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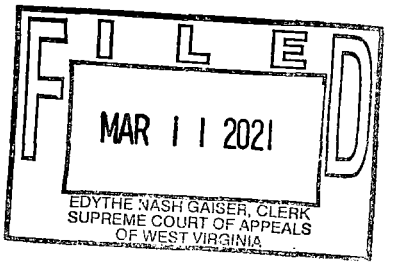

IN THE
SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA

LAURA GODDARD,

PLAINTIFF-PETITIONER,

v.

TYLER HOCKMAN and
EMILY A. HOCKMAN,

DEFENDANTS-RESPONDENTS,

Interlocutory Appeal from the Circuit Court of Jefferson County, West Virginia
The Honorable David M. Hammer (Civil Action No.: CC-19-2018-C-14)

SUMMARY RESPONSE OF RESPONDENTS PURSUANT TO RULE 10(e) OF THE WEST VIRGINIA RULES OF APPELLATE PROCEDURE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

RESTATEMENT OF THE CASE

The facts of the instant case are central to the application by the circuit court of *Carden v. Bush,* 109 W.Va. 655, 155 S.E. 914 (1930) and *Walker v. Summers,* 9 W.Va. 533 (1876). These facts are also integral to the decision of the Circuit Court to depart from a strict application of *Hite v. Donnally,* 85 W.Va. 640, 102 S.E. 478 (1920). The relevant facts as found by the Circuit Court are as follows: Wolverine Investments, LLC ("Wolverine") purchased a parcel of real estate in Jefferson County for $1,037,500.00 pursuant to a deed dated February 3, 2005 which described the real estate by a metes and bounds description (the "Wolverine Deed"). App. 30-32. Jefferson Security Bank ("JSB") financed this purchase, and obviously the subsequent development of the parcel, and secured its loans to Wolverine totaling $1,387,500.00 (App. 35) by a Deed of Trust pursuant to which Wolverine conveyed the real estate to the Trustee therein named for the benefit of JSB which recorded the deed of trust in the land records. App. 34-43. Wolverine thereafter developed the property into the Falcon Ridge Farms subdivision pursuant to various filings with Jefferson County Planning, Zoning and Engineering ("County"), including the filing of a Community Impact Statement (the "CIS") on or about August 1, 2005. App. 112-135. The CIS, as required by the County's subdivision ordinance, described the intended improvements to the subdivision as follows:

> The internal roadway network to be constructed by the developer shall serve all of the lots. The proposed Falcon Ridge Drive is a typ. 50' right-of-way that spans 3,141 feet....There will also be a 21.78 acre commons *(sic)* area that will be used by everyone in the subdivision. It will contain of *(sic)* grassland and used *(sic)* for horse grazing and horseback riding...

App. 117-118. The CIS also provided in paragraph 20 thereof that "[t]he proposed 21.70 acre commons area will be used for horse grazing and horse-back riding. This will complement the parent tract which is *(sic)* originally a horse farm." App. 128. The CIS further provided in its

description of the proposed covenants and restrictions that "in no event shall the Common Area be used by or in connection with any permitted no-impact home-based business." App. 118-119. The Final Plat of Falcon Ridge Farms was recorded in the Jefferson County land records on March 16, 2007 in Plat Book 24, at page 1 (the "Final Plat"). App. 136-138. The Final Plat clearly delineates the 21.52082 acre parcel as "COMMON AREA" and Notes 10, 11, and 13 on the Final Plat read as follows:

> 10. A HOMEOWNER'S ASSOCIATION MUST BE ESTABLISHED WITHOUT DELAY AS SOON AS 50% OF PROPERTIES ARE SOLD. MEMBERSHIP IN THE ASSOCIATION IS MANDATORY FOR ALL PROPERTY OWNERS WITHIN THE SUBDIVISION. ALL DEVELOPERS SHALL DEDICATE ALL COMMON LANDS (SWM BASIN, ROADS, RIGHTS-OF-WAY, ETC.) TO THE HOMEOWNER'S ASSOCIATION.
>
> 11. A COMMON INTEREST OWNERSHIP AGREEMENT MUST BE ESTABLISHED TO PROVIDE FOR THE MAINTENANCE OF COMMONLY-OWNED LAND, INCLUDING, BUT NOT LIMITED TO THE PRIVATE ACCESS ROADS WITHIN THE SUBDIVISION. THIS COMMON INTEREST OWNERSHIP AGREEMENT MUST BE DEVELOPED IN ACCORDANCE WITH THE UNIFORM COMMON INTEREST OWNERSHIP ACT OF WEST VIRGINIA.
>
> 13. EACH PARCEL SHOWN ON THIS PLAT SHALL BE RESTRICTED TO A SINGLE FAMILY RESIDENCE ONLY UNLESS OTHERWISE APPROVED BY THE PLANNING COMMISSION IN CONFORMANCE WITH THE PREVAILING COUNTY LAND DEVELOPMENT LAWS.

