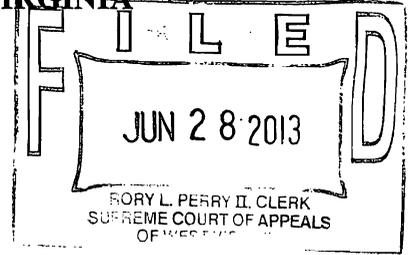


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1505

KEYSER HOUSE BONDS, L.L.C.,
Plaintiff Below, Petitioner
v.



KEYSERHOUSE ASSOCIATES LTD PARTNERSHIP and
CITY OF KEYSER
Defendants Below, Respondents

Hon. Philip B. Jordan, Jr., Judge
Circuit Court of Mineral County
Civil Action No. 12-C-62

BRIEF ON BEHALF OF RESPONDENT
CITY OF KEYSER

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III. INTRODUCTION

The Keyserhouse is a 44 unit subsidized housing facility located in Keyser, West Virginia. The Keyserhouse serves a vital function in the City of Keyser by providing affordable housing for low-income individuals and families. Nearly all of the tenants living in the Keyserhouse are eligible for and receive some amount of rent subsidy from the U.S. Department of Housing and Urban Development through its Housing Assistance Program. The rent subsidy is the largest component of the total monthly income generated by the Keyserhouse. Were it not for the rent-subsidized housing available in the Keyserhouse, many of its tenants would not be able to afford housing in or around the City of Keyser and would be forced to relocate to another subsidized housing facility, or find unsubsidized housing.

Petitioner herein, the holder of certain municipal bonds issued in 1981 by the City of Keyser to finance the construction of the Keyserhouse, filed a Declaratory Judgment Action and Motion for Injunctive Relief in the Circuit Court of Mineral County alleging events of default by Keyserhouse Associates LTD Partnership under the Indenture of Trust encumbering the Keyserhouse, including non-payment of the final installment of principal and interest due and owing on the municipal bonds, and failure by Keyserhouse Associates LTD Partnership to maintain the physical condition of the Keyserhouse.

Ultimately, the Circuit Court entered two orders that, among other things: (1) enjoined petitioner from foreclosing on the Keyserhouse without leave of Court; (2) removed Keyserhouse Associates LTD Partnership from managing the Keyserhouse; (3) directed that the Keyserhouse be sold to an interested purchaser; and (4) ordered Keyserhouse Associates LTD

Partnership to make monthly payments in the amount of \$5,000.00 to petitioner as payment toward principal and interest due and owing on the Bonds.

While not part of the record below, it is important that this Honorable Court is aware that since the Circuit Court issued its November 13, 2013 order, RLJ Management has been running the Keyserhouse and has significantly improved its physical condition. The Keyserhouse is scheduled to be sold to Buckeye Community Development, a company associated with RLJ Management, and will be maintained as a subsidized housing facility. The threat by HUD to end Housing Assistance Payments has considerably diminished. Petitioner is being paid \$8,000.00 per month on the Bonds, an increase from Court-ordered \$5,000.00 monthly payment. Finally, it currently is anticipated that due to the impending sale of the Keyserhouse, petitioner will receive full payment of principal and accrued interest due and owing on the Bonds in the near future.

IV. STATEMENT OF THE CASE

In 1981, the City of Keyser (“City”) entered in to a transaction with Respondent herein, defendant below, Keyserhouse Associates LTD Partnership (“KAP”), to construct the Keyserhouse. As part of the transaction, KAP conveyed to the City two parcels of real property upon which the Keyserhouse was to be constructed. (Schedule--Real Estate, A.R. 152). The City, in turn, issued, pursuant to the Industrial Development and Commercial Development Bond Act, W.Va. Code § 13-2C-1 et seq., two thirty-year bonds (“Bonds”) to finance the construction of the Keyserhouse in the principal amounts of \$1,279,250.00 and \$225,750.00 for a total of \$1,505,000.00. (Indenture, Art. I, § 1(b); A.R. 169). The Bonds originally paid interest at 8%, and Bond proceeds were tax free. (Id).

The Bonds are secured by an Indenture of Trust (“Indenture”), which encumbers the Keyserhouse, and an assignment of rents in favor of a Trustee created by the Indenture. (Indenture, Art. III, § 1; A.R. 175). The Bonds are a special obligation of the City of Keyser and payable only from revenues and receipts derived from the leasing or sale of the Keyserhouse. (Indenture, Art. I, § 1(f); A.R. 169; and W.Va. Code § 13-2C-7 et seq.). The Bonds are not a debt of the City of Keyser, and are not payable from, or are a charge against the general revenue of the City of Keyser. (Id). The Bonds provide that holders or their assigns are scheduled to receive monthly payments of principal and interest on the Bonds from the revenue generated by the Keyserhouse in an amount sufficient to pay the Principal and Interest in full on July 10, 2011. (Indenture, Art. I § 1(c); A.R. 169).

The City, in turn, leased back to KAP (“Lease”) the real property that KAP had conveyed to it. KAP built the Keyserhouse upon the real property. The Lease between the City and KAP

was for an original term of thirty (30) years, the end of which coincided with the date final payment was scheduled to be made on the Bonds. (Lease Agreement, A.R. 132).

In 2001 after falling in arrears on payments to the then bondholders, KAP filed a Chapter 11 petition in United States Bankruptcy Court, District of Maryland (“Bankruptcy Court”). The primary asset of KAP’s Chapter 11 Estate was its leasehold interest in the Keyserhouse. In 2002, the Bankruptcy Court approved KAP’s Chapter 11 Plan. In relevant part, the Chapter 11 Plan: (1) reduced to \$1,060,000.00 the principal amount owed on the Bonds; (2) reduced from eight (8) to five (5) percent the interest rate on the Bonds; (3) scheduled monthly payments to the Bondholders in the amount of \$6,700.00 for a period of 72 months, followed by monthly payments of \$7,500.00 for the next 48 months; and (4) re-scheduled the payoff date of the Bonds from July 2011 until April 2012, when KAP was to make a balloon payment to the Bondholders for the balance of the principal and interest then due and owing on the Bonds. (Second Amended Plan of Reorganization, A.R. 300-08; Order Confirming Plan of Reorganization, A.R. 310-12.). The Bankruptcy Court retained subject matter jurisdiction to enforce the Chapter 11 Plan. (Id.).

