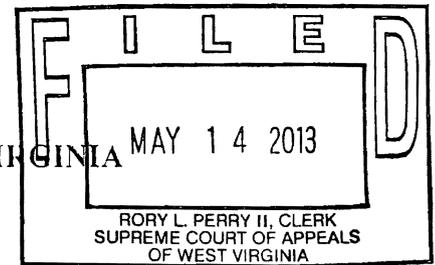


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1505

(Mineral County Circuit Court, Civil Action No. 12-C-62)



KEYSER HOUSE BONDS, LLC,

Petitioner,

v.

KEYSERHOUSE ASSOCIATES, LTD
PARTNERSHIP, and
THE CITY OF KEYSER,

Respondents.

**KEYSER HOUSE BONDS, LLC'S
PETITION FOR APPEAL**

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III. ASSIGNMENTS OF ERROR

- A. **West Virginia Public Policy Requires Bond Provisions be Construed in Favor of Negotiability and that Its Needy Citizens have Safe, Sanitary, and Affordable Housing.**
- B. **The Circuit Court Erred in Misconstruing the Indenture of Trust.**
- C. **The Circuit Court Erred in Awarding Only Five Thousand Dollars per Month Payments to Petitioner because the Circuit Court Arbitrarily Calculated this Amount without Evidence.**
- D. **The Circuit Court Failed to Provide Sufficient Factual Findings and Conclusions of Law in Violation of Rule 52(a) of the West Virginia Rules of Civil Procedure when It Denied Petitioner's Motion for an Injunction and Enjoined Petitioner from Foreclosing.**
- E. **The Circuit Court Erred in Finding Petitioner in Contempt because Petitioner Failed to Receive Adequate Notice and Opportunity to Respond to the Alleged Violation; the Circuit Court Possessed Insufficient Evidence that Failed to Meet the Evidentiary Burden of Contempt; and the Circuit Court Exceeded Its Authority by Enjoining Petitioner from Foreclosing.**

IV. STATEMENT OF THE CASE

On June 1, 1981, the City of Keyser ("City Respondent") and Keyserhouse Associates LTD Partnership ("KAP Respondent") entered into two separate agreements related to the erection of a low-income housing project ("Keyserhouse"). The first agreement leased property, owned by City Respondent, to KAP Respondent for constructing Keyserhouse. The other agreement, an Indenture of Trust ("Indenture"), secured the revenue bonds City Respondent issued to fund the Keyserhouse project. In all, City Respondent issued commercial development revenue bonds in the aggregate principal amount of One Million Five Hundred Five Thousand Dollars (\$1,505,000.00). [R. at 169, Indenture Art. I § 1(b).] The holders of these commercial development revenue bonds expected to receive a rate of eight percent (8%) interest per annum, monthly payments of Eleven Thousand Forty-Three Dollars and fifteen cents

(\$11,043.15), and expected payment in full on or before July 10, 2011.¹ [*Id.*, Indenture Art I § (b)-(c).] Petitioner holds a one hundred percent (100%) interest in both sets of bonds. [R. at 118, Complaint ¶ 14].²

Beginning in 2000, KAP Respondent experienced financial difficulties, fell behind on making its monthly payments and eventually stopped paying altogether. [R. at 119, Complaint ¶ 18.] This default led the Indenture’s Trustee—at this time M&T Bank—to institute foreclosure proceedings against Keyserhouse. [*Id.*, Complaint ¶ 19.] Immediately thereafter, KAP Respondent filed for Chapter 11 bankruptcy protection with the District of Maryland Bankruptcy Court (“Bankruptcy Court”). [*Id.*, Complaint ¶ 20.] While this bankruptcy filing halted Keyserhouse’s foreclosure, the filing constituted an event of default under the Indenture. [R. at 188, Indenture Art. VI, § 1(g).]

On January 23, 2002, the Bankruptcy Court entered a Second Amended Plan of Reorganization (“Reorganization Plan”). [R. at 300-08, Reorganization Plan.] Under this Reorganization Plan, KAP Respondent agreed to make the following payments to the bondholders:

Class 2 Claim, in the amount of \$1,060,000.00, will be paid out over 10 years in monthly payments, at an interest rate of 5% per annum, with the debt balance due at the expiration of ten years. The first 72 monthly payments shall be \$6,700.00 per month. The next 48 monthly payments will be \$7,500.00 per month. The final payment, due 30 days hereafter, will be the remaining balance due. If during the last four years the occupancy rate reaches 90%, the

¹ The first payment owed differed: “except that the first payment due August 10, 1981, shall be reduced to reflect actual interest accrued on the Bonds from the date of delivery thereof.” [R. at 169, Indenture Art I § (b).]

² KAP Respondent never answered the Complaint and, therefore, never denied the allegations set forth therein. Therefore, they are deemed admitted as true. *See* W. Va. R. Civ. P. 8(d) (“Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.”). [R. at 419-21, Certified Docket Sheet.]

monthly amount, for any month in which the rate reaches 90% will increase from \$7,500.00 to \$8,500.00 per month.

[R. at 304, Reorganization Plan.] Under this Reorganization Plan, Petitioner expected full payment on the bonds on or before April 24, 2012 (“Amended Maturity date”). On February 29, 2012, Petitioner noticed KAP Respondent of its obligation to pay Six Hundred Sixty-Five Thousand, Seven Hundred Eighty-Nine Dollars and twenty-two cents (\$667,789.22) on or before the Amended Maturity Date. [R. at 221, Feb. 29, 2012. Lt. from Zilm to Nelson.] KAP Respondent failed to pay. As of the filing of this Petition, KAP Respondent still owes Petitioner an amount in excess of Six Hundred Fifty Thousand Dollars (\$550,000.00) on the bonds that matured over one year ago.

The bond payment problems notwithstanding, KAP Respondent allowed Keyserhouse to lapse into a state of disrepair and dilapidation. [R. at 231-70, HUD Inspection Reports.] Beginning on December 4, 2007, and continuing through January 25, 2012, the United States Department of Housing and Urban Development (“HUD”) issued numerous citations to KAP Respondent for failing to provide its tenants with affordable, safe and sanitary housing conditions. [*Id.*] KAP Respondent’s inattention to its responsibilities in maintaining Keyserhouse caused the tenants to live with inoperable kitchen appliances, non-functioning air-conditioners, exposed wiring, and without lights, hot water or operable smoke detectors. [R. at 234-39, Dec. 4, 2007, Report]; [R. at 246-50, June 4, 2010, Report]; [R. at 261-68, Jan. 25, 2012, Report.] HUD warned KAP Respondent of the serious ramifications from these violations:

Because [Keyserhouse] received a score of less than 60, the inspection has been referred to the Department of Enforcement Center for enforcement action. HUD may suspend the administrative procedure described in 24 CFR 200 Subpart P when HUD determines it necessary to protect HUD’s financial interest

and to protect the residents as provided by 24 CFR 200.857(i)(4). Properties scoring below 60 have physical deficiencies that do not meet the contractual obligations to HUD. **Residents of such properties are not receiving the quality of housing to which they are entitled to.** Accordingly, HUD is making a determination that it may proceed to enforcement action as authorized by existing statutes, regulations, contracts or other documents.

....

If you fail to correct the physical deficiencies, fail to correct the EH&S violations, or, fail to provide HUD with the required certification within the required timeframes, or falsely certify to repairs made, these noncompliance issues may adversely affect your eligibility for participation in the HUD program. . . .

[R. at 232-33, Dec. 4, 2007, Lt. from HUD to KAP Respondent (emphasis added).] On June 4, 2010, HUD issued Keyserhouse another failing inspection score. [R. at 246-50, June 4, 2010, Report.] On January 25, 2012, HUD again issued Keyserhouse another failing inspection score, twenty points lower than HUD's minimal habitability standard and the lowest score Keyserhouse received to date. [R. at 261-68, Jan. 25, 2012, Report.] Despite repeated requests from HUD, KAP Respondent took no corrective action. On April 29, 2012, Petitioners noticed KAP Respondents of their default for the five years' worth of HUD violations.³ [R. at 222, Apr. 19, 2012 Lt. from Zilm to Nelson.] In spite of this notice, the problems continued. HUD twice threatened to suspend its subsidy payments and relocate the residences due to KAP Respondent's failure to provide functioning laundry facilities [R. at 231, May 21, 2012, Email from HUD to KAP Respondent], and failure to maintain water utilities for its residents.⁴ [R. at 358-60, Second Supp. to Mot. for Injunctive Relief.]

³ This notice was sent to the Trustee, as well, via certified mail. [R. at 222, Apr. 19, 2012 Lt. from Zilm to Nelson.]

⁴ This violation compelled Petitioner to file a second supplement to its Motion for a Preliminary Injunction.