App. 136.

After creation of the subdivision, and prior to the foreclosure under JSB's Deed of Trust, Wolverine sold Lots 1, 4, 5, 6, and Lot 8 "Residue" (the "Outsale Lots") (App. 216-224; App. 302) as the same were described on the Final Plat with the outsale deeds each referencing the existence of the Final Plat, including the notes thereon. Thereafter an Amended and Restated Declaration of Covenants, Conditions and Restrictions for Falcon Ridge Subdivision ("Declaration") dated the 2nd day of January, 2009, was filed of record with the County. Prior to

the Foreclosure Sale, JSB recognized the subdivision of its collateral by releasing from the JSB Deed of Trust, *inter alia*, the Outsale Lots. App. 239-248. The Petitioner purchased the Lot 8 Residue containing 27.50303 acres for a purchase price of $357,900 by a Deed dated August 15, 2010. App. 250-253.

After Wolverine defaulted under the JSB Deed of Trust, the Substitute Trustee noticed a Trustee's Sale of Valuable Real Estate (the "Trustee's Notice") which described the property to be sold using the original metes and bounds description less and excepting the Outsale Lots. Specifically, the Trustee's Notice provided that "[a] the foreclosure sale, Lots 2, 3, 7 and any remaining acreage in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1 will be sold individually and then as a group." The Trustee's Notice further provided that "[t]he above-described property will be sold subject to any covenants, restrictions, easements, leases and conditions of record..." App. 142-159. At the December 27, 2012 foreclosure sale the Substitute Trustee sold Lots 2, 3, and 7 to JSB for $80,000 per lot and sold the "remaining acreage" consisting of the common area containing 21.52082 acres (App. 137) and Falcon Ridge Drive, to the Stephens, the high bidder for said property, for $1,000.00. App. 142-145. The Trustee's Deed into JSB described the property being conveyed only by reference to the Final Plat - "Lots 2, 3, and 7 in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1." App. 108-109. The Trustee's Deed to the Stephens described the property using the original metes and bounds description but clearly excepted therefrom "Lots 1, 2, 3, 4, 5, 6, 7, and 8, Falcon Ridge Farms, as shown on the plat recorded in Plat Book 24, at Page 1." App. 45-48.

Petitioner thereafter purchased "Lots 2 and Lot 3, in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1" from JSB by a Deed dated February 7, 2013. App.

255-256. Respondent, Tyler Hockman, purchased "Lot 7 in Falcon Ridge Farms as shown on the plat recorded in Plat Book 24, at Page 1" from JSB by a Deed dated June 27, 2013. Petitioner next purchased the common property from the Stephens by a deed dated the 8th day of February, 2017 (the "Goddard Deed") for $18,000.00. App. 26-28. The Goddard Deed, unlike the Stephens Deed, described the property conveyed thereby as "all that 'Common Area' containing 21.52082 acres, more or less, as the same is designated and described [on the Final Plat] TOGETHER WITH right to use Falcon Ridge Drive and subject to the rights of others to use Falcon Ridge Common Areas including Falcon Ridge Drive." App. 26. The Goddard Deed did not convey the fee simple title to Falcon Ridge Drive to Petitioner. Only after the filing of suit did Petitioner obtain a Deed of Correction dated July 24, 2017 from the Stephens which mirrored the Trustee's Deed into the Stephens without mention of the Common Area. App. 258-262.