Rather than following the foreclosure procedures contained in the Indenture, on May 30, 2012, petitioner herein, and plaintiff below, filed in the Circuit Court of Mineral County, West Virginia (“Circuit Court”), a Complaint for Declaratory Judgment and Motion for Injunctive Relief, and supplemented on May 31, 2012, its Motion for Injunctive Relief. (Motion for Injunctive Relief, A.R. 226-28; Supplement to Motion for Injunctive Relief, A.R. 229-30.). Petitioner named KAP, Huntington National Bank, who then was the Trustee (“Trustee”) under the aforementioned Indenture, and the City of Keyser. In its Complaint, petitioner alleged various acts of default by KAP of its obligations under its Lease and the Indenture, including its bankruptcy. (Complaint, pp. 4-6, A.R. 119-21.). Petitioner also alleged that an event of default

under the Indenture had occurred due to the notices from the Department of Housing and Urban Development (“HUD”) citing the Keyserhouse for deficiencies in its physical condition, which threatened to terminate the HUD contract and housing assistance payments. (Id., pp. 5-6, A.R. 120-21.). Petitioner also alleged failure by KAP to pay the final payment of \$665,789.22. (Id., p. 5, A.R. 120.).

On June 8, 2012 petitioner filed a Notice of Trial, which scheduled trial on the merits for June 25, 2012. (Docket, A.R. 419.). On June 14, 2012 the City, moved to continue trial, arguing, among other things, that the Circuit Court may not have subject matter jurisdiction due to KAP’s bankruptcy. (Id.). The City also timely filed an answer and affirmative defenses. (City of Keyser’s Answer and Motion to Dismiss, A.R. 273-83.). On June 19, 2012, the Circuit Court held a hearing on the City’s Motion.¹ The Circuit Court granted the City’s Motion for a continuance, and, in anticipation of a Motion to Dismiss, entered a briefing schedule for the parties to address the issue of subject matter jurisdiction. (Docket, A.R. 419).

On June 29, 2012 the City moved to dismiss petitioner’s claims for lack of subject matter jurisdiction. (City of Keyser’s Answer and Motion to Dismiss, A.R. 273-87.). On July 2, 2012, KAP appeared by counsel, and also filed a motion to dismiss, which also was noticed for hearing on July 17, 2012. (Motion to Dismiss, A.R. 288-93). The Circuit Court, after the July 17, 2012 hearings, dismissed the matter for lack of subject matter jurisdiction, finding in an Order dated August 21, 2013, that the Bankruptcy Court had reserved for itself subject matter jurisdiction in its Order confirming KAP’s Chapter 11 Plan. (Order Granting Motion to Dismiss, A.R. 355-57.). Petitioner filed an action in the Bankruptcy Court, but it refused to exercise subject matter jurisdiction.

¹ Only counsel for plaintiff and counsel for the City appeared because the other defendants in the case, Huntington National Bank, which was then the Trustee, had not yet been served, and KAP had not yet entered an appearance.

On September 14, 2012, petitioner renewed its Motion for Injunctive relief and requested relief from the Circuit Court's August 21, 2012, Order dismissing the case, and noticed a hearing for September 19, 2012. (Plaintiff's Renewed Motion, A.R. 371-372.). In its renewed Motion, petitioner did not ask for relief different than what was requested in its original Motion for Injunctive Relief. (Motion for Injunctive Relief, A.R. 226-28.). A hearing was held on September 19, 2012 at which all named parties appeared by counsel, including the Trustee, who had resigned as Trustee on August 24, 2012², effective October 30, 2012. After arguments of counsel, the Circuit Court, faced with allegations by petitioner that the physical condition of the Keyserhouse was endangering HUD funding, acted to preserve the Keyserhouse.

In an Order entered on October 11, 2012, the Circuit Court ordered that: (1) it would not, at this time, consider petitioner's Motion; (2) RLJ Management was to replace KAP as manager of the Keyserhouse; (3) the City and KAP were permitted to negotiate and enter into a purchase agreement to sell to Buckeye Community Hope Foundation, parent company of RLJ Management, the Keyserhouse in an amount sufficient to generate enough revenue to pay the outstanding principal and interest due on the Bonds; and (4) KAP was ordered to pay petitioner \$5,000.00 per month as payment toward principal and interest due on the Bonds. (Oct. Order, A.R. 381-83.). The Circuit Court also found that petitioner had failed to name BB&T as a necessary party to the proceedings, due to the Bondholder's collateral assignment of the Bonds to BB&T Bank. (Id.). The Circuit Court also ordered that the parties keep it informed of the situation at the Keyserhouse. (Id.).

On October 23, 2012, Huntington National Bank withdrew its resignation as Trustee, an action that is not provided for in the Indenture. (Withdrawal Letter, A.R. 418). Petitioner, in

² Trustee's resigned pursuant to Article VII of the Indenture. (Oct. Hr'g, A.R. 91, 94, 109.). The Trustee's resignation was tendered on August 24, 2012 and effective October 30, 2012.

conjunction with the Trustee subsequently published Notice of a Foreclosure Sale for the Keyserhouse. (Letter, A.R. 413-17.). KAP and the City, pursuant to Article VII, Section 6, of the Indenture removed the Trustee, and noticed a status conference for October 29, 2012 as requested by the Court. (Notice, A.R. 389-91.).

At the October 29, 2012 status conference, the City and KAP represented to the Circuit Court that RLJ Management had been managing the Keyserhouse and was making great strides to improve its physical condition since the previous hearing in September. (Oct. Hr'g, A.R. 86-89.). The Circuit Court also was informed that a sales contract for the Keyserhouse had been agreed to with Buckeye Community Hope Foundation. (Id, A.R. 86). The Circuit Court also was advised of petitioner's and the now former Trustee's attempt to foreclose on the Keyserhouse. (Id, A.R. 91-92.). After hearing the arguments of the parties, the Circuit Court entered an Order dated November 13, 2012. In its Order, the Circuit Court enjoined petitioner or anyone on his behalf from foreclosing on the Keyserhouse without further order of the Circuit Court. Petitioner also was directed not to interfere or hinder with the purchase agreement for the Keyserhouse; and The Circuit Court also removed Huntington Bank as trustee as of October 26, 2012. (Nov. Order, A.R. 397.).