Petitioner faced dire circumstances. A month passed, and Petitioner still had yet to receive payment on its overdue mature bonds. All the while, Petitioner's security interest in Keyserhouse diminished as a result of KAP Respondent's mismanagement and lack of attention to maintenance. These issues led Petitioner to seek relief from Huntington National Bank, acting as Trustee; however, the Trustee failed to promptly act. Therefore, and pursuant to the provisions in the Indenture, Petitioner sought judicial relief from the Circuit Court.

On May 30, 2012, Petitioner filed an action in the Circuit Court of Mineral County requesting a declaratory judgment and a preliminary injunction based on Respondents' default and the Trustee's failure to take action. [R. at 116-225, Complaint]; [R. at 226-28, Mot. for Injunctive Relief]; [R. at 229-72, Supp. to Mot. for Injunctive Relief.] In its Complaint, Petitioner requested that the Circuit Court determine the duties, rights and obligations of the parties. While Petitioner knew the Indenture permitted foreclosing on Keyserhouse, Petitioner sought the Circuit Court's intervention, in part, because the Trustee refused to timely act, and the Indenture on file was missing a page outlining the duties of the parties in the event of Default. [R. at 121, Complaint ¶¶ 26, 33]; [R. at 71, Sept. Hr'g.] Respondents acknowledged that the bonds required full payment upon maturity and were past due; however, Respondents contended that Petitioner failed to abide by the terms of the Indenture and that this failure precluded Petitioner from seeking the requested relief.

On September 19, 2012, and after some delay for some procedural issues, Petitioner requested that the Circuit Court re-open the case and enjoin KAP Respondent from operating Keyserhouse.⁵ [R. at 371-73, Mot. for Relief from Order, Renewed Motion for

⁵ Prior to considering the merits, the Circuit Court contemplated the issue of its own subject matter jurisdiction. On July 17, 2012, the Circuit Court entertained argument on this issue. Respondents argued that,

Injunctive Relief, and Notice of Hr'g.] Petitioner sought this relief, as the Trustee failed to act pursuant to the Indenture. In response, the Trustee explained its failure to initiate the foreclosure proceedings stemmed from needing an additional party to the action, namely, the bank to which Petitioner collaterally assigned the bonds as security for a loan. [R. at 45, Sept. Hr'g.] Other than this issue, the Trustee took no other adverse position to Petitioner's claims and requested relief.

As for Respondents, they defended solely on procedural grounds. For instance, KAP Respondent argued it received insufficient notice of the default and no opportunity to cure. [R. at 36-37, Sept. Hr'g.] In response, Petitioner again alerted the Circuit Court that the bonds matured, and that KAP Respondent failed to pay. [R. at 41-42, Sept. Hr'g.] This entitled Petitioner to relief:

Nothing in the Indenture contained shall, however, affect or impair the right of the holders of the Bonds to enforce the payment of the principal of and interest on the Bonds at and after maturity thereof, or the obligations of the Issuer to pay the principal of and interest on the Bonds to the holders thereof at the time, place from the source and in the manner in the Bonds expressed.

[R. at 193-94, Indenture Art. VI, § 13 (emphasis added)]; [R. at 42-43, Sept. Hr'g.] In essence, Petitioner argued that the failure to pay the bonds at maturity superseded any notice provisions, curative rights or procedural niceties relied upon by Respondents. Additionally, KAP Respondent received notice of its HUD deficiencies back on April 19, 2012. [R. at 222, Apr. 19,

pursuant to the Reorganization Order, the Bankruptcy Court maintained jurisdiction over the matter. [R. at 8, July Hr'g.] The Circuit Court agreed and dismissed Petitioner's case; however, the Circuit Court reserved Petitioner's right to re-file the action with the Circuit Court if the Bankruptcy Court chose not to exercise its exclusive jurisdiction. [R. at 356-57 Aug. 21, 2012, Order.] On September 13, 2012, the Bankruptcy Court declined jurisdiction. [R. at 374-76, Consent Order Granting Emergency Motion.]

2012, Lt. from Zilm to Nelson.] Despite that more than ninety days passed since KAP Respondent received notice of its HUD deficiencies, KAP Respondent took no action. Instead, KAP Respondent inaction led HUD to act on its previous threats, suspend its subsidy payments, and commenced its plan to move the Keyserhouse's tenants:

We would further like to inform you that by Notice dated May 5, 2010, the Secretary of the U.S. Department of Housing and Urban Development (HUD) declared that [KAP Respondent], Owner of Keyserhouse was in default of its HAP Contract for failure to maintain the Project in a decent, safe, and sanitary condition.

The Owner did not satisfactorily address the Project's unacceptable physical conditions as required by HUD's notice. . . .

Effective this date, HUD has determined that the Section 8 subsidy payments for all units covered by the HAP Contract for the Project shall be suspended (abated) pursuant to Paragraph 2.21 of the HAP Contract and 24 CFR 886.123(d), and HUD shall hereafter cause Housing Choice Section 8 vouchers to be issued to eligible Project residents (subject to HUD's funding availability).

[R. at 377-78, Sept. 10, 2012, Lt. from HUD to KAP Respondent.]

Petitioner offered the Circuit Court a suitable plan that would not only ensure Petitioner receive payment in full, but at the same time would provide safe, suitable and affordable housing to the tenants of Keyserhouse. [R. at 58, 65, Sept. Hr'g.] In support, Petitioner presented Barbara Schmuck ("Ms. Schmuck"), of TM Associates, an entity specializing in the management of low-income housing facilities and which HUD approved and endorsed to take over management of Keyserhouse immediately. [R. at 58, Sept. Hr'g.] Petitioner also sought out and obtained several interested buyers for a foreclosure and informed the Circuit Court of its intention to bid. [R. at 69-73 Sept. Hr'g.]; [R. at 193, Indenture Art. VI § 11.]

In contrast, Respondents proposed a plan in which RLJ Management would take over Keyserhouse, and Buckeye Community Hope Foundation (“Buckeye”) would ultimately buy the Keyserhouse building.⁶ [R. at 59-62, Sept. Hr’g.] The Circuit Court attempted to reach Mr. Boone, an associate of RLJ Management, unsuccessfully. [R. at 59, Sept. Hr’g.] Thereafter, KAP Respondent represented that RLJ Management could immediately take over management of Keyserhouse to HUD’s satisfaction, and if Buckeye agreed to a purchase contract, these proceeds would pay Petitioner in full. [R. at 60-61, Sept. Hr’g.] In all, KAP Respondent anticipated a six-month period to finalize the sale. [R. at 62, Sept. Hr’g.]

Without the aid of testimony from either RLJ Management or TM Associates, the Circuit Court endorsed Respondents’ proposal. [R. at 73-74, Sept. Hr’g.] The Circuit Court proceeded in this manner based on its concerns that Petitioner violated the indenture through its alleged failure to provide notice and an opportunity to cure. [R. at 73, Sept. Hr’g.] Therefore, the Circuit Court doubted that this Court would uphold a foreclosure sale of Keyserhouse. [R. at 382, Oct. Order.]

Following this ruling, Petitioner requested that the Circuit Court calculate and award Petitioner a monthly payment as a means of reducing the outstanding balance owed on the bonds. [R. at 75, Sept. Hr’g.] While KAP Respondent’s counsel felt unprepared to offer the Circuit Court an estimated payment, Petitioner referred the Circuit Court to the payments required under the previously effective Reorganization Plan: either Seven Thousand Five Hundred Dollars (\$7,500.00) or Eight Thousand Five Hundred Dollars (\$8,500.00), if

⁶ The Circuit Court first learned of this proposal through an *ex parte* conversation with Respondents before the hearing. [R. at 57, Sept. Hr’g.] The Circuit Court noted this conversation on the record.

Keyserhouse reached ninety (90%) capacity. [R. at 76, Sept. Hr'g]; [R. at 304, Reorganization Plan.] With this information, the Circuit Court concluded:

The Court: The last amount, you're saying was 8500?

Mr. Sites: Only if they were at 90 percent occupancy and they are not.

The Court: **I'm just going to a number out of the air that seems reasonable**, so that we don't have further argument over it, and I'm going to say \$5,000.00 a month.

[R. at 76, Sept. Hr'g (emphasis added).] Additionally, Petitioner requested that the Circuit Court award it payments for the five-month period between the Amended Maturity Date and the October 1, 2012, payment. The Circuit Court denied this request. [R. at 78, Sept. Hr'g]

Following this hearing, and upon reconsideration of the matter, the Trustee informed Petitioner that it now believed Petitioner fully complied with the terms set forth in the Indenture and, therefore, the Trustee felt comfortable initiating foreclosure proceedings. On October 22, 2012, Petitioner and Trustee notified Respondents of their intention to declare the bonds mature and unpaid, declare the amount immediately due and, if not paid, invoke the power under the Indenture and foreclosure on Keyserhouse.⁷ [R. at 413-16, Oct. 22, 2012, Lt. from Sites to Nelson.]