Prior to instituting suit, Petitioner provided the Respondents with "A Letter about the Falcon Ridge Common Area Release" together with a proposed "Deed & Release". App. 160-163. In this letter, Petitioner acknowledges that she "purchased the Common Area on Falcon Ridge", claims that "the Falcon Ridge Lot Owners have no ownership of, or claim to, the Common Area" and sought to have the Respondents execute a deed which would release any of their rights in the Common Area. In exchange for giving up any rights to the Common Area, Petitioner wrote that she would grant to the owners of lots in the subdivision "the right to use the access easement known as Falcon Ridge Drive." App. 160-163. Petitioner claims that "[a]ll the lot owners who purchased lots within Falcon Ridge (Lots 1,4,5,6, and the Lot 8 Residue) prior to the aforesaid foreclosure had knowledge of the foreclosure sale" (Pet. Brief at 3), however, this fact was never established below. Petitioner claims all of the lot owners, except the Respondents,

have relinquished their rights in the Common Area pursuant to a Deed dated March 7, 2017. (App. 16-24). However, in addition to there having been no establishment of the fact of ownership of all of the remaining lots in the subdivision by the Circuit Court, the signatures of two of the lot owners, the Neils, were not acknowledged and the Deed is therefore not capable of being admitted to record in the land records pursuant to W.Va. Code § 39-1-2.

ARGUMENT IN RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

Petitioner's Assignment of Error No. 1:

"The trial court erred by applying *Carden v. Bush*, 109 W.Va. 655, 155 S.E. 914 (1930) and *Walker v. Summers*, 9 W.Va. 533 (1876) – cases with substantially dissimilar facts to the facts in the case at bar and disregarding the longstanding rule of law as outlined in *Hite v. Donnally*, 85 W.Va. 640, 102 S.E. 478 (1920) – a properly conducted foreclosure of a deed of trust extinguishes inferior encumbrances."

It is important to note at the outset that the instant case concerns a deed of trust used to secure a loan made by a bank to a developer for the obvious purpose of developing the property into a subdivision in order that the developer could sell lots in that subdivision and use those proceeds, *inter alia*, to repay the loan. It defies reality to even think, let alone argue, that the subdivision of the property pursuant to the Jefferson County subdivision regulations would not have been contemplated by JSB. As lots were sold in the subdivision, the bank released those lots from the effect of the deed of trust made for its benefit. When the borrower defaulted, the remaining property was sold as individual lots as created by the plat.

Petitioner looks to the holding in *Hite v. Donnally*, 85 W.Va. 640, 102 S.E. 478 (1920), that "a purchaser under the deed of trust would take the property entirely free of any subsequent encumbrance thereon" in a vacuum. *Id.*, 85 W.Va. at 643, 102 S.E. at 480. However, the actual implications of the development of subdivisions by a grantor under a deed of trust must be, and

clearly our law shows they have been, taken into consideration. Such development results in conferring a benefit upon the lender through the platting and sale of lots in the subdivision; a benefit of which the lender, such as here, may choose to, and did here, take advantage. In acquiescing to the platting and sale of lots by its borrower through the release of those lots from the effect of its deed of trust as lots are sold, and then by individually credit bidding the remaining subdivided lots at foreclosure, the lender is choosing to take advantage of a right acquired through the efforts of its borrower. As stated in *Industrial Bank v. Holland Furnace Co.*, 109 W.Va. 176, 153 S.E. 309 (1930), "[i]t is settled law that the purchaser at a trustee's sale of realty acquires all the title of the grantor at the time of making the trust deed together with any after-acquired right secured by him which has inured to the benefit of the secured creditor." *Id.*, 109 W.Va. at 179, 153 S.E. at 310, citing 3 *Jones on Mortgages* (8th Ed.) § 2122, pp. 623-625; 41 C.J. 996. Likewise, in *Burner v. Mutual Protective Ass'n*, 117 W.Va. 206, 185 S.E. 222 (1936), the Court held that "[i]t was settled law in the Virginias as early as 1819 ('not at this day to be questioned') that in consummating a sale under an ordinary deed of trust, the deed of the trustee conferred on his vendee indefeasibly the whole title of the trustor. *Id.*, 117 W.Va. at 207, 185 S.E. at 222-23.