V. SUMMARY OF ARGUMENT

Petitioner filed a Complaint for Declaratory Judgment and Motion for Injunctive Relief in the Circuit Court of Mineral County upon allegations that Respondent KAP had defaulted on its obligations under the Indenture for the Keyserhouse. Rather than follow the cure provisions in the Indenture and foreclosing on the Keyserhouse pursuant to its provisions, petitioner requested relief from the Circuit Court. The Circuit Court, after providing an opportunity to the parties to present information, documents and arguments of counsel, issued orders dated October 11, 2012,

and November 13, 2012, which, among other things, provided provisional remedies that stabilized the allegedly deteriorating physical conditions at the Keyserhouse, enjoined petitioner from foreclosing on the Keyserhouse without further leave of the Circuit Court, and directed that KAP make monthly payments to petitioner for principal and interest due and accruing on the Bonds.

Despite asking the Circuit Court for relief, some of which was granted, petitioner now argues that the Circuit Court misconstrued the Indenture and erred by finding that petitioner failed to provide KAP with notice of its default and 90 day cure right to cure period, which is clearly stated in the Indenture. To buttress its arguments, petitioner now argues that this action somehow makes the Bonds non-negotiable, in violation of West Virginia public policy, something that was not argued in Circuit Court. Similarly, petitioner now argues that the Circuit Court's injunction against petitioner's foreclosure on the Keyserhouse somehow violates West Virginia's public policy of providing its needy citizens with safe affordable and sanitary housing—when the Circuit Court's Orders actually do the opposite. Finally, petitioner claims the Circuit Court erred by finding petitioner in contempt, despite the fact that not one of the Orders entered in this matter by the Circuit Court does so, nor does the record below support petitioner's argument.

The Circuit Court's October 11, 2012 and November 11, 2012 Orders should be affirmed. Petitioner overlooks the fact that both of the Circuit Court orders left the Circuit Court available to any party litigant for additional redress. The Court, in a proper exercise of its equitable powers crafted provisional remedies that stabilized conditions at the Keyserhouse, led to an alleviation of the alleged dire physical deterioration of the Keyserhouse, and attempted to put petitioner in the same position it was in with respect to receiving monthly income from the

Keyserhouse prior to the alleged default by KAP. Further, the November 13, 2012 Order, dismissing the matter without prejudice, should be upheld for the reason that petitioner failed to name a necessary party, despite the Circuit Court granting petitioner ample opportunity to do so.

VI. STATEMENT REGARDING ORAL ARGUMENT

The City requests oral argument as this case involves questions of public importance. Specifically this case offers this Court with an opportunity to affirm the Circuit Court's exercise in exigent circumstances its equitable power to preserve subsidized public housing for its needy citizens.

VII. ARGUMENT

A. The Circuit Court Properly Exercised its Power to Fashion a Temporary Remedy Subject to Continuing Circuit Court Scrutiny that Preserved the Keyserhouse and Protected the Interests of the Parties.

The Circuit Court's Orders of October 11, 2012, and November 13, 2012, were an appropriate use of the Court's discretion and equitable power to fashion a temporary remedy to protect the interests of the parties. A Court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of the Court's jurisdiction. *Shields v. Romine et al.*, 122 W.Va. 639 (1941). It is generally acknowledged that requests for injunctive relief fall under the Court's equitable powers. *Gribben v. Kirk*, 195 W.Va. 488, 493 (1995). Equitable principles may be implicated in a declaratory judgment action. *United Steelworkers of America v. Tri-State Greyhound Park*, 178 W.Va. 729, 735 (1987) ("A court of equity having jurisdiction of a cause derived from general equitable principals and practice may grant declaratory relief.") *Dolan v. Hardman*, 126 W.Va. 480 (1944)

Petitioner's principal issue has evolved into claims that the Circuit Court erred by enjoining foreclosure on the Keyserhouse—and all of the dire public policy implications as alleged by petitioner. In reality, petitioner's request to permit foreclosure only was a small part of the overall relief requested in Circuit Court. In its Complaint for Declaratory Judgment, ("Complaint"), and Motion for Injunctive Relief, ("Motion") petitioner requested wide-ranging forms of relief, some of which were not included in the Indenture, (*See Indenture*, Art. VI, § 2; A.R. 188) and asked the Circuit Court to:

- (a) declare that the Indenture was in default;
- (b) declare that petitioner is immediately due \$665,789.22 as of April 24, 2012 plus maximum allowable interest;
- (c) grant judgment against the defendants, including the City, in the amount of \$665,789.22
- (d) declare that petitioner has direction over the appropriate remedy, whether by foreclosure, appointment of a receiver, or renegotiation of a new lease between the City of Keyser and a prospective lessee;
- (e) declare that in the event the matter proceeded to a foreclosure sale, that the Circuit Court declare that petitioner be allowed to use the amount of the judgment due them as valuable consideration if petitioner elected to bid at the foreclosure sale;
- (f) declare the Lease in default;
- (g) declare that petitioner has an interest in the Lease, remove KAP as lessee and replace it with petitioner;
- (h) alternatively declare the Lease void;
- (i) grant judgment against KAP for attorney fees associated with prosecution of the matter; and
- (j) for an award of relief that it deems is equitable, proper, and in the pursuit of justice.

Petitioner characterized his Complaint as a request that the Circuit Court **determine the appropriate remedy** to petitioner's alleged breach of the Lease and Indenture. (Motion for Injunctive Relief, ¶ 4, A.R. 227.) (emphasis added).

Petitioner, in its Motion, did not ask the Court to foreclose. (Id., A.R. 226-28.). Rather petitioner moved the Circuit Court for an Order:

- (a) enjoining and restraining KAP from acting in any manner as the Lessee under the lease agreement between KAP and the City;
- (b) enjoining KAP from obtaining possession of any of the assets of the Keyserhouse including personal property located on the premises, rents, receipts, or any other item of value associated with the Keyserhouse Project; and
- (c) that KAP be enjoined from entry or occupation of the Keyserhouse. Petitioner also asked in its prayer for relief that the Court enter an order granting temporary injunction against KAP, appoint a receiver of rents, revenues and income, and appoint petitioner to manage or procure a proper party to manage the Keyserhouse to protect the interest of all involved.