On October 25, 2012, City Respondent noticed a **status conference** for October 29, 2012. [R. at 389-91, Notice of Status Conference.] In spite of the short notice, Petitioner participated, without objection, based on the characterization of the hearing. At this

⁷ On October 23, 2012, the Trustee withdrew its previous resignation and expressed an intent to remain as Trustee under the Indenture. [R. at 418, Oct. 23, Lt. Withdrawal of Trustee Resignation.] The Trustee initially resigned on August 24, 2012. [R. at 418, Lt. Withdrawal of Trustee Resignation.]

hearing, however, Respondents alleged that Petitioner and the Trustee violated the Circuit Court's September Order in initiating foreclosure proceedings on Keyserhouse. [R. at 92, 103, Oct. Hr'g.] The accusation caught Petitioner off guard. Nevertheless, Petitioner attempted to explain that the Trustee initiated foreclosure proceedings based on the terms in the Indenture, and that the Circuit Court's order never precluded this action. [R. at 102-03, Oct. Hr'g.] The Circuit Court disagreed and found Petitioner's foreclosure efforts in violation of the Circuit Court's order. [R. at 109, Oct. Hr'g.]; [R. at 396, Nov. Order.] As punishment, the Circuit Court enjoined Petitioner from foreclosing on Keyserhouse.

For the reasons provided below, Petitioner respectfully requests that this Court reverse and remand the Circuit Court's orders.

V. SUMMARY OF THE ARGUMENT

The Circuit Court's decision to enjoin Petitioner from seeking permissible relief under the Indenture not only violates the unambiguous terms of the Indenture, but also infringes upon two fundamental public policies: (1) the need to ensure the timely payment to bondholders by interpreting and construing bond instruments in favor of negotiability; and (2) the need to provide the needy citizens of West Virginia with safe, sanitary and affordable housing. The Circuit Court held that Petitioner failed to provide an opportunity for KAP Respondent to cure its default of failing to pay the balance of the bonds at maturity. This ruling, if correct, destroyed the negotiability of the bonds by conditioning the promise to pay. This is a clear violation of West Virginia public policy as the negotiability of the bonds greatly facilitates investment in this State and its municipalities. For this reason alone, the Circuit Court must be reversed. However, the Circuit Court's ruling also negatively impacted the tenants of Keyserhouse. The evidence

presented to the Circuit Court unequivocally showed that KAP Respondent, who managed Keyserhouse, failed to pay the remaining balance on Petitioner's bonds upon maturity and similarly failed to maintain Keyserhouse to HUD's minimal acceptable level. Notwithstanding these failures, the Circuit Court still implemented KAP Respondent's proposed management transition and sale plan and enjoined Petitioner from seeking relief under the Indenture. This action was inappropriate.

Furthermore, the Indenture clearly allows Petitioner to seek and obtain its requested relief. Article VI, section thirteen, of the Indenture unambiguously allows Petitioner the right to enforce payment of principal and interest owed upon maturity unimpeded. Yet, the Circuit Court ignored, or chose not to apply, this provision. Instead, the Circuit Court denied Petitioner's requested relief, in part, based on Petitioner's alleged failures to provide notice and an opportunity to cure. Not only does Article VI, section thirteen, of the Indenture supersede these provisions, Petitioner also provided more than enough notice and opportunity to cure. KAP Respondent chose to do nothing and, consequently, Petitioner should have been awarded its requested relief.

Moreover, and despite acknowledging that the bonds reached maturity and Petitioner never received payment, the Circuit Court only awarded Petitioner a \$5,000.00 monthly payment after it adopted Respondents' proposed sale plan. This monetary award fails to even cover the per annum interest owed on the bonds. The bonds are due now, and have been due since April 24, 2012. Worse still, the Circuit Court admitted to reaching this amount arbitrarily by "pulling a number out of thin air." This "methodology" requires this Court to reverse and remand the litigation.

Likewise, the Circuit Court denied Petitioner's injunction and enjoined Petitioner from seeking relief under the Indenture without articulating sufficient findings of fact or conclusions of law to support either decision. This failure obstructs this Court from a meaningful opportunity to review. In particular, the Circuit Court's order never stated which provisions of the Indenture the Circuit Court relied upon; how the relief granted will timely pay Petitioner on the overdue bonds; or why the tenants' interests are best protected by the very entity who has neglected their needs for years. Finally, the mischaracterization of the October hearing as a status conference prevented Petitioner from having sufficient notice and an opportunity to properly defend the accusations that it violated the Circuit Court's Order. For these reasons, and the reasons set forth in the arguments below, Petitioner respectfully requests that this Court reverse and remand this action.

VI. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure, Petitioners request oral argument, as this case involves issues of fundamental public importance. Namely, this litigation involves two paramount public policy considerations, both of which the Circuit Court failed to give proper consideration: (1) the need to adequately protect bondholders in the event of nonpayment, based on their investment in West Virginia; and (2) the need to provide needy citizens of West Virginia with safe, sanitary and affordable housing. The Circuit Court's decision to enjoin Petitioner from invoking remedies under the Indenture violates both policies. As of the filing of this brief, Petitioner has yet to receive payment on bonds that are over a year past maturity, and has no remedy available to it based on the Circuit Court's erroneous action. The Circuit Court's Order also destroyed the negotiability of the bonds. This has the potential crippling effect of rendering all similarly situated bonds in the State non-negotiable and, thus,

thwarting the possibility of future investment. Moreover, the Circuit Court's Order requires the tenants of Keyserhouse to remain with an entity—KAP Respondent—who, for five years, mismanaged the facility and failed to provide the tenants with basic needs such as hot water, working kitchen appliances, lights and smoke detectors. This injustice needs rectification.

Without a doubt, the jurisprudence of this State recognizes these important public policy principals; however, this litigation presents this Court the formal opportunity to enforce these public policies in its jurisprudence. Currently, only West Virginia statutes acknowledge the tantamount significance of making sure bondholders receive payment and adequate security, as well as the need to provide citizens with safe, sanitary and affordable housing. For this reason, and for the reasons contained in the entirety of this brief, Petitioner respectfully requests that this Court provide Petitioner with the opportunity of oral argument.

In support, Petitioner asserts that this litigation presents this Court the opportunity to introduce the following new syllabus points of law:

- This State's public policy of promoting investment in its bonds mandates that bond instruments be interpreted and construed in favor of negotiability.
- This State's public policy of providing citizens of low to moderate income with affordable, safe, sanitary and adequate housing requires the courts to set forth specific findings of fact and conclusions of law detailing their decision and how it promotes this public policy.

VII. ARGUMENT

A. **West Virginia Public Policy Requires Bond Provisions be Construed in Favor of Negotiability and that Its Needy Citizens have Safe, Sanitary, and Affordable Housing.**

“A determination of the existence of public policy in West Virginia is a question of law. . . .” Syl. pt. 1, *Cordle v. Gen. Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). This Court recognized that West Virginia’s public policy principals arise out of:

our federal and state constitutions, our public statutes, our judicial decisions, the applicable principles of the common law, the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom government-with us-is factually established.

See id. at 325, 325 S.E.2d at 114 *quoting in part Allen v. Commercial Cas. Ins. Co.*, 37 A.2d, 37, 38-39 (N.J. 1944). This litigation presents two compelling public policy considerations: (1) bondholders’ timely payment in full upon the maturity of the bonds; and (2) needy citizens’ rights to safe, sanitary and affordable housing.

Without question, West Virginia statutory authority recognizes both critical public policies. The West Virginia legislature often recognizes the paramount importance of obtaining sufficient funding for necessary and vital development projects. *See, e.g.*, W. VA. CODE § 13-2C-2 (“that the means and measures herein authorized for the promotion of industrial projects and commercial projects are, as a matter of public policy, for the public purpose of the several counties, municipalities and the State of West Virginia”); W. VA. CODE § 13-1-2 (“Debt may be incurred and bonds issued under this article for the purpose of acquiring, constructing and erecting, enlarging, extending, reconstructing or improving any building . . .); W. VA. CODE §

31-18-16 (providing bondholders of housing development bonds several recourses of action if bonds fall into default). Similarly, West Virginia statutes and federal regulations acknowledge the need to provide citizens of low and moderate income with safe, sanitary and affordable housing:

The Legislature hereby finds and declares that as a result of public actions involving . . . urban renewal activities, and as a result of the spread of slum conditions and blight to formerly sound urban and rural neighborhoods, there exists in the State of West Virginia a serious shortage of sanitary, decent and safe residential housing available at low prices or rentals to persons and families of low and moderate income.