With this backdrop, the Circuit Court correctly looked to *Carden* and *Walker*, both of which involved foreclosure sales of real property granted as collateral for the benefit of the lender prior to further development or encumbrance of that property by the grantor/borrower. In *Walker*, Summers sold and owner-financed a parcel of land to Walker who subdivided the same. This Court specifically noted that Summers had never recognized the platting of the lots from the land sold to Walker and which secured Summers' note. Summers never consented to Walker's

actions such as to "effect his rights under the said deed of trust". *Id.*, 9 W.Va. at 545. In fact, Summers had refused to release his lien on any part of the land. "Indeed it is clear from the whole case, that Summers was careful to avoid doing any act, which could, justly, be construed into evidence of proof, that he had, or intended, to relinquish, release, or in anywise change or modify, any of his rights under the deed of trust in any respect." *Id.* In the instant case, JSB actions clearly revealed its intent to modify its rights under its deed of trust by releasing subdivided lots as they were sold, in purchasing individual lots at the foreclosure sale, and in obviously failing to bid on the Common Area and Falcon Ridge Drive allowing the same to be sold for a mere $1,000.

The Circuit Court likewise looked to the factual differences between the case at hand and those in *Carden*. In that case, in 1924 the Lewises purchased a lot from the Burks and obtained secured purchase-money financing from the Burks. After the purchase, the Lewises entered into an agreement with the Cardens, owners of an adjoining lot, whereby the Lewises agreed that no structure over 14 feet in height would be erected on a certain portion of the Lewises' lot. This agreement was recorded in the land records. After conveyance of the lot by the Lewises and the assumption of the note by the purchaser, the purchaser failed to pay the note and the lot was sold at foreclosure sale. The foreclosure sale purchaser, Bush, began erection of a 3-story building on the lot. *Carden*, 109 W.Va. at 656, 155 S.E. at 915. This Court found that "Bush was an **innocent purchaser** for value at the trust sale, and took title of the trustee just as the trustee received it in 1924, and free in every way from the agreement of 1925." *Id.*, 109 W.Va. at 657, 155 S.E. at 915 (emphasis added). This holding, and the general rule as it pertains to bona fide purchasers without actual notice, is contained within Syl. Pt.1 of *Carden*:

> A bona fide purchaser at a trustee's sale (regularly conducted) under a recorded deed of trust, takes the property sold free from a recorded contract relating thereto, made by the grantor of the trust deed, subsequent to the deed but prior to the sale, neither the trustee nor the beneficiary being a party to the contract.

In *Carden*, the Court noted that because Bush had denied any *actual notice* of the agreement recorded after the deed of trust and given that under the applicable statute (the precursor of W.Va. Code § 40-1-15) Bush was not affected by constructive notice, it was not necessary to determine what effect notice of those claims would have had on him. Bush stood in the shoes of an innocent purchaser without notice. *Id.*, 109 W.Va. at 657, 155 S.E. at 915. Unlike the purchaser Bush, the Petitioner here was not an "innocent purchaser" and the Circuit Court so found. It is the issue of actual notice, *inter alia*, as discussed below, upon which Petitioners' claims were, and must likewise be, rejected.

Petitioner's Assignment of Error No. 2:

"The trial court erred by applying the "bona fide purchaser doctrine" to the instant suit, as this rule does not apply to the facts of the case at bar."

Petitioner claims that the Circuit Court erred in applying the "bona fide purchaser doctrine" because of the timing of the various purchases which led to this suit. According to the Petitioner, because the Respondents did not purchase their Lot 7 of Falcon Ridge until after the Petitioner purchased the Common Property of Falcon Ridge, the Respondents did not possess "prior rights and equities" pre-dating the Petitioner's purchase, which the Petitioner claims to be a requirement for the application of the bona fide purchaser doctrine. Pet. Brief at 13. This is not a correct statement of the law as articulated in the cases cited by the trial court.

This Court in *Pocahontas Tanning Co. v. St. Lawrence Boom & Mfg. Co.*, 63 W.Va. 685, 60 S.E. 890 (1908) thoroughly discussed the law as it applies to placing a purchaser upon notice. The Court held that "[w]hatever is sufficient to direct the attention of a purchaser to prior rights