At the time of the September 19, 2012 hearing, the Circuit Court was, or had been presented with allegations and documents that told of the deteriorating physical conditions at the Keyserhouse. (Petition, pp. 18-19.). The Court could take no action until after the Bankruptcy Court had acted because it, not the Circuit Court, had subject matter jurisdiction. Once the Bankruptcy Court had refused to exercise its jurisdiction, the Circuit Court provided a hearing date in response to petitioner's renewed Motion for Injunctive Relief to address the critical issues and allegations raised by petitioner's renewed motion. (Oct. Hr'g, A.R. 85).³

The alleged deteriorating conditions at the Keyserhouse obviously would adversely affect the lives of the individuals and families living in the Keyserhouse. (Oct. Hr'g, A.R. 90-91.). The deteriorating conditions also threatened the continuation of HUD funding. (Id.). The loss of HUD

³ Plaintiff filed a Motion for Relief from Order and Renewed Motion for Injunctive Relief on September 14, 2012. Given the urgency of the issues raised by plaintiff, the Court scheduled a hearing for September 19, 2012. None of the parties objected.

funding would be a major setback for the residents of the Keyserhouse and the City. This threatened the major component of the revenue stream from the Keyserhouse, which was the source of revenue immediately available to pay principal and interest due and owing on the Bonds. (Indenture, Recitals, A.R. 161.). This problem was critical because the Bonds are not a general charge against the City, but only are payable from the proceeds generated by the Keyserhouse. (Indenture, Art. I, § 1(f); A.R. 169.).

Prior to its ruling, the record establishes that the Circuit Court afforded the parties an opportunity to present information in support of their varying interests, particularly as they related to the management and disposition of the Keyserhouse. Counsel for petitioner indicated that petitioner's priority was payment of the bondholders. (Sept. Hr'g, A.R. 64-66.). He was accompanied by Barbara Schmuck and TM Associates, and he indicated they were a HUD-approved management firm that was prepared to take over management of the Keyserhouse immediately. (Id, A.R. 58, 65-66.). He further argued that a foreclosure sale would allow for a comparatively quick sale of the property, and that his clients had two known prospective buyers. (Id, A.R. 64, 69.). Furthermore, he suggested that the bondholders would be prepared to bid their position, and use the Keyserhouse in order to secure financing to allow them to renovate. (Id, A.R. 69-70.). Petitioner did not, however, offer any information to rebut the potential adverse impact of a foreclosure sale on the Keyserhouse, its residents, or the HUD funding stream.

The Circuit Court likewise heard argument from counsel for KAP and the City of Keyser. Counsel for KAP presented information to the Court about RLJ Management ("RLJ") and Buckeye Community Development ("Buckeye"). (Id, A.R. 59-63.). He represented that RLJ was prepared to step in immediately to begin managing the Keyserhouse, and Buckeye was willing to enter into a Purchase Contract. (Id, A.R. 60.). He also represented that HUD was comfortable

with this proposal, and would withhold withdrawal of the contract for housing assistance payments in the event it came to fruition. (Id., A.R. 61.). Finally, he indicated that the entire process would likely reach resolution in six months, and, in the interim, payments would be made to the bondholders. (Id., A.R. 62.). Counsel for the City of Keyser represented that the city would not object to such a proposal. (Id., A.R. 63.).

The Circuit Court declined to grant petitioner's Motion. However, much of the immediate relief the Circuit Court granted had been requested by petitioner. When viewed in context, and given the information that the parties had provided to the Court, the relief the Circuit Court granted at the September 19, 2012 hearing was fair, and protected the interests of the various parties and the citizens then residing in the Keyserhouse. By permitting RLJ Management to take control of the Keyserhouse, the Circuit Court's Order addressed the deteriorating conditions at the Keyserhouse, and granted request to remove KAP from managing the Keyserhouse. By permitting negotiations for the sale of the Keyserhouse to move forward, the Circuit Court provided a mechanism by which the Bonds could be paid in full, possibly in a short period of time, and from revenue generated by the sale of the Keyserhouse. The Circuit Court also provided petitioner, who had received no income from the Keyserhouse since March of 2012, with monthly income from the Keyserhouse in the amount of \$5,000.00 per month. The number was decided upon by the Circuit Court when petitioner could not provide the Court with any accurate or reliable information regarding the monthly amount of income petitioner had been receiving prior to the alleged default.

Critically, the Circuit Court left the matter open, and requested that it be advised as to subsequent developments at the Keyserhouse. This was critical in that it permitted the parties with access to the Circuit Court to report on conditions at the Keyserhouse, or how the Circuit

Court's Order was affecting them. For example, petitioner could have determined how much monthly income it had been receiving KAP, prior to April 2012, and moved the Circuit Court with a request to increase the amount.

The Circuit Court's November 13, 2012, Order also was an appropriate use of the Court's discretion and equitable power to fashion a temporary remedy to protect the interests of the parties. The Order reinforced the Circuit Court's October 13, 2012 Order by ending petitioner's attempted foreclosure, which would have upset the stability that the Circuit Court's order had brought to the situation at the Keyserhouse. Prior to the October 29, 2012 status conference, petitioner, acting through the Trustee, who had initially resigned, but subsequently withdrawn its resignation, had noticed a foreclosure sale for the Keyserhouse. (Letter, A.R. 413-17.). The foreclosure sale was a violation of the Court's October 11 Order. (Oct. Order, A.R. 381-83.).

Equally as important as violating the Circuit Court's earlier Order, a foreclosure sale threatened the stabilizing aspects of the Circuit Court's October 13, 2012 Order and upsetting the various interests protected by the Order, including the interests of petitioner. Because the Circuit Court could not be assured of the continuation of the HUD funding stream after a foreclosure, petitioner was threatening the Keyserhouse's principal source of revenue, their monthly payments, as well as the long term viability of the Keyserhouse as subsidized housing. Further, there was no assurance that a foreclosure sale would have generated enough revenue to pay off all of the principal and interest due and owing on the Bonds at the time of the foreclosure.

While the November 13, 2012 Order ended petitioner's attempted foreclosure, petitioner overlooked the fact that it did not completely extinguish this one particular remedy, because the Circuit Court's Order distinctly states that there would be no foreclosure against the Keyserhouse

without further order of the Circuit Court. (Nov. Order, A.R. 397.). As was the case with the Circuit Court's October 13, 2012 Order, the Circuit Court left the door open for foreclosure, or any other remedy provided for by the Indenture, provided that petitioner acted to cure the alleged defaults through the auspices of the Circuit Court. Obviously this was a realization by the Circuit Court of the parties competing vital interests and the overall complexity of the matter.

B. The Circuit Court Rulings Protect the Interests of the Residents of the Keyserhouse and Support West Virginia's Public Policy Principal of Providing Needy Citizens with Safe and Affordable Housing.