W. VA. CODE § 31-18-2(a); *see e.g.*, 24 C.F.R. § 368.112(b) (financial assistance “for essential non-routine maintenance needed to keep the property habitable. . . .”); 24 C.F.R. § 511.1(a) (“The purpose of the Program is to help provide affordable, standard permanent housing for low-income families”); 24 C.F.R. § 200.1. Regrettably, the Circuit Court’s decision to deny Petitioner’s request for an injunction and instead enjoining Petitioner from foreclosing on Keyserhouse violates both of these public policies.

1. The Circuit Court’s Decision to Enjoin Petitioner from Foreclosing on Keyserhouse Violates the Public Policy Principle of Paying Bondholders in Full upon Maturity and Threatens to Render All Outstanding Revenue Bonds Non-Negotiable.

The Circuit Court’s decision to enjoin Petitioner from foreclosing on Keyserhouse violated West Virginia’s public policy on timely paying bondholders in full upon maturity. The Circuit Court’s decision to impose the cure provision of the Indenture on the promise to pay renders these bonds, and all other similarly situated bonds, non-negotiable. *See Friedman v. Airlift Intern., Inc.*, 44 A.D.2d 459, 461 (N.Y. App. Div. 1974). This is an untenable position.

Friedman presents a very similar factual scenario. In *Friedman*, an owner of 5.75% of a debenture bond sued the recipient of the bonds' funds for failing to make the required payments. *Id.* at 460. Defendant conceded it failed to make the payments and admitted plaintiff stood as the beneficial owner of the bonds. Nevertheless, defendant defended the action, stating that the indenture required at least 25% participation to initiate suit, and that the indenture set forth several conditions to suit, none of which plaintiff followed. *Id.* The trial court agreed, granted defendant's cross-motion for summary judgment and dismissed plaintiff's complaint.

Reversing, the Supreme Court, Appellate Division of New York, held that the conditions set forth in the indenture only applied if expressly stated on the face of the bond, even when the bond expressly referenced the indenture. *Id.* at 460-61. However, more importantly, the Court determined that the conditions that defendants sought to impose destroyed the negotiability of the bonds:

The indenture provides certain rights of collection in the event of certain contingencies and also sets up procedural limitations on the enforcement of those rights. The bond itself is intended to be a negotiable instrument. **Any limitation on the obligation to pay at maturity appearing on its face would render it non-negotiable.** It would appear that defendant has circulated its negotiable promises to pay and now seeks to deny their negotiability. As a matter of law the references in the bond to the indenture do not accomplish this.

Id. at 461.

This litigation presents even more compelling facts than the facts in *Friedman*. For instance, rather than holding a small interest, Petitioner owns a one hundred percent (100%) interest in the bonds. Like the defendant in *Friedman*, Respondents admit that KAP Respondent owes Petitioner an amount in excess of Six Hundred Fifty Thousand Dollars on these bonds.

More still, the bonds in this litigation **matured** on April 24, 2012, and, yet, KAP Respondent has failed to pay Petitioner. [R. at 221, Feb. 29, 2012, Lt. from Zilm to Nelsen.]; [R. at 72, Sept. Hr'g.] Finally, Respondents, just like the *Friedman* defendants, attempt to shirk their obligations based on Petitioner's alleged failure to follow the conditions in the Indenture. This Court must allow Petitioner to enforce payments of its bonds through foreclosure.

To hold otherwise would cause serious ramifications for West Virginia's municipalities' revenue-raising future. The Circuit Court's ruling conditioned the payment of the bonds at maturity. This occurred when the Circuit Court determined that Petitioner needed to provide KAP Respondent an additional ninety-day opportunity to cure. Such a condition renders the bond non-negotiable as it conditions the very promise to pay. *See* W. Va. Code §§ 46-3-104, 46-3-106. "It is axiomatic that absent negotiability, there is no transfer of rights to the funds represented by the commercial instrument." *See O'Mara Enters., Inc. v. People's Bank of Weirton*, 187 W. Va. 591, 420 S.E.2d 727 (1992). The implications of such a proposition are enormous. Many investors choose to invest in West Virginia municipal bonds due to their tax-free status and their negotiability. The negotiability of the bonds ensures that the purchasing individuals can take possession of an unconditional promise to pay without being subject to claims and defenses of the world. *See England v. MG Invests., Inc.*, 93 F. Supp. 2d 718, 723 (S.D. W. Va. 2000) ("Holder in due course (HDC) status insulates an assignee from the dire consequences of this rule, of course."). Yet, with the stroke of a pen, the Circuit Court's ruling threatens to destroy the negotiability of all similarly situated bonds in this State. This cannot happen.

In sum, if the Circuit Court held correctly that the Indenture placed a condition—ninety-day period to cure—on the promise to pay at maturity, these bonds would be non-

negotiable. Every other outstanding bond in this State subject to an indenture, deed of trust, or similar instrument would also be rendered non-negotiable. In that event, investing in West Virginia municipal bonds will freeze overnight. Investors will take their money elsewhere and, instead, choose to invest with states that protect their right of unconditioned payment. Consequently, this State will lose a vital revenue stream for its future commercial development and industrial projects. This appeal allows this Court to correct the Circuit Court's erroneous actions and ensure West Virginia's future economic vitality. This Court should, therefore, reverse and remand this action.

2. The Circuit Court's Decision to Enjoin Petitioner from Foreclosing on Keyserhouse Violates the Public Policy Principle of Providing Needy Citizens a Right to Safe, Sanitary and Affordable Housing.

The Circuit Court's decision to enjoin Petitioner from foreclosing on Keyserhouse violated West Virginia's public policy of providing needy citizens a right to safe, sanitary and affordable housing. At the September hearing, Petitioner brought Ms. Schmuck, an employee of TM Associates, to the hearing to testify regarding TM Associates' plan to improve Keyserhouse's habitability and transition its management without disturbing the lives of the tenants. [R. at 58, Sept. Hr'g ("Ms. Schmuck is here and she's ready, her words before the hearing began were 'if we take over today, how do I get the keys?' They're ready.")] In contrast, KAP Respondent proposed a transition plan in which RLJ Management would assume management of Keyserhouse with Buckeye, eventually purchasing the housing facilities. [R. at 60-61, Sept. Hr'g.] The Circuit Court chose KAP Respondent's proposal.

The problem with this ruling, however, is that the Circuit Court took no evidence and heard no testimony from either RLJ Management or TM Associates. In fact, the only

evidence before the Circuit Court related to KAP Respondent's mismanagement of Keyserhouse. This evidence included five years of declining scores below HUD's minimal, acceptable level. [R. at 234-39, Dec. 4, 2007, Report]; [R. at 246-50, June 4, 2010, Report]; [R. at 261-68, Jan. 25 2012, Report.] This evidence showed that the tenants of Keyserhouse suffered from a lack of operable kitchen appliances, broken air conditioners, damaged bathroom fixtures, malfunctioning laundry facilities, no hot water, and exposed wiring; that HUD repeatedly cited KAP Respondent for its failure to maintain adequate smoke alarms in the building; and that HUD threatened to pull its subsidy payments and remove the tenants due to KAP Respondent's failures to provide functioning laundry facilities and working utilities. [R. at 231, May 21, 2012, Email from HUD to KAP Respondent]; [R. at 358-60, Second Supp. to Mot. for Injunctive Relief.] These threats finally came to fruition, with HUD threatening to suspend subsidy payments and remove the tenants on October 1, 2012, unless KAP Respondent took immediate action. [R. at 377-78, Lt. from HUD to KAP Respondent.]

Given the plethora of evidence presented, the Circuit Court needed to critically examine both Petitioner's and Respondents' proposed courses of action and evaluate whether one presented a superior option. The Circuit Court never engaged in this analysis. The Circuit Court's Order violated this paramount public policy, and this Court should reverse and remand this litigation.

The facts of this case provide this Court the opportunity to formally recognize and acknowledge the following public policies through new syllabus points of law:

- This State's public policy of promoting investment in its bonds mandates that bond instruments be interpreted and construed in favor of negotiability.

- This State’s public policy of providing citizens with low to moderate income with affordable, safe, sanitary and adequate housing requires the courts to set forth specific findings of fact and conclusions of law detailing their decision and how it promotes this public policy.