and equities of third parties, so as to put him on inquiry into ascertaining their nature, will operate as notice." *Id.* at Syl. Pt. 1. The Court went on to further hold that "....a purchaser, having sufficient knowledge to put him on inquiry, or being informed of circumstances which ought to lead to such inquiry, is deemed to be sufficiently notified to deprive him of the character of an innocent purchaser. *Id.* at Syl. Pt. 3. In *Pocahontas,* Pocahontas Tanning purchased the property in question from McGraw who had purchased it from Holt and Mathews. In the deed into McGraw, it was stated that the timber on the land had been conveyed many years ago. Holt and Mathews had purchased the property at judicial sale together with one McCarty, then deceased. McCarty did not join in the deed to McGraw but after his purchase from Holt and Mathews, McGraw ultimately obtained conveyances of title from McCarty's heirs, one of which deeds likewise referenced that the timber on the property had been conveyed many years ago. After McGraw sold to Pocahontas Tanning, St. Lawrence Boom, claiming to own at least a portion of the timber rights, and began cutting timber on the property prompting, in part, the suit against it by Pocahontas. The question before this Court was whether McGraw was without notice of the rights of those under whom St. Lawrence Boom claimed its right to the timber. *Id.*, 63 W.Va. at 689-690, 60 S.E. at 891-892. The Court found that McGraw was not a bona fide purchaser without notice and that Pocahontas acquired no greater rights as respects the rights under which St. Lawrence held McGraw held. *Id.*, 63 W.Va. at 690, 60 S.E. at 894. In finding that Pocahontas was charged with McGraw's notice The *Pocahontas* Court relied upon language of a Virginia court which had been quoted with approval by the Supreme Court of the United States in *Simmons Creek Coal Co. v. Doran*, 142 U.S. 417, 12 S.Ct 239, 35 L.Ed. 1063 (1892), wherein the Virginia court stated that a purchaser "must look to the title papers under which he

buys, and is charged with notice of all the facts appearing on their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information and then say he is a bona fide purchaser without notice." *Id.*

In addition to *Pocahontas*, the trial court looked to other cases decided by this Court in which it was found that even where there is a lack of record notice, purchasers may be charged with searches beyond their chain of title. In *Eagle Gas Co. v. Doran & Associates, Inc.*, 182 W.Va. 194, 387 S.E.2d 99 (1989), the Court found that "when a prospective buyer has reasonable grounds to believe that property may have been conveyed in an instrument not of record, he is obliged to use reasonable diligence to determine whether such previous conveyance exists. *Id.*, 387 S.E.2d at 102. *In Wolf v. Alpizar*, 219 W.Va. 525, 637 S.E.2d 623 (2006), the Court noted that in order to be a bona fide purchaser, one must be "without notice of any suspicious circumstances to put him on inquiry." *Id.*, 219 W.Va. at 529, 637 S.E.2d at 623 (citing *Stickley v. Thorn*, 87 W.Va. 673, 678, 106 S.E. 240, 242 (1921)).

The Respondents derived their title from JSB which recognized its borrower's final plat and the notes thereon. The Petitioner derived her title from the Stephens and the very deed which conveyed the Common Area to her specifically recited that the land Petitioner was purchasing was the Common Area of the subdivision as shown on the Final Plat. The Petitioner's attempt to correct this error post-suit had no effect upon the knowledge previously imparted to Petitioner, a fact which the Petitioner acknowledged when she sought to obtain a release of the Respondents' rights in the Common Area of the subdivision. The trial court correctly applied the "bona fide purchaser doctrine" to the facts at hand.

Petitioner's Assignment of Error No. 3:

"It was error on the part of the trial court to apply the "common scheme doctrine" to the case at bar, as equitable restrictions do not apply to the facts in the instant case."

Petitioner's primary argument against the application of the common scheme doctrine to the instant case is, as with her other assignments of error, based upon her claim that only those doctrines which have been strictly held to apply to cases of foreclosure under a deed of trust can apply here. Pet. Brief at 15. A foreclosure under a deed of trust results in a sale and ultimate conveyance by the foreclosing trustee of the lender's collateral. Where that collateral is a larger tract of land which the borrower subdivided with the funds obtained from the lender, additional principles of real property law must be permitted to enter into the equation. When the housing market tanked in late 2008 into early 2009, it is common knowledge that lenders were left with numerous unfinished subdivisions as collateral. Prior to the default by their developer borrowers, lenders regularly released lots platted after the deed of trust was placed of record. This is precisely what occurred here. Upon default by the borrower and foreclosure, the recorded plat provided the lender with the ability to sell individual lots rather than the balance of the subdivision as a whole. Again, this is what JSB did here. JSB accepted the after-acquired rights secured by its borrower. In recognizing the recorded plat, the lender cannot cherry-pick what it will recognize on the final plat. The lender cannot, for instance, ignore that the plat created a common roadway for ingress and egress of the lots in the subdivision, for to do so it would create landlocked parcels incapable of being sold. Likewise, the lender cannot ignore the common scheme of development as shown on the final plat given (1) the fact that it has released other lots in the subdivision from its lien when those were sold by its borrower to third parties who would have relied upon that common scheme; and (2) the lender's need for that common

