No. 22-ICA-36

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
At Charleston

CHARLES WV MALL, LLC,

Petitioner,

v.

CHARLESTON URBAN RENEWAL AUTHORITY, UMB, N.A., AS SUCCESSOR TRUSTEE FOR THE SERIES 1996C SUBORDINATE CAPITAL APPRECIATION PARKING FACILITY REFUNDING BONDS,

Respondents.

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF

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I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

Cases:

Statutes:

APPELLANT'S BRIEF

III. ASSIGNMENTS OF ERROR

Appellant Charles WV Mall, LLC ("CWVM") asserts that the Circuit Court of Kanawha County ("Circuit Court") erred as follows:

1. The Circuit Court committed reversible error in finding that the Original Order, which was not recorded in the real estate records and was issued in a previously dismissed civil action, binds CWVM by virtue of its purchase of the Developer Parcel from U.S. Bank.

2. The Circuit Court committed reversible error in making numerous findings of fact for which no evidence was submitted or heard by the Court, which was an abuse of the Court's discretion.

3. The Circuit Court committed reversible error in finding that CWVM is contractually obligated under the Construction, Operation and Reciprocal Easement Agreement dated May 10, 1982, and recorded in Book 2002, page 122 with the Kanawha County Clerk (the "Clerk") (the "COREA"), to pay over/remit parking fees collected under tenant leases to the manager of the parking garage.

4. The Circuit Court committed reversible error in finding that CWVM is not a beneficiary of or successor to the Settlement Agreement, which resulted in the dismissal of the underlying Civil Action in 2020.

5. The Circuit Court committed reversible error in not finding that Section 4.2 of the Amended and Restated Joint Development Agreement dated September 8, 2020, and recorded in Book 3077, page 227 (the "Restated JDA"), replaced the prior payment arrangement concerning parking fees collected under tenant leases.

IV. STATEMENT OF THE CASE.

This matter arises from a civil action filed in 2017 -- and dismissed in 2020 -- in the Circuit Court concerning the Charleston Town Center Mall ("Mall"), which civil action the Circuit Court reopened in 2022 in order to require CWVM, the owner since May 10, 2021, of the 6.492-acre Developer Parcel[1] (on which the Mall is located), to pay tenant parking charges that CWVM contends are no longer required to be paid (the "Civil Action").

During the pendency of the Civil Action, receivers were appointed for the Developer Parcel and the parking garages on the Parking Parcel[2] adjacent to the Developer Parcel ("Mall Receiver" and "Garage Receiver"). Thereafter, Respondent Charleston Urban Renewal Authority ("CURA") and other parties filed a Joint Motion for Transfer of Mall Tenant Parking Charges from the Mall Receiver to Garage Receiver ("Joint Motion"), which asked the Circuit Court to order the transfer to the Garage Receiver of tenant parking charges ("Parking Garage Tenant Charges") received by the Mall Receiver pursuant to (1) Attachment No. 4 of a Joint Development Agreement dated April 15, 1982, and recorded in Book 2002, Page 1 (the "Former JDA"); (2) Section 10.9(b) of the COREA; (3) parking charge lease provisions in tenant leases; and (4) the course of performance regarding Parking Garage Tenant Charges from the beginning of the Mall to that date. The Joint Motion stated, in part:

> Attachment #4 to the [Former] JDA calls for the Mall Developer to collect and transfer additional income to the Parking Facility from

[1] The "Developer Parcel" is defined in Background Paragraph 3 and Exhibit A-2 of the COREA and is substantially the same property as the Mall Parcel" defined in the second recital paragraph and Attachment A of the Restated JDA. App. at 763, 912-913 and 666, 679-680. This Brief uses the term Developer Parcel, on which the Mall is located.

[2] The "Parking Parcel" is defined in Recital Paragraph 2 and Attachment A of the Restated JDA and is substantially the same property as the "Authority Parcel" defined in Background Paragraph 8 and Exhibit A Part 7 of the COREA. App. at 666, 681-687 and 764, 918-921. This Brief uses the term Parking Parcel, on which the parking garages adjacent to the Mall are located.

> tenants who pay rent. In particular, the attached pages 4 and 5 of Attachment #4 sets forth this obligation and prescribe the rate to be followed in computing the Parking Garage Tennant Charges to be paid by Tenants.

App. at 348 (Joint Motion ¶1, p. 3). Notably, in its responsive pleading, the Mall Receiver stated that "it appears the only documentation which could create a legal obligation for the Mall Receiver to pay the Parking Revenue to a third-party is Attachment 4…." App. at 374 (Mall Receiver CBRE, Inc's Response to Joint Motion at ¶12, p. 5).

In response to the Joint Motion, the Circuit Court entered an Order on January 14, 2019, which ordered the Mall Receiver to pay over the Parking Garage Tenant Charges to the Garage Receiver ("Original Order"). App. at 494. The Original Order explicitly based its decision on Attachment No. 4 of the Former JDA and Section 10.9(b)(ii) of the COREA. App. at 493 (Original Order at ¶4, p. 6-7). The Circuit Court further found that it "does not find any ambiguity in Attachment No. 4[.]" App. at 494 (Original Order at ¶4, p. 6-7). In the Original Order, the Circuit Court identified the Former JDA as the "cornerstone document" in the relationship between CURA and the Mall Owner. App. at 490 (Original Order at ¶7, p. 3). The Circuit Court also noted in the Original Order