B. The Circuit Court Erred in Misconstruing the Indenture of Trust.

“Where the terms of a contract are clear and unambiguous, they must be applied and not construed.” Syl. pt. 3, *Waddy v. Riggelman*, 216 W. Va. 250, 606 S.E.2d 222 (2004). “It is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning.” Syl. pt. 3, *Bennett v. Dove*, 166 W. Va. 772, 277 S.E.2d 617 (1981). “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl. pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962). “It is presumed that parties enter into a contract with the intention of accomplishing some purpose by it; and, therefore, courts will not give to the contract a construction which will render it void if it can reasonably be interpreted in such a way as to give it effect.” Syl. pt. 1, *Hunt v. Shamblin*, 179 W. Va. 663, 371 S.E.2d 591 (1988). “In interpreting a contract, a court determines the existence of an ambiguity as a matter of law.” *HN Corp. v. Cyprus Kanawha Corp.*, 195 W. Va. 289, 294, 465 S.E.2d 391, 396 (1995). In this instance, the Circuit Court’s order made no finding of ambiguity nor expressly referenced the provisions of the Indenture it relied upon. [R. at 381-83, Oct. Order.] Consequently, this Court reviews this issue *de novo*. See *Toppings v. Rainbow Homes, Inc.*, 200 W. Va. 728, 733, 490 S.E.2d 817, 822 (1997).

A valid Indenture exists and this Indenture governs the parties.⁸ Under the Indenture, KAP Respondent made two affirmative representations: First, KAP Respondent obligated itself to repay the holder of the “Commercial Development Bonds, Series 1981 (Keyserhouse)” the principal amount of \$1,505,000.00, plus interest, and agreed to make monthly payments, commencing on August 10, 1983, in the amount of \$11,043.15, with final payment due on or before July 10, 2011. [R. at 161, Indenture Art. I § 1(b)-(c).] While the Reorganization Plan altered these payment obligations, KAP Respondent still consented to pay Petitioners \$1,060,000.00, at a rate of 5% interest, on or before April 24, 2012. [R. at 346, Reorganization Plan.] Under the Reorganization Plan, KAP Respondent promised that “[t]he first 72 payments will be at the rate of \$6,700.00 per month. The last 48 payments will be \$7,500.00 per month, unless the occupancy is 90%, in which case the monthly amount for any such month will be \$8,500.00 per month. **All remaining principal and interest due on the Bond will be due and payable in full ten years from Consummation.**” [*Id.* (emphasis added).] The second obligation arose from KAP Respondent’s promise to maintain Keyserhouse in a state of good repair. [R. at 179, Indenture Art. V, § 4.] In the event it faltered, City Respondent represented that it would pledge the Housing Assistance Payments and assign rents to Petitioner as security. [R. at 161-62, Indenture.] This aforementioned conduct constituted events of default under the Indenture.⁹

⁸ Black’s Law Dictionary defines an indenture of trust as “[a] document containing the terms and conditions governing a trustee’s conduct and the trust beneficiaries.” This definition is synonymous with the term “deed of trust.” BLACK’S LAW DICTIONARY, Indenture (9th ed. 2009). This Court has previously defined the deed of trust as a: “a deed that conveys title to real property in trust as security until the grantor repays the loan. In the case of default of a debt secured by a deed of trust, the property becomes liable to sale under the power of sale conferred upon the trustee.” Syl. pt. 7, *Arnold v. Palmer*, 224 W. Va. 495, 686 S.E.2d 725 (2009).

⁹ Article VI, section one, describes events of default. Without question, KAP Respondent violated the following three subsections: (a) If default shall be made in the payment of principal of or interest on the Bonds or the prepayment of any part thereof when and as the same becomes due and payable, whether by the terms thereof, by declaration, by becoming subject to mandatory redemption or otherwise;

Importantly, KAP Respondent does not dispute, nor can they, that their conduct created an event of default under the Indenture. After all, the undisputed evidence shows that KAP Respondent failed to pay the bonds at maturity, failed to maintain Keyserhouse in accordance with HUD's minimum standards, and previously filed for bankruptcy. [R. at 221, Feb. 29, 2012, Lt. from Zilm to Nelson]; [R. at 234-39, Dec. 4, 2007, Report]; [R. at 246-50, June 4, 2010, Report]; [R. at 261-68, Jan. 25 2012, Report]; [R. at 119, Complaint ¶ 20.] Events of default occurred. However, in spite of these default events, KAP Respondent argues, somewhat hypocritically, that Petitioner failed to follow the procedures in the Indenture and this failure precludes Petitioner from obtaining its requested relief. This contention lacks merit.

KAP Respondent alleged that Petitioner failed to provide it adequate notice of the defaults and ninety-day notice to cure. [R. at 37-39, Sept. Hr'g]; [R. at Oct. Hr'g]; [R. at Indenture Art. VI § 4]; [R. at Indenture Art. VII, § 2.] Two fundamental flaws exist in this argument. First, KAP Respondent ignores that the bonds reached maturity. [R. at 304, Reorganization Plan]; [R. at 221, Feb. 29, 2012, Lt. from Zilm to Nelson.] When the bonds reach maturity, Article VI, section thirteen, of the Indenture becomes effective:

(f) Failure of the Lessee or the Issuer to perform or observe duly any covenant, certification, condition or agreement on their part required to be performed or observed, or to perform and comply with any of their other obligations under this Indenture, other than an event of default provided in subsections (a), (b), (c), (d) and (e) above; provided such failure shall have continued for a period of thirty days after written notice to the Lessee and the Issuer by the Trustee specifying such non-performance or breach and requiring the same to be remedied, unless the Trustee shall have agreed in writing to an extension of its expiration; [and]

(g) The filing of a voluntary petition in bankruptcy or the commission of any act of bankruptcy by the Lessee or the adjudication of the Lessee as a bankrupt, or the making by the Lessee of an assignment for the benefit of creditors, or the appointment by final order, judgment or decree of a court of competent jurisdiction of a receiver for the whole or any substantial part of the properties of the Lessee; provided such receiver shall not have been removed or discharged within sixty days of the date of his qualification, unless the Trustee shall have agreed in writing to an extension of the time within which to remove or discharge such receiver. [R. at 187-188, Indenture Art. VI § 1(a), (f), (g).]

Bondholders Not to Enforce Remedies Hereunder Except Under Certain Conditions. It is expressly covenanted and agreed, and the Bonds issued hereunder are subject to the condition that the holders of the Bonds shall not be entitled to institute any suit, action or proceeding at law or in equity to enforce any rights or remedies granted by this Indenture unless and until the Trustee shall have refused or, for ten days following delivery to it of a written demand therefor, signed by the holders of not less than 60% of the Bonds, shall have failed to take appropriate remedial action authorized by the Indenture upon the happening of one or more events of default specified in section 1 of this Article. Such demand shall specify and describe the default.

Nothing in the Indenture contained shall, however, affect or impair the right of the holders of the Bonds to enforce the payment of principal of and interest on the Bonds at and after the maturity thereof, or the obligation of the Issuer to pay the principal of and interest on the Bonds to the holders thereof at the time, place from the source and in the manner in the Bonds expressed.

[R. at 193-94, Indenture Art. VI § 13 (emphasis added in bold).] Any notice provision,¹⁰ curative rights or other procedural niceties lost effect once the bonds matured and KAP Respondent failed to pay. To hold otherwise violates the clear bolded language above:¹¹ “Nothing . . . shall . . . affect or impair the right of the holders of the Bonds to enforce the payment . . . after the maturity thereof.” [R. at 193-94, Indenture Art. VI § 13.] As no ambiguity exists and this Court’s jurisprudence requires courts to apply and enforce this unambiguous language, the Circuit Court erred. This error requires this Court to reverse and remand.

¹⁰ Moreover, Article V, section seventeen, provides that: “The Issuer will not directly or indirectly **extend or consent to the extension of the time** of payment of any Bond unless consented to by the holder of such Bond.” [R. at 184, Indenture Art. V § 17 (emphasis added).] City Respondent’s agreement that the Indenture required a ninety-day period to cure violates this provision. The so-called agreement, acts as a 90-day *de facto* extension past the maturity date, in addition to being an impediment to the bondholder’s uninhibited right to payment after maturity as set forth Article VI, section thirteen, of the Indenture. [R. at 193-94, Indenture Art. VI § 13.]

¹¹ Holding otherwise also renders the bonds non-negotiable, an absurd result given the intentions of the parties. *See supra* pages 15-17.

Nevertheless, Petitioner provided KAP Respondent sufficient notice and opportunity to cure the HUD deficiencies. The evidence shows that on April 19, 2012, Petitioner noticed KAP Respondent of their five years' worth of HUD Violations. [R. at 222, Apr. 19, 2012, Lt. from Zilm to Nelson.] By the time the Circuit Court addressed the merits of Petitioner's motion for a preliminary injunction, five months, or more than one hundred fifty (150) days, passed. In that time period, KAP Respondent managed to arouse the ire of HUD to the point that it pulled its subsidy payments and noticed its intent to remove the tenants. By way of recap, the following events occurred after Petitioner gave notice of the HUD violations:

- HUD threatened to suspend its payments and relocate the residents based on their complaints that Keyserhouse lacked functioning laundry facilities; [R. at 231, May 21, 2012, Email from HUD to KAP Respondent.]
- HUD again threatened to suspend its payments and relocate the residents because the water department noticed its intent to turn off the water to Keyserhouse; [R. at 358-60, Second Supp. to Mot. for Injunctive Relief.]
- HUD acted on its previous threats, suspended its subsidy payments and noticed its intent to remove the tenants unless immediate action was taken. [R. at 337-78, Sept. 10, 2012, Lt. from HUD to KAP Respondent.]

