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DOES A PURCHASER AT A FORECLOSURE SALE TAKE TITLE SUBJECT TO ENCUMBRANCES RECORDED AFTER THE BORROWER EXECUTED THE DEED OF TRUST?

The long-standing rule in Washington is first in time, first in right. This is the basic rule of Washington's Recording Act at RCW 65.08.070. In addition, when a deed of trust is foreclosed under RCW 61.24, the trustee's deed conveys all title that the borrower had at the time of executing the deed of trust to the purchaser.

In other words, the purchaser (Paul) at a trustee's sale is bound by any valid instruments recorded prior to the recording of the property's Deed of Trust, which was foreclosed, but is not bound to any later recording.

The material facts of this issue are limited to two items: (1) the documents that transferred or encumbered title, and (2) the dates these documents were recorded.

For example:

- Does a recorded deed of trust have priority over covenants recorded after the deed of trust?
- Did the purchaser at the trustee's sales of the foreclosed properties take the properties subject to the later recorded CCRs?

The Recording Act, RCW 65.08, going back to 1854, defines the basic rule of first in time, first in right. The statute is the basis for making a deed of trust recorded first in time superior to any other conveyance of an interest in the property, unless a grantee has actual knowledge of an unrecorded transfer. RCW 65.08.070 in pertinent part reads:¹

A conveyance of real property ... may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser ... An instrument is deemed recorded the minute it is filed for record.

"The term "conveyance" includes every written instrument ... by which the title to any real property may be affected." RCW 65.08.060(3). Deeds of trust and CCRs would constitute

¹ The statute reads: A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record; see also, *Altabet v. Monroe Methodist Church*, 54 Wn. App. 695, 697, 777 P.2d 544 (1989) (citing *Tacoma Hotel, Inc. v. Morrison & Co.*, 193 Wn. 134, 74 P.2d 1003 (1938)).

conveyances under the statute—the CCRs affect title to real property.

Although the statute’s plain language applies only to instruments “not so recorded,” and the CCRs were indeed recorded, the implication is clear: first in time, first in right. Any hesitance to afford a purchaser at a trustee’s sale the benefits of this rule are assuaged by the Deed of Trust Act, which makes the rule quite clear.

Under RCW 61.24.050(1), the trustee’s deed conveys:

all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor [borrower] had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired.

In other words, owner, Oscar, borrowed funds from the bank. The bank took deeds of trust as security for the loans. Oscar defaulted on the loans, and the bank foreclosed, ending in the trustee’s sales. Paul purchased the properties at the trustee’s sales. The trustee’s deeds conveyed to Paul all of the right, title, and interest in the real properties sold at the trustee’s sales that Oscar had when the deeds of trust were executed.

Oscar’s right, title, and interest in the real properties when he executed the deeds of trust were unencumbered by HOA CCRs. The deeds of trust were recorded prior to the CCRs.

Accordingly, the properties conveyed by the trustee’s deeds to Paul are unencumbered by the HOA’s CCRs. The CCRs were recorded after the subject deeds of trust. First in time, first in right—the basic rule of real property conveyances—governs.

In summary, it appears that no legitimate dispute contests this basic tenet of Washington law: the deeds of trusts are senior to the CCRs, and therefore the holder of the deeds of trust, the bank, and the purchaser at the trustee’s sales take the properties clear of the later recorded junior CCRs.

Any other ruling would create chaos in our system of land titles. For example, a property owner could fully encumber her property (i.e., borrow money with concomitant deed of trust) and then further encumber the property (i.e., with CCRs). The subsequent recorded CCRs could significantly diminish the property value, and significantly diminish the lender’s security interest in the property. As such, the lender’s security interest would be significantly damaged.

This simple fact is why lenders include boiler plate language in deeds of trust to preclude any further encumbrances.

This matter is ultimately about the priority of interests in real property as evidenced by instruments recorded with the Thurston County Auditor, and the basic rules of Washington’s Recording Act and Deed of Trust Act.

Washington law is well-established and clear on this matter: Where deeds of trust were conveyed prior to recording of the CCRs, the foreclosure of the deeds makes the trustee’s deeds not subject to the later recorded CCRs on the foreclosed parcels.