The City has three overlapping concerns in this matter: (1) that its residents living in the Keyserhouse have a safe and affordable place to live; (2) that the Keyserhouse maintains its status as HUD subsidized housing; and (3) that bondholders are paid in full from revenue generated by the Keyserhouse all of the principal and interest owed to them in full at the earliest possible date. The Circuit Court's actions support these goals, and West Virginia's public policy of providing its needy citizens with safe, sanitary and affordable housing. Until petitioner had filed their Complaint, the City was unaware of the issues cited by petitioner regarding the physical condition of the Keyserhouse. Petitioner's letters to KAP were not copied to the City. (Letters, A.R. 405-06, 407.).

The Circuit Court's Orders support West Virginia public policy of providing its needy citizens with safe, affordable housing. KAP, the party that had allegedly permitted the Keyserhouse to fall into disrepair, was ordered to enter into a management contract with RLJ Management for the Keyserhouse. (Oct. Order, A.R. 382.). The Circuit Court ordered that RLJ's management of the Keyserhouse begin on Monday, September 24, 2012. (Id.). RLJ Management took over management of the Keyserhouse and immediately began to undertake improvements to the physical condition of the Keyserhouse. (Oct. Hr'g, A.R. 87.). RLJ put maintenance

personnel into the building to make minor repairs and other improvements. (Id.). Common areas were cleaned up and upgrades, including phone, fax, and internet service were installed in the Keyserhouse office. (Id.). Furniture was ordered, and an on-site manager was hired and placed at the Keyserhouse. It was represented to the Court that the property was under control. (Id., A.R. 88).

With respect to the continuation of HUD funding, the City believes it is vital that the HUD funding for the Keyserhouse remain in place, and that it not be endangered by the failure of the Keyserhouse management to keep the facilities in proper and good repair. The Court was advised at the October 29 hearing that RLJ management had been in touch with Mr. Torreyson at HUD. RLJ Management had advised him that the purchase agreement was in place and of ongoing work to improve the property. (Id.). The Court was also made aware that in the short term, there was very little, if any risk that the HUD contract would be cancelled. (Id.). The Circuit Court Orders stabilized the situation at the Keyserhouse, and did not exacerbate them by action that was neither imprudent nor precipitous. This act furthered West Virginia's public policy of providing its needy citizens with affordable public housing.

C. The Circuit Court's Orders do not Make the Bonds Non-Negotiable and Therefore Do Not Threaten to Render All Outstanding Municipal Bonds Non-Negotiable.

Petitioner's argument that the Circuit Court's November 13, 2012 Order, which enjoined petitioner from foreclosing, imposes a condition on the Bonds which renders them non-negotiable in contravention of West Virginia public policy, is misplaced. West Virginia's Industrial Development and Commercial Development Bond Act, under which the Bonds were issued, requires that the Bonds be negotiable. W.Va. Code § 13-2C-7 et seq. However, the term negotiable is not defined in the Act. W.Va. Code § 13-2C-3. A negotiable bond is defined as a bond that can be transferred from the original holder to another. Blacks Law Dictionary Seventh

Edition, p. 171. The Bonds fit this definition because when they were issued, they were payable to the Bondholder or its registered assigns. (Indenture, A.R. 163).

The Circuit Court's Order enjoining foreclosure does not impact the Bonds' negotiability.

The Court's November 13, 2012 Order states:

The plaintiff is hereby enjoined from foreclosing on the Keyser House, and accordingly, neither the petitioner, nor anyone acting on petitioner's behalf may proceed with a foreclosure against the Keyserhouse *without further order of this Court*.

(Nov. Order, A.R. 397.) (emphasis added).. The injunction is not permanent—nothing would prevent a subsequent purchaser of the Bonds from filing an action to remedy an alleged event of default under the Indenture. Further, petitioner currently earns tax-free interest on the outstanding Bond principal at the rate of twelve percent (12%) per annum. (Indenture, Art. VI, § 3; A.R. 190-91.). Petitioner also currently receives \$8,000.00 per month in income from the Keyserhouse, and the Keyserhouse is scheduled to be sold in an amount to pay off the Principal and interest owed on the Bonds in the near future. These features may make the Bonds an attractive investment to a subsequent purchaser. Because the Circuit Court's Orders is not a permanent injunction, it is analogous to the Indenture and the retention of subject matter jurisdiction over KAP's Chapter 11 Plan by the Bankruptcy Court.

Bondholder's interests are secured by the Indenture, which remains valid. Bondholders purchased the Bonds subject to the Indenture, and benefit from its terms, as it provides them with a security interest on the unpaid Bonds. The Indenture provides for a Trustee, having certain duties and powers under the Indenture, including the right to cure an event of default. The Indenture defines "events of default," including, for relevant purposes, failure to pay principal or interest on the Bonds. (Indenture, Art. VI, § 1(a); A.R. 187.). The Indenture also provides procedures that Bondholders or the Trustee are to follow upon the occurrence of an event of a

default. Upon the occurrence of the event of default, Lessee has a ninety-day right to cure after notification of the occurrence of the event of default. (Indenture, Art. VI, § 4; A.R. 191.). The Indenture provides the Bondholder with a menu of possible remedies that are available to it in the event of a default, and the Indenture does not render the Bonds non-negotiable. A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment or acceleration or (ii) because payment is limited to resort to a particular fund or source. W.Va. Code § 43-3-106(b).

Further, at the time petitioner purchased the Bonds, the Bond principal and payments were subject to revisions approved by Bankruptcy Court. KAP's Chapter 11 Plan: (1) reduced the principal amount owed on the Bonds from \$1,505,000.00 to \$1,060,000.00; (2) reduced the interest rate on the Bonds from eight percent to five percent; (3) scheduled monthly payments to the Bondholders in the amount of \$6,700.00 for a period of 72 months, followed by monthly payments of \$7,500.00 for the next 48 months; and (4) re-scheduled the payoff date of the Bonds from July 2011 until April 2012. (Second Amended Plan of Reorganization, A.R. 300-08; Order Confirming Plan of Reorganization, A.R. 310-12.). Despite these changes to the amount, interest, and final payment date, petitioner purchased the Bonds, thereby establishing their negotiability despite alterations to the key financial aspects of the Bonds by the Bankruptcy Court.