KAP Respondent received its notice and an opportunity to cure and took no corrective action.¹² Therefore, the Circuit Court erred in holding that Petitioner failed to provide sufficient notice and opportunity to cure, and this Court needs to reverse and remand this action.

In sum, the Circuit Court erred in misapplying the terms of the Indenture. Rather than recognizing Petitioner's uninhibited right to payment upon the bonds maturity, the Circuit Court instead imposed notice and right to cure restrictions that apply to events of default before maturity and not to payment of the bonds in full at maturity. Moreover, the evidence presented

¹² To be sure, at or after bond maturity no notice or opportunity to cure was needed pursuant to Article VI, section thirteen of the Indenture. [R. at 193-94, Indenture Art. VI § 13.]

establishes that Petitioner did notice the HUD violations, and in spite of the passage of one hundred fifty (150) days, KAP Respondent took no action. For these reasons, this Court should reverse and remand this litigation.

C. The Circuit Court Erred in Awarding Only Five Thousand Dollars per Month Payments to Petitioner because the Circuit Court Arbitrarily Calculated this Amount without Evidence.

“In reviewing challenges to the findings and conclusions of the circuit court . . . , a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court’s underlying factual findings are reviewed under a clearly erroneous standard. . . .” Syl. pt. 1, *Robertson v. B.A. Mullican Lumber & Mfg. Co., L.P.* 208 W. Va. 1, 537 S.E.2d 317 (2000). An abuse of discretion occurs when the Circuit Court acts in an arbitrary and irrational manner. See *Wells v. Key Commc’ns. L.L.C.*, 226 W. Va. 547, 551-703 S.E.2d 518, 522 (2000), quoting *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994). “A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Syl. pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Even a cursory review of the evidence demonstrates that the Circuit Court violated both standards of review in awarding Petitioner only Five Thousand Dollars (\$5,000) per month to apply to the indebtedness on the bonds.

At the September 19, 2012, hearing, and after the Circuit Court declined Petitioner’s motion for a preliminary injunction, Petitioner requested that the Circuit Court set an amount for KAP Respondent to pay monthly in order to reduce the indebtedness on the bonds.

[R. at 75, Sept. Hr'g.] When the Circuit Court inquired as to the amount, Petitioner's counsel remarked that the Reorganization Plan previously required KAP Respondent to pay Petitioner either Seven Thousand Five Hundred Dollars (\$7,500.00) a month or Eight Thousand Five Hundred Dollars (\$8,500.00), depending on whether Keyserhouse possessed an occupancy rate of over ninety percent (90%). [R. at 76, Sept. 19, Hr'g]; [R. at 304, Reorganization Plan.] KAP Respondent's counsel felt uninformed and, therefore, declined to make a representation as to what constituted the proper amount. [R. at 75-76, Sept. Hr'g.] With this information, the Circuit Court concluded:

The Court: The last amount, you're saying was 8500?

Mr. Sites: Only if they were at 90 percent occupancy and they are not.

The Court: **I'm just going to pull a number out of the air that seems reasonable**, so that we don't have further argument over it, and I'm going to say \$5,000.00 a month.

[R. at 45, Sept. Hr'g (emphasis added).] In essence, the Circuit Court ordered a payment far below the amount KAP Respondent previously paid under the Reorganization Plan, and which currently fails to pay the interest accumulating on the bonds. If KAP Respondent/RLJ Management pay only \$5,000.00 for the next year, decade, century or millennium, the principal will remain unchanged on the bonds. This is an incongruous result. Moreover, the Circuit Court reached this amount arbitrarily and with absolutely no evidence. For this reason, this Court should reverse and remand the Circuit Court.

Similarly, the Circuit Court erred in failing to award Petitioner money for the five months of missed payments from the Amended Maturity Date through the September hearing.

[R. at 77, Sept. Hr'g.]

Mr. Sites: Beginning October 1st. Is there anything in the Court's decision regarding the five months where there's been no payment?

The Court: What are you looking for there?

Mr. Sites: Again, there's nothing to go by. They [Petitioner] were getting paid \$7500.00 dollars a month. Their last payment—. The Court has now set it at five, which is below that, and they went five months without anything.

The Court: Well, I think, I mean, if this sale goes through, you're going to get everything that's owed to you, and I think, it sounds like this place is going to be cashed strapped for awhile [sic]. So I don't know that trying to get an arrearage or anything like that is going to help you much.

[R. at 78, Sept. Hr'g.] Ultimately, Petitioner believes that KAP Respondent needs to pay Petitioner the full amount on the bonds, as they reached maturity over a year ago. However, in the event that this Court decides to uphold the Circuit Court's injunction, the Circuit Court must formulate proper payments through evidence and not guesswork. Therefore, the Circuit Court's actions require reversal and remand from this Court.

D. The Circuit Court Failed to Provide Sufficient Factual Findings and Conclusions of Law in Violation of Rule 52(a) of the West Virginia Rules of Civil Procedure when it Denied Petitioner's Motion for an Injunction and Enjoined Petitioner from Foreclosing.

Rule 52 of the West Virginia Rules of Civil Procedure requires that circuit courts set forth sufficient findings of fact and conclusions of law when the circuit court grants or denies preliminary injunctions. W. Va. R. Civ. P. 52(a). The primary purpose of Rule 52(a) is to

“adequately enable an appellate court to apply the law to the facts of a case during appellate review.” Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 52(a), 1140 (4th ed. 2012). West Virginia jurisprudence requires this Court to reverse and remand decisions to grant or deny a preliminary injunction when circuit courts fail to articulate sufficient findings of fact and conclusions of law to justify their rulings. *See e.g., Phillips v. Fox*, 193 W. Va. 657, 662, 458 S.E.2d 327, 332 (1995); syl. pt. 4, *Ashland Oil, Inc. v. Kaufman*, 181 W. Va. 728, 384 S.E.2d 173 (1989).

Twice in this litigation, the Circuit Court issued insufficient factual findings and conclusions of law to support its ruling to (1) deny Petitioner’s request for a preliminary injunction and (2) to enjoin Petitioner from seeking the remedy of foreclosure. Either failure independently provides this Court with sufficient reason to remand this action for further proceedings.

1. The Circuit Court’s October Order Failed to Set Forth Sufficient Findings of Fact and Conclusions of Law Necessary to Justify the Circuit Court’s Decision to Deny Petitioner’s Request for a Preliminary Injunction.

In adopting Respondents’ proposal, the Circuit Court implicitly denied Petitioner’s request for an injunction. The Circuit Court supported its ruling with the following factual findings:

- [t]hat the [Circuit] Court has a serious concern regarding whether the [Petitioner] properly complied with all of the requirements set forth in the Indenture of Trust regarding the [Respondent KAP’s] right to cure default and notice with regard thereto.
- [t]hat the [Circuit] Court further has a serious concern as to whether any foreclosure sale as proposed by the [Petitioner] under the subject Indenture of Trust would be found to be valid by the appellate court.

[R. at 382, Oct. Order.]

As argued *supra*, these two findings of fact misapplied the controlling provisions of the Indenture. These findings of fact also are legally deficient. Noticeably, these findings fail to specify which provisions of the Indenture the Circuit Court relied upon in reaching its conclusion. As previously discussed in this brief,¹³ Petitioner contends that because KAP Respondent failed to pay the remaining balance on the bonds at maturity, the Indenture allowed Petitioner to seek its right to payment of the interest and the principal unencumbered. [R. at 193-94, Indenture Art. VI, § 13.] Yet, the Circuit Court's findings never explain why the language found in this section of the Indenture fails to apply. Is it ambiguous? Superseded by other provisions? Invalid? The order remains silent. [R. at 382, Oct. Order.] It is this silence that Petitioner contends violates Rule 52(a) of the Rules of Civil Procedure and inhibits this Court's meaningful review. It is unfair to require Petitioner to respond to a vague order. For this very reason, this Court frequently reverses and remands circuit court orders that fail to sufficiently articulate their findings of fact and conclusions of law.

Moreover, even assuming the Indenture provided KAP Respondent an opportunity to cure even after the bonds reached maturity, KAP Respondent presented absolutely no evidence of its ability to cure the default. In fact, the Circuit Court acknowledged KAP Respondent's financial difficulties in its decision not to award Petitioner any payments for the five-month period following the Amended Maturity date. [R. at 78, Sept. Hr'g.] If the "cash strapped" KAP Respondent lacked the resources to make a few monthly five and seven thousand dollar payments, it certainly lacked the ability to pay Petitioner in full, regardless of any ninety-day period. The Circuit Court's findings fail to acknowledge this.

