property, based on the only evidence of the Property's as-is value. The court was well within its discretion in denying Levine's upset-price motion – she received fair value, she waited way too long to address the issue, and the normal Grays Harbor real-estate

market is at odds with the upset-price rule. This Court should affirm
and award Timberland fees.

RESPECTFULLY SUBMITTED this 8th day of June,
2011.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 8th day of June 2011, to the following counsel of record at the following addresses:

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RCW 6.23.020

Time for redemption from purchaser — Amount to be paid.

(1) Unless redemption rights have been precluded pursuant to RCW 61.12.093 et seq., the judgment debtor or any redemptioner may redeem the property from the purchaser at any time (a) within eight months after the date of the sale if the sale is pursuant to judgment and decree of foreclosure of any mortgage executed after June 30, 1961, which mortgage declares in its terms that the mortgaged property is not used principally for agricultural or farming purposes, and in which complaint the judgment creditor has expressly waived any right to a deficiency judgment, or (b) otherwise within one year after the date of the sale.

(2) The person who redeems from the purchaser must pay: (a) The amount of the bid, with interest thereon at the rate provided in the judgment to the time of redemption, together with (b) the amount of any assessment or taxes which the purchaser has paid thereon after purchase, and like interest on such amount from time of payment to time of redemption, together with (c) any sum paid by the purchaser on a prior lien or obligation secured by an interest in the property to the extent the payment was necessary for the protection of the interest of the judgment debtor or a redemptioner, and like interest upon every payment made from the date of payment to the time of redemption, and (d) if the redemption is by a redemptioner and if the purchaser is also a creditor having a lien, by judgment, decree, deed of trust, or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the redemptioner shall also pay the amount of such lien with like interest: PROVIDED, HOWEVER, That a purchaser who makes any payment as mentioned in (c) of this subsection shall submit to the sheriff the affidavit required by RCW 6.23.080, and any purchaser who pays any taxes or assessments or has or acquires any such lien as mentioned in (d) of this subsection must file the statement required in RCW 6.23.050 and provide evidence of the lien as required by RCW 6.23.080.

[1987 c 442 § 702; 1984 c 276 § 4; 1965 c 80 § 4; 1961 c 196 § 1; 1899 c 53 § 8; RRS § 595. Formerly RCW 6.24.140.]

RCW 61.12.060

**Judgment — Order of sale — Satisfaction —
Upset price.**

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

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

[1935 c 125 § 1; Code 1881 § 611; 1877 p 127 § 616; 1869 p 146 § 565; 1854 p 207 § 410; RRS § 1118.
FORMER PART OF SECTION: 1935 c 125 § 1 1/2 now codified as RCW 61.12.061.]

SUBJECT PROPERTY