Petitioner's reliance upon *Friedman et al. v. Airlift International Inc.*, 44 A.D.2d 459 (S. Ct. App. Div. 2d Dep't 1974) is misplaced as it is not binding authority in West Virginia, and the issues presented in the case are not on point with the facts of the instant matter. In addition to being a New York case, *Friedman* was decided by an intermediate appellate level court, in New York, and not by the New York Court of Appeals. At issue in *Friedman* were debenture bonds issued by a private company, not municipal bonds. The *Friedman* Court addressed the issue of

the effectiveness of restrictions against a suit contained in an indenture. *Id.* at 460. Relying on New York law, the *Friedman* Court found, that in this instance, the Indenture restrictions were not effective because there was not adequate notice provided for on the face of the Bonds. Petitioner cited no similar rule in West Virginia and, importantly, that what appears on the face of the Bonds is not the issue in this matter.

D. The Circuit Court Properly Interpreted the Indenture by Finding that Petitioner did not Comply with the Notice and Right to Cure Provisions in the Indenture.

The Circuit Court properly interpreted the Indenture by enforcing the Notice and Right to cure provisions. Petitioner's argument that the notice and right to cure provisions do not apply when the Bonds are mature is not supported by the text of the Indenture. The Indenture of Trust secures petitioner's interest in the Keyserhouse, and binds the parties to it to certain agreements and procedures. The Indenture defines certain circumstances as "events of default;" provides the Trustee with procedures to follow upon the occurrence of an event of default, including but not limited to foreclosure; and provides the defaulting party with the right to cure.

While petitioner argues that the Indenture is unambiguous, it was brought to the Circuit Court's attention by counsel for petitioner (Petition, p. 5) there appears to be text missing in Article VI Section 2 of the Indenture, which addresses remedies for an event of default.⁴ (A.R. 188.) It has not been determined how much text is missing or the text's contents. However, it is presumable that the missing text addresses some aspect of remedies for an event of default as it appears to be missing from Article VI, Section 2 of the Indenture which addresses that subject. The Circuit Court correctly applied those provisions that are fully stated in the Indenture as

⁴ The missing text appears to be between the end of page 32 and the beginning of page 33 of the Indenture. The pages of the Indenture are numbered consecutively, as are the public record page numbers. However, the missing text becomes apparent when one reads Indenture Article VI, Section 2, which begins on the bottom of page 32, through the end of first paragraph on page 33.

outlined below. Article VI Section 1 of the Indenture defines events of default including, in relevant part:

- (a) If a default shall be made in the payment of principal 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;

- (f) Failure of Lessee or the Issuer (City) 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 subsection (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 Issuer of by the Trustee specifying such non-performance or breach and requiring the same to be remedied, unless the Trustee specifying such non-performance or breach requiring the same to be remedied, unless the Trustee shall have agreed in writing to an extension of such time prior to its expiration. . . .

It is clear that an alleged failure to make any payment of principal or interest, including an alleged failure to make the final payment of amounts due and owing on the Bonds is an event of default as defined in Article VI Section 1(a). (A.R. 187). KAP's alleged failure to maintain the Keyserhouse would be an event of default under Article VI Section 1(f) of the Indenture, which is appears to be a catch-all provision. (A.R. 187).

Article VI Section 2 of the Indenture provides the Trustee with the remedies that are to be used to address an occurrence of an event of default. (A.R. 188-90). In relevant part, Article VI Section 2(iv) grants to the Trustee the power of sale to foreclose, which also details certain procedures to be followed in the event of foreclosure sale:

- (iv) with or without entry, personally or by attorney, by (x) selling or causing to be sold, all and singular the Project [Keyserhouse], and all the estate, right and interest, claim and demand therein, such sale or sales to be made at public outcry at the main door of the Courthouse of Mineral County at such time or times and upon such terms as may be required by law or as the Trustee may determine after having first given notice of the time, place and terms of sale, together with the description of the property to be sold, by publication once a week for three consecutive weeks prior to said sale in any newspaper then published and of

general circulation in said County, or (y) instituting suit or proceeding for the foreclosure of the Indenture, with or without further, other or incidental relief, such as the appointment of a receiver, the specific enforcement of covenants or obligations or an injunction to prevent violations or threatened violations of any covenant, obligation, or agreement provided by the Indenture;

(A.R. 189). Article VI Section 2(b) grants to the Trustee the power to litigate to cure an event of default:

(b) In the enforcement of any rights and remedies under the Indenture, the Trustee shall be entitled to sue for, enforce payment of, and receive any and all amounts then or during an event of default becoming, and at any time remaining, due from the Issuer or the Lessee under any of the provisions of the Indenture or of the Bonds, ... ;

(Id.). Article VI Section(c) permits the Trustee to appoint to appoint a receiver for the Keyserhouse, which is a remedy available upon the occurrence of an event of default.

Article VI Section 4 of the Indenture unambiguously gives rights to the Lessee in the event of default as follows:

Whenever an event of default shall occur, the Lessee shall have **the right to remedy such default within ninety days** after notification or the occurrence thereof, provided that the Lessee shall pay all expenses incurred in the exercise of rights or remedies hereunder and all expenses of remedying such default. The Trustee covenants and agrees promptly to notify the Issuer and the Lessee of any other default in the Indenture brought to its attention. **The exercise of the remedies set forth in Section 2 of this Article is subject to the right of the Lessee under this Section to remedy a default as in this Section provided and limited.**

(A.R. 191) (emphasis added). This section clearly provides the Lessee with the right to cure any event of default, including a default on the final payment due and owing on the bonds. The Trustee's exercise of the remedies provided for in Article VI Section 2 of the Indenture cannot take place until after 90 days has passed from the date that the Lessee is informed that an event of default has occurred under Article VI Section 1 of the Indenture.

In addition, Article VI Section 20 provides a general notice requirement in which any notice given under the Indenture is to be sent by United States registered or certified mail, postage prepaid to the Issuer, Trustee, and Lessee at addresses provided in the Indenture. (A.R. 195).

Petitioner argues that it provided notice to the Lessee through years of letters advising the Lessee of the deteriorating physical condition of the Keyserhouse. (Petition, p. 4.). Petitioner's argument fails because none of the letters cited by petitioner were sent to the City or the Trustee as required by the notice provisions contained in Article VI Section 20 of the Indenture. Petitioner also argues that it provided notice of KAP's default for failure to make the final payment due and owing on the Bonds. However, this notice also was defective, because it was sent prior to the date the final payment was due, nor was a copy of this Notice sent to the City or the Trustee as required by Article VI Section 20 of the Indenture. At no time during the Circuit Court proceedings did petitioner provide the Court with evidence that it had properly provided the parties to the Indenture with notice of KAP's default.