¹³ See *supra* pages 15-17, 19-21 and accompanying text.

Also, the Circuit Court's finding that Petitioner failed to provide notice and opportunity to cure the HUD default conflicts with the evidence. Petitioner provided notice of default to KAP Respondent for its five years of HUD infractions on April 19, 2012. [R. at 222, Apr. 19, 2012, Lt. from Zilm to Nelson.] By the time the hearing occurred on September 19, 2012, five months, or more than one hundred and fifty days passed, and still KAP Respondent took no action to correct the deficiencies. In fact, the opposite situation occurred. KAP Respondent's mismanagement actually caused HUD to pull or abate its subsidy payments. [R. at 371-78. Sept. 10, 2012, Lt. from HUD to KAP Respondent.] The Circuit Court's order contains none of these facts, or why they fail to apply or change the Circuit Court's analysis of the issues. This lack of specificity allows this Court to reverse and remand pursuant to Rule 52(a) of the West Virginia Rules of Civil Procedure.

For these same reasons, the Circuit Court failed to provide the proper findings of fact in reaching the conclusion that this Court would not uphold a potential foreclosure sale of Keyserhouse. The evidence presented established that Petitioner found willing purchasers and offered to purchase Keyserhouse itself for at least the deficit owed. [R. at 67-73, Sept. Hr'g]; [R. at 193. Indenture, Art. VI, § 11.] Petitioner further found a HUD-approved management company—TM Associates—willing to seamlessly step in and transition management without any disturbance to the tenants. [R. at 58, Sept Hr'g.] Yet, the Circuit Court devoted no time to this important fact, and this error is magnified in light of this State's important public policy of providing its citizens with safe, sanitary and affordable housing. For these reason, this Court should reverse and remand this action to the Circuit Court.

In sum, the Circuit Court's October Order violates Rule 52(a) of the West Virginia Rules of Civil Procedure. In several material respects, it lacks sufficient specificity to

enable a meaningful review from this Court. Particularly troubling is the lack of any discussion on why Article VI, section thirteen, of the Indenture fails to apply. As demonstrated *supra*, this provision supersedes the notice and cure provisions the Circuit Court relied upon and allows Petitioner to move forward with its foreclosure relief. Yet, the October Order never even mentions this provision. Consequently, this failure, along with the other failures previously described, allows this Court to reverse and remand this litigation.

2. Similarly, the Circuit Court's November Order Failed to Set Forth Sufficient Findings of Fact and Conclusions of Law Necessary to Justify the Circuit Court's Decision to Enjoin Petitioner from Foreclosing on KAP Respondent based on its Violation and Default under the Indenture.

Like the October Order, the November Order suffers from similar deficiencies of findings of fact and conclusions of law. In the November Order, the Circuit Court permanently enjoined Petitioner from seeking the remedy of foreclosure and, in doing so, the Circuit Court espoused the following findings of fact:

- By proceeding with a foreclosure sale whereby the Plaintiff's counsel is advertised as agent, Plaintiff, Plaintiff's counsel, and Huntington are clearly in violation of, as well as the purpose and intent of, the Court's October 11, 2012 Order.¹⁴
- The public interest, as well as the interest of the citizens of Keyser living in the Keyserhouse, will be promoted by proceeding by the sale of the Keyserhouse to Buckeye as anticipated and described by Mr. Michael. The Court also notes that the interest of the parties and the interest of justice will be served by said sale and payment of the bonds with sale proceeds.
- [Petitioner] has failed to offer any evidence or proof that it complied with the pre-foreclosure notice and right to cure procedures contained in the Indenture.
- [Petitioner] opted to pursue this matter thorough a declaratory judgment action, rather than through the procedures set forth in the Indenture, and

¹⁴ This finding is discussed in greater detail *infra*.

requested that this Court “award any such other relief that it deems equitable, proper and in the pursuit of justice.”

[R. at 396, Nov. Order.] These findings of fact suffer from the same deficiencies plaguing the previous order. First, the Court’s findings state that the public interest will be promoted by allowing Respondents to negotiate a sale of Keyserhouse with Buckeye [R. at 396-97, Nov. Order.] How? As discussed at length *supra*, the Circuit Court’s ruling destroyed the bonds negotiability. This holding potentially extinguishes numerous outstanding bonds throughout the state. It appears that the public interest needs to promote the public policy of interpreting bonds in favor of negotiability. Yet, the findings remain silent on this issue. Rule 52(a) of the West Virginia Rules of Civil Procedure requires more.

As to whether Petitioner failed to offer evidence or proof that it complied with the notice and right to cure, the evidence suggests otherwise. Again, the Circuit Court failed to explain (1) why Article VI, section thirteen, fails to apply; (2) why the April 19, 2012, notice failed to alert KAP Respondent of its default; (3) why KAP Respondent took no action during the one hundred fifty-day period to correct any of the HUD violations; and (4) how a “cash strapped” KAP Respondent could have cured the payment due at maturity of its Six Hundred Fifty Thousand Dollar-plus debt. [R. at 193-94, Indenture Art. VI § 13]; [R. at 222, Apr. 19, 2012 Lt. from Zilm to Nelson]; [R. at 78, Sept. Hr’g.] This finding is further undercut by the Trustee’s willingness to initiate foreclosure. [R. at 413-16, Oct. 22, 2012, Lt. from Sites to Nelson.] At this point, the Trustee obviously felt Petitioner satisfied the terms of the Indenture. The Trustee furthermore expressed a willingness to act at the September 19, 2012, hearing; its only concern being if the action needed to add another party. Therefore, this finding is deficient under Rule 52(a) of the West Virginia Rules of Civil Procedure.

Finally, the Circuit Court that found its equitable power and the interests of justice promoted its ruling. The findings provide no further analysis on this issue. As previously stated, Petitioner sought the Circuit Court's aid because the Trustee initially failed to act and because the Indenture on file is missing a critical page regarding the parties' obligations. [R. at 121, Complaint ¶¶ 26, 33]; [R. at 71, Sept. Hr'g.]

In sum, the Circuit Court made substantial findings with insufficient analysis, and the same defects that plagued the October Order again appear in the November Order. Therefore, Rule 52(a) of the West Virginia Rules of Civil Procedure allows this Court to reverse and remand this litigation.

E. The Circuit Court Erred in Finding Petitioner in Contempt because Petitioner Failed to Receive Adequate Notice and Opportunity to Respond to the Alleged Violation; the Circuit Court Possessed Insufficient Evidence that Failed to Meet the Evidentiary Burden of Contempt; and the Circuit Court Exceeded Its Authority by Enjoining Petitioner from Foreclosing.

“In a prosecution for contempt of court for an alleged violation of an injunction decree. not committed in the presence of the court, the defendant is entitled to be fully and plainly informed of the character and cause of the accusation.” Syl. pt. 2, *State ex rel. Hoosier Eng'g Co. v. Thornton*, 137 W. Va. 230, 72 S.E.2d 203 (1952). Civil contempt, unlike criminal contempt “do[es] not seek to punish the defendant, but rather to benefit the complainant: the remedial measures applied are either compensatory or coercive; compensatory measures benefit the complainant directly, while coercive measures influence the defendant to act in a way that will ultimately benefit the moving party.” *Floyd v. Watson*, 163 W. Va. 65, 70-71, 254 S.E.2d 687, 691 (1979) quoting Comment, *The Coercive Function of Civil Contempt*, 33 U. Chi. L. Rev. 120, 123-24 (1965). While a court possesses the capacity to sanction conduct if it “offends the

integrity of the judicial system and a party's right to a fair trial. . . . (see *Clark v. Druckman*, 218 W. Va. 427, 435, 624 S.E.2d 864, 872 (2005)), the alleged contemnor "must have been charged with a specific act of contempt, and the affidavit or information must allege the act constituting the offense with as great a certainty as is required in criminal proceedings." Stephen P. Meyer, *Trial Handbook for West Virginia Lawyers*, § 5.3 at 52 (1192) citing *Doctors Mem'l Hosp., Inc. v. Woodruff*, 165 W. Va. 324, 267 S.E.2d 620 (1980). Three errors surrounding the Court's contempt sanction require immediate reversal: (1) insufficient notice of the contempt allegation; (2) the Circuit Court possessed insufficient evidence to find contempt; and (3) the Court imposed a permanent, rather than eliminable sanction.