scheme to continue in order to maintain the enhanced value of the lots which, as here, the lender often must credit bid in order to protect its investment. In this respect, the lender is taking precisely what its grantor, the developer borrower, possessed with the lender's acquiescence. As previously noted, a purchaser at a foreclosure sale acquires not only "the title of the grantor at the time of making the trust deed" but also takes "any after-acquired right secured by [the grantor] which has inured to the benefit of the secured creditor." *Industrial Bank,* 109 W.Va. at 179, 153 S.E. at 310.

It is clear that the trial court recognized the real-world implications of trust deed sales upon lenders and third-party purchasers alike. In so doing, the trial court looked to the "common scheme doctrine" which serves to impose the apparent intent of a developer on an individual tract of land in a subdivision. *Jubb v. Letterle*, 185 W.Va. 239, 406 S.E.2d 465 (1991). Here, that common scheme is evident from the Final Plat which laid out the lots, the roadway for ingress and egress to those lots, and the Common Area, and also imposed various restrictive covenants on that property in addition to those set forth in earlier deeds and in the Declaration. Importantly, the developer borrower's intent was carried forth by JSB in releasing the platted lots, in having its collateral sold and, in part, credit bid in, by the lot, and in permitting the sale of the roadway and the Common Area of the subdivision for only $1,000. As stated in *Jubb*, "'[t]he fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish.' *Wallace v. St. Clair, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962).*" *Id.*, 185 W.Va. at 242, 406 S.E.2d at 468. This Court concluded in *Jubb* that "whether through actual or constructive

notice, any potential purchaser would have been aware of the restrictive covenants." *Id.*, 185 W.Va. at 243, 406 S.E.2d at 469.

In applying the common scheme doctrine to the instant case, the trial court recognized that the Final Plat contained a common scheme or general plan of development for Falcon Ridge. A critical part of that common scheme was the existence of the Common Area as shown on the Final Plat as well as the restrictions contained in the plat notes. Petitioner was conveyed Lot 8 with reference to that Final Plat in 2010. While Petitioner might argue that her vertical chain of title to the Common Area would not provide constructive notice of the Final Plat given that it was recorded after the JSB Deed of Trust, Petitioner cannot argue that she did not have actual notice of the Final Plat which specifically depicted the Common Area and contained various restrictive covenants in the plat notes. Having such actual notice of the Final Plat, the Petitioner cannot avoid the imposition of the common scheme doctrine to this case.

Petitioner's Assignment of Error No. 4:

"The cases cited by the trial court in support of the "unity rule" involve parties that derived title from a common developer, not a foreclosing trustee – a party with superior rights to that of the lot owners of the Falcon Ridge Subdivision."

Petitioner again argues that because the "unity rule" as previously applied by this Court has not been applied except as between parties which derived their title from a common developer, the trial court erred in applying this doctrine. Pet. Brief at 16-17. By continuing to take the position that a foreclosing trustee is, without exception, "a party with superior rights to the lot owners of the Falcon Ridge Subdivision" (Pet. Brief at 16-17), the Petitioner once again ignores established principles of real estate law as applied by the trial court. One such principle is the "unity rule" as enunciated in the early case of *Cook v. Totten*, 49 W.Va. 177, 38 S.E. 491 (1901): "When lands are laid off into lots, streets, and alleys, and a map plat thereof is made, all

lots sold and conveyed by reference thereto, without reservation, carry with them, as appurtenant thereto, the right to the use of the easement in such streets and alleys necessary to the enjoyment and value of such lots." *Id.*, at Syl. Pt. 2. The trial court further cited to *Rudolph v. Glendale Improvement Co.*, 103 W.Va. 81, 137 S.E. 349 (1927), wherein this Court recognized the "unity rule" and extended such private dedication by way of a plat to parks shown on such a plat, much like the Common Area here at issue.