Alternatively, petitioner argues that because the Bonds had matured, the cure provision contained in Article VI Section 4 is not applicable. Petitioner relies on Article VI Section 13 for support. This argument is misplaced. Article VI Section 13 of the Indenture grants to the Bondholders the right to enforce one of the remedies contained in Article VI Section 2 of the Indenture—the right to file suit—except under certain conditions. Article VI Section 13 does not create a new a new remedy in event of default, nor does it grant petitioner the right to foreclose without judicial intervention. Article VI Section 13 states in full:

Section 13 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 therefore, 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 the 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.

(A.R. 193-94).

Petitioner misconstrues the provision cited to support its argument because it misinterprets the word “enforce.” Petitioner cites the phrase “[n]othing in the Indenture contained shall, *however*, affect or impair the right of the holders of the Bonds to *enforce* the payment of principal and interest on the Bonds at and after the maturity thereof” (Indenture Art. VI, § 13; A.R. 193-94) (emphasis added). The word “however” in the above clearly indicates that the paragraph continues to expound on the preceding paragraph, which limits the petitioner’s right to institute litigation and employs the word “enforce” in that particular context: “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 refuses or fails to act under certain conditions].” *Id.* (emphasis added). When read in its proper context, the paragraph cited by petitioner is clearly intended to allow the holders of the Bonds to pursue a remedy provided for in Article VI Section 2, when the Bonds had matured, without providing the Trustee a ten day first right of refusal. Instead, petitioners tried to foreclose

without complying with the terms of the Indenture, and in violation of the Circuit Court's October 11, 2012 Order.⁵

Because petitioner's right to cure an event of default is found in Article VI Section 2, KAP was required to receive notice and have 90 days to cure the event of default. The Circuit Court was therefore correct when it did not consider petitioner's motion for injunctive relief at the September 19, 2012 hearing. Petitioner failed to provide any evidence that it had properly noticed KAP of its default or had provided to KAP the requisite ninety days to cure.

E. The Circuit Court's November 13, 2012 Order Dismissing the Litigation Without Prejudice was appropriate as Petitioner Failed to Name a Necessary Party

Rule 19(a)(1) of the West Virginia Rules of Civil Procedure requires that a person or entity who is subject to service of process shall be joined as a party if in the person or entity's absence complete relief cannot be accorded among those already parties absence. The Court is required to order the person be made a party, and one who will not join as a plaintiff can be made a defendant. W.Va. R. C. P. 19(a)(1).

At the September 19, 2012 hearing, the Court was made aware petitioner had, in 2009, granted to BB&T a collateral assignment of the Bonds, and heard argument that BB&T was a necessary party to the proceedings. (Sept. Hr'g, A.R. 46-48.). The Circuit Court was provided a copy of the collateral assignment. (Id., A.R. 49.). Counsel for the Trustee, counsel for the City, and counsel for KAP each agreed that BB&T was a necessary party to the proceedings and should be joined. (Id., A.R. 46-48.). After representing to the Court that BB&T did not want to be involved in the litigation, petitioner's counsel acknowledged that "the Court can't proceed if they're a necessary party." (Id., A.R. 50.). Although the issue was not briefed in writing, the

⁵ Pursuant to Article VI, Section 2 and Article VII, Section 1 of the Indenture, the Trustee cannot be compelled by the holders of the Bonds to take action unless and until it is identified against loss, cost, liability, and expense, which Petitioner apparently failed to do. *See, e.g.*, Sept. Hr'g., p. 39, lines 6-11; A.R. 71).

Court, after hearing the comments of counsel and after being presented for its review with a copy of the collateral assignment of the Bonds, found that BB&T Bank was a necessary party and ordered that they should be joined and brought into the action. (Oct. Order, A.R. 382.).

The Court's October 11, 2012 Order states that for this, and other reasons, the Court would not consider petitioner's motion "at this time." (Id.). After the Court ruled, the record below does not show any attempt to bring BB&T into the litigation as a party, as required by the Court's Order. Petitioner was aware of the existence of the collateral assignment of the Bonds to BB&T when suit was filed, but this fact was not included in petitioner's Complaint or in its Motion.

At the time of the October 19, 2012 status conference, BB&T was still not a party litigant. The record shows a letter dated October 4, 2012 wherein BB&T consents and agrees that the Trustee may rely upon the direction of petitioner as to actions to be taken by the Trustee in accordance with provisions of the Indenture. (BB&T Letter, A.R. 412.). However, this letter does not comply with the Court's October 11, 2012 Order directing petitioner to join BB&T Bank as a party litigant, nor was this letter presented to the Court at the October 29, 2012 status conference. Even if the Court had been inclined to grant the Motion and permit a foreclosure sale to proceed, it could not have done so because of the absence of BB&T Bank as a party.

F. The Circuit Court did not Find Petitioner in Contempt.

The record below does not support petitioner's claim that the Circuit Court's November 13, 2012 Order found it, or its counsel, in contempt of Court. The Court's November 13, 2012 Order does not reference contempt. (Nov. Order, A.R. 392-98.). The issue of contempt was not before the Court, nor was the Court asked by any of the parties to find petitioner or its counsel in contempt. (Id.). The October 29 status conference ended as follows:

THE COURT: Okay. I'm going to end this. Mr. Sites, at the end of your Complaint, and I recognize this is maybe standard boiler plate language, but you said: "That the Honorable Court award any such other relief that it deems equitable, proper and in the pursuit of justice." And the Court came up with something at the last hearing that it deemed equitable, proper and in the pursuit of justice, and by taking this action you're trying to sabotage those efforts, clearly in violation of what the Court was trying to accomplish in response to your original action of bringing this before the Court.

So I'm going to find first of all, that Huntington Bank has, by virtue of this Notice dated October 25th has been removed as Trustee. By, under the Indenture agreement, which is proper by the City and the Lessee, and that they are no longer the Trustee in this matter and cannot proceed to any foreclosure. And I guess I'll keep them in as a party in case there are any type of cross-claims or anything. I'm hoping we're not going to get into that, but if there are, I guess we have to keep them in for those purposes. And, you know, I'm finding that the bondholders, everybody's interests will be promoted by proceeding with the sale that's been outlined here by Mr. Michael and which was anticipated by the Court's last ruling.