1. Petitioner Received Inadequate Notice of Its Alleged Contempt.

On October 25, 2012, Petitioner received a notice of a status conference filed by City Respondent for a hearing on October 29, 2012:

PLEASE TAKE NOTICE that a Status Conference is scheduled to occur in the above-referenced matter beginning at 1:30 p.m. on October 29, 2012 or as soon thereafter as counsel may be heard, at the Circuit Court of Mineral County, West Virginia, the Honorable Judge Jordan presiding. You are invited to protect your interests, if any.

[R. at 389, Notice of Status Conference (bold in original).] Prior to receiving this notice, Petitioner never received any pleadings from Respondents or the Circuit Court noticing Petitioner's alleged violation of the Circuit Court's prior order. Because the Notice characterized the hearing as a status conference, Petitioner chose not to object to timeliness of the notice and, instead, prepared only for a status conference. [R. at 389, Notice of Status Conference.]

At the October 29, 2012, hearing, Respondents alleged that Petitioner and the Trustee violated the Circuit Court's September Order in initiating foreclosure proceedings on Keyserhouse. [R. at 92, 103, Oct. Hr'g.] Despite never receiving notice of this alleged violation, Petitioner attempted to explain why it and the Trustee initiated foreclosure proceedings. [R. at 102-03, Oct. Hr'g.] Throughout the procedural history of this litigation, Respondents constantly contended that Petitioner failed to abide by the notice of default and right to cure terms of the Indenture, and that is why Respondents resisted Petitioner's efforts for relief. The other facts were always uncontroverted: the bonds matured and KAP Respondent failed to pay. Yet, when Petitioner went out of its way to comply with conditions that the Circuit Court imposed, conditions not found in the Indenture, Respondents again cried foul.¹⁵ Ultimately, the Circuit Court agreed and found Petitioner's foreclosure efforts as a violation of the Court's Order. [R. at 109, Oct. Hr'g.]; [R. at 396, Nov. Order.] As a consequence, the Circuit Court enjoined Petitioner from seeking any foreclosure relief.

Without question, the notice of status conference failed to adequately provide notification of the contempt charges. The notice merely informed Petitioner of a status conference, not a contempt proceeding. The law requires that the alleged contemnor "must have been charged with a specific act of contempt, and the affidavit or information must allege the act constituting the offense with as great a certainty as is required in criminal proceedings." Meyer, *Trial Handbook for West Virginia Lawyers*, § 5.3 at 52; see also *Hendershot v. Handlan*, 162 W. Va. 175-186, 248 S.E.2d 273, 278-79 (1978) (Miller, J. concurring in part and dissenting in part) ("And, since a prosecution for contempt is in the nature of a prosecution for a crime, such

¹⁵ As stated *supra*, Article VI, section thirteen, superseded any notice and cure rights Respondents' possessed. Further, the Circuit Court's imposition of the cure provision to the promise to pay at or after bond maturity results in the untenable position of rendering the bonds non-negotiable. This underscores the Circuit Court's error.

affidavit or information should state the acts constituting the offense with as great a certainty as is required in criminal proceedings. . . . To support an adjudication of contempt the information or affidavit, upon which the rule is issued, must show on its face facts sufficient to constitute the offense. . . .”). This never occurred. Consequently, this Court should reverse and remand this litigation.

2. The Circuit Court Possessed Insufficient Evidence to Find Petitioner in Contempt.

Notwithstanding the inadequate notice, the record also shows no contempt violation occurred. The Circuit Court’s prior order simply provided that Respondents were “free to immediately proceed to negotiate and enter into a purchase agreement with RLJ Management, Inc. or its parent company, Buckeye Community Hope Foundation, for the purchase and sale of the property of [KAP Respondent].” [R. at 382, Oct. Order.] Nothing in this order prevented Petitioner from seeking relief under the Indenture. Finally, the Trustee’s participation and approval suggests that Petitioner acted appropriately in attempting to foreclose. [R. at 413-17, Oct. 22, 2012, Lt. from Sites to Nelson.]

Contempt carries a high evidentiary burden. Even civil contempt is a quasi-criminal proceeding. Therefore, at the least, the Circuit Court needed clear and convincing evidence and may have needed evidence in excess of reasonable doubt. Stephen P. Meyer, *Trial Handbook for West Virginia Lawyers*, § 5.3. No matter the standard, the evidence presented fails both. As such, Respondents never met the evidentiary burden to find Petitioner in contempt. This Court should reverse and remand this litigation.

3. The Circuit Court Exceeded Its Authority by Enjoining Petitioner from Foreclosing.

Finally, the punishment of enjoining Petitioners from foreclosing exceeds the power of the Circuit Court's contempt sanctions. Civil contempt seeks to correct the conduct of the individual/entity in contempt. *Floyd*, 163 W. Va. at 70-71, 254 S.E.2d at 691. Implicit in this notion is that the party found in contempt needs the opportunity to purge itself of the sanction. Syl. pt. 7, in part, *State v. Cottrill*, 204 W. Va. 77, 511 S.E.2d 488 (1998). Petitioner can never purge itself of the Court's remedy. At the same time, KAP Respondent continues to benefit from its use of the bond funds without paying the bonds. This injustice needs correction. Therefore, this Court should reverse and remand this litigation.

VIII. CONCLUSION

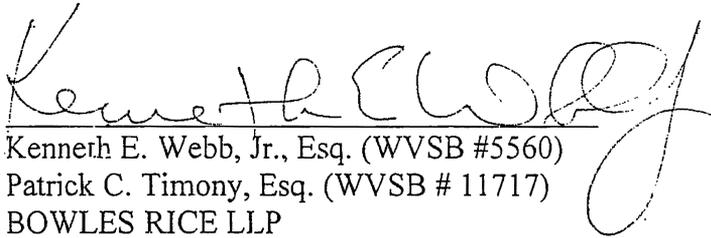
The Circuit Court's rulings present a myriad of problems, any one of which independently requires this Court to reverse and remand this litigation. First and foremost, West Virginia public policy must encourage investment by interpreting and construing bond instruments in favor of negotiability. Additionally, West Virginia public policy must make sure that citizens of low to moderate means have safe, sanitary and affordable housing options. The Circuit Court's orders failed to accomplish or support these policies. Instead, the Circuit Court's rulings has the chilling effect of rendering these bonds, and similarly situated bonds, non-negotiable. Non-negotiable bonds have little value as they now become subject to claims and defenses previously unavailable. While RLJ Management's operation of Keyserhouse may very well improve the tenants' quality of life, the Circuit Court failed to consider Petitioner's option and whether it provided the tenants with a better situation. These errors require reversal.

More still, the Circuit Court misinterpreted the Indenture. Article VI, section thirteen, provides Petitioner an unencumbered, unimpeded right to seek relief once the bonds mature. This happened. The plain and ordinary meaning of this provision shows it supersedes other sections of the Indenture, particularly these sections requiring notice and a right to cure defaults occurring prior to maturity of the bonds. Further, this State's public policy, *supra*, favors this interpretation as it maintains the bonds status as negotiable instruments. The Circuit Court's analysis of the notice and cure provisions wholly ignores that Petitioner noticed the violations and despite receiving over one hundred fifty (150) days to cure, KAP Respondent took no action. These errors require reversal.

Finally, the Circuit Court erred in three more ways. First, the Circuit Court arbitrarily awarded insufficient monthly payments. The Circuit Court's admitted that it "pulled a number out of thin air" to avoid further argument. This number, however, fails to even compensate Petitioner for the monthly interest accumulating on the bonds. Secondly, the Circuit Court's Orders contain insufficient findings of fact and conclusions of law. Lastly, the Circuit Court contempt citation enjoined Petitioner from foreclosing as a consequence of allegedly violating the Circuit Court's Order without sufficient notice or sufficient evidence. For any one or more of these reasons, this Court to reverse and remand this litigation, and this Court should act accordingly.

KEYSER HOUSE BONDS, LLC,

By Counsel,

A handwritten signature in cursive script, appearing to read "Kenneth E. Webb, Jr.", written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1505

(Mineral County Circuit Court, Civil Action No. 12-C-62)

KEYSER HOUSE BONDS, LLC,

Petitioner,

v.

KEYSERHOUSE ASSOCIATES, LTD
PARTNERSHIP, and
THE CITY OF KEYSER,

Respondents.

CERTIFICATE OF SERVICE

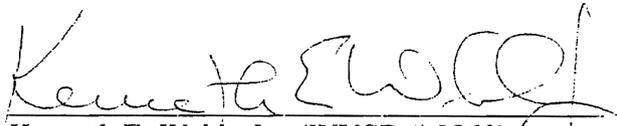
I, Kenneth E. Webb, Jr., do hereby certify that I have caused copies of the hereto attached *Keyser House Bonds, LLC's Petitioner for Appeal* to be served upon the following:

Nelson M. Michael, Esq.
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by first class mail, postage pre-paid on this **14th day of May 2013.**


Kenneth E. Webb, Jr. (WVSB # 5560)