The trial court properly found that each purchaser of a lot in the Falcon Ridge Subdivision acquired as an appurtenance to their lot, the right to use Falcon Ridge Drive and the Common Area, all as shown on the Final Plat. If the Petitioner's argument is taken to its logical conclusion, then no lot owner in the subdivision would have a means of ingress or egress to and from their lot. But once again, this Court cannot cherry pick, as Petitioner would suggest, in order to give access to the lots without likewise giving effect to the Common Area as shown on that plat and the Final Plat notes as respects that Common Area. Each of the purchasers of lots in the Falcon Ridge Subdivision acquired an easement appurtenant in Falcon Ridge Drive and the Common Area. These were easements appurtenant which vested by virtue of the recordation of the Final Plat which the foreclosing lender, JSB, recognized both pre-foreclosure in releasing lots from the effect of its deed of trust and later recognized in acquiescing to the sales of the remaining three lots, the roadway, and the Common Area by its substitute trustee.

Petitioner's Assignment of Error No. 5:

"The trial court's order relied on the Community Impact Statement in making its finding, as easements, covenants and restrictions are not enforced by Jefferson County and were therefore irrelevant to the trial court's determination."

Petitioner argues that because "easements, covenants and restrictions are private agreements [and] are not enforced by [Jefferson] County... the [Community Impact Statement]

and [the] Falcon Ridge Subdivision plat are irrelevant to this Court's determination" contrary to the findings of the trial court. Pet. Brief at 18. Petitioner's sole authority for this proposition is some uncited portion of the County zoning ordinance. That the County would take this position most certainly makes sense inasmuch as "[t]he general public acquires no proprietary rights to the platted ways in a case of a private dedication" such as that here at issue. *Bauer Enters., Inc. v. City of Elkins*, 173 W.Va. 438, 441, 317 S.E.2d 798, 800 (1984). Jefferson County's intent to enforce or to not enforce the content of a CIS or an approved final plat is irrelevant to the instant matter. Contrary to the Petitioner's assertions, the unity rule, as discussed above, is the very basis upon which lots, streets, and parks as laid out on a plat "carry with them, as appurtenant thereto, the right to the use of the easement in such streets" and parks. Syl. Pt. 2, *Cook v. Totten; Rudolph v. Glendale Improvement Co.*, 103 W.Va. 81, 137 S.E. 349 (1927).

CONCLUSION

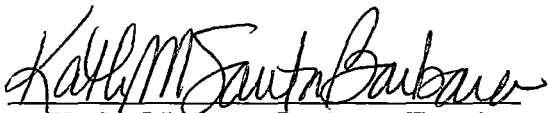
The trial court correctly applied principles of real estate law to arrive at its decision. To hold otherwise would have long-standing adverse impacts on the ability of lenders to sell at foreclosure the remaining lots in a subdivision once a default occurs by the developer. As to consumers, a contrary holding would affect their vested rights under a final plat and have an adverse impact on the value of their investment. For the reasons set forth above, and in the Order of the lower court, this Honorable Court should affirm the holding of the Circuit Court of Berkeley County.

Dated this 10th day of February, 2021.

Respectfully submitted,

TYLER HOCKMAN and
EMILY A. HOCKMAN
Respondents, By Counsel

THE LAW OFFICE OF KATHY M. SANTA BARBARA, PLLC

By: 

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ACKNOWLEDGMENT OF SERVICE

STATE OF WEST VIRGINIA

COUNTY OF BERKELEY, TO WIT:

I, Kathy M. Santa Barbara, Esq., counsel for the Defendants-Respondents having been first duly sworn, state that I served a copy of the ***Summary Response of Respondents Pursuant to Rule 10(e) of the West Virginia Rules of Appellate Procedure*** upon the following, as counsel for the Plaintiff-Petitioner, by U.S. Mail, postage prepaid, this 10th day of March, 2021:

Katherine N. Ridgeway, WVSB#12500
Crawford Law Group, PLLC
214 Lutz Avenue
Martinsburg, WV 25404

Kathy M. Santa Barbara

Taken, subscribed, and sworn to before me Kathy M. Santa Barbara on the 10th day of March, 2021.

Notary Public

My Commission Expires: 11/6/24.

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
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