So, and I'm finding that, you know, that the Trustee, the sale, the foreclosure cannot go forward. Any other particular findings or guides that anybody needs?

(Oct. Hr'g.; A.R. 108-110). The Circuit Court's ruling was based upon a finding that: (1) petitioner failed to comply with the notice and right to cure provisions of the Indenture, which were required for foreclosure; (2) the Trustee was found to be have been properly removed by Respondent and the City of Keyser pursuant to the Indenture; (3) petitioner sought equitable relief and the Circuit Court ruled according to what it found to be most equitable under the circumstances; and (4) petitioner failed to join a necessary party. (Sept. Order, A.R. 382; Nov. Order, A.R. 396-97.). The matter was not dismissed with prejudice, but held that petitioner could not foreclose without further order of this Court (Oct. Order, A.R. 397). Nothing prevented petitioner from following procedures in the Indenture, and re-filing or moving to re-open with BB&T Bank named and served as a necessary party.

G. Petitioners currently are Being Paid \$8,000.00 per Month from Income Generated by The Keyserhouse—Petitioner’s Argument is Moot.

The Circuit Court, on October 13, 2012 ordered KAP to pay bondholders the sum of \$5,000.00 per month. Petitioner argues that the Circuit Court had insufficient facts upon which to order this amount. Petitioner’s argument fails for two reasons; (1) petitioner’s counsel below offered the Court no information as to how much petitioner had been receiving in monthly payments prior to April 2012; and (2) it is moot because since February 2013, petitioner has been receiving \$8,000.00 per month as payment toward the principal and interest due and owing on the bonds.

At the September 29, 2012 hearing, the Court ordered that KAP pay petitioner \$5,000.00 per month toward principal and interest then due and owing on the Bonds. Petitioner’s counsel offered the Circuit Court no concrete information on what the amount of the payment had been prior to April 2012.

THE COURT: Isn’t there a set amount now, what they’re supposed to be paying?

MR. SITES: No, sir.

MR. MICHAEL: I’m totally unfamiliar with that end of it, Your Honor. I would presume that there would have been some regular payment that would have been set, allegedly to retire those bonds on the schedule they were running on. If the Court would like, *I can inquire and find out what that amount was and ...*

MR. SITES: There is no set amount. There was originally some payments to pay them off in thirty years, which would have been July 1, 2011. That began to fall behind in 2000, in 1999. It then went to Bankruptcy Court.

MR. MICHAEL: I think the loan, not to cut Mr. Sites off but I believe, I would ask him to correct me if I’m wrong, but I believe that loan was restructured maybe after the bankruptcy, or as a part of the bankruptcy ...

MR. SITES: No. The Bankruptcy Court - - - the last six years was \$7500.00, \$8500.00 if there was 90 percent occupancy, with a balloon payment April the 24th of this year. That would have paid it off. But those bankruptcy payment schedules are now over. That bankruptcy case is closed. *So there is no set amount*

in any document, because the original lease has expired basically. The Indenture of Trust was scheduled to end. It was never modified. And the Bankruptcy Court is over.

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

MR. SITES: Only if they were at 90 percent occupancy and they are not.

(Sept. Hr'g., A.R. 75-77) (emphasis added). Petitioner's counsel did not provide the Circuit Court with any information as to how much interest was accruing monthly as interest on the unpaid principal of the Bonds, nor did counsel offer any information as to how much petitioner was required to pay BB&T Bank (if anything) due to the collateral assignment of the Bonds.⁶

Having limited information as to how much revenue the Keyserhouse was generating per month, and little information as to how much petitioner had been receiving per month prior to April 2012, the Court picked an amount that it felt at the time was fair and equitable. Petitioner was to receive \$5,000.00 per month, which was considerably more than they had been receiving since April 2012, and the Circuit Court requested that the parties keep it advised as to conditions at the Keyserhouse. This Order allowed petitioner the opportunity to gather information as to how much they owed BB&T due to the collateral assignment of the Bonds, and/or to obtain data on how much interest was accruing on the Bonds, and to present it to the Court on Motion or at any subsequent status conference. Petitioner failed to avail itself of this opportunity.

While not in the record, events subsequent to the Court's November 13 order are worth noting. Since February 2013, petitioner, due to the efforts of the City, KAP, and RLJ Management, have been receiving payments of \$8,000.00 per month from revenue being generated by the Keyserhouse, rather than the \$5,000.00 per month ordered by the Court.. petitioner, through counsel, have indicated that this sum is sufficient to pay the monthly interest

⁶ The Indenture provides for an interest rate of 12% percent when the Bonds are in default. (Indenture, Art. VI, § 2(b), A.R. 171.).

accruing on the Bonds, leaving approximately \$1,000.00 left which is being accounted for as being applied to principal. Currently, the Bonds are earning 12% interest, tax free, the sum of which is being paid in full monthly, and the remaining payment due on the Bonds is being reduced by some \$1,000.00 per month.

VIII. Conclusion

The Circuit Court's October 11, 2012 and November 11, 2012 Orders should be affirmed. Petitioner overlooks the fact that both of the Circuit Court orders left the Circuit Court available to any party litigant for additional redress. The Court, in a proper exercise of its equitable powers crafted provisional remedies that stabilized conditions at the Keyserhouse, led to an alleviation of the alleged dire physical deterioration of the Keyserhouse, and attempted to put petitioner in the same position it was in with respect to receiving monthly income from the Keyserhouse prior to the alleged default by KAP. Further, the November 13, 2013 Order, dismissing the matter without prejudice, should be upheld for the reason that petitioner failed to name a necessary party, despite the Circuit Court granting petitioner ample opportunity to do so.

THE CITY OF KEYSER
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1505

**KEYSER HOUSE BONDS, L.L.C.,
Plaintiff Below, Petitioner**

v.

**KEYSERHOUSE ASSOCIATES LTD PARTNERSHIP and
CITY OF KEYSER
Defendants Below, Respondents**

**Hon. Philip B. Jordan, Jr., Judge
Circuit Court of Mineral County
Civil Action No. 12-C-62**

CERTIFICATE OF SERVICE

I, Arnold J. Janicker, counsel for City of Keyser, certify that a true and correct copy of the foregoing *Brief on Behalf of Respondent City of Keyser* by mailing the same, first class postage prepaid, in an envelope addressed to the following counsel of record on this 28th day of June, 2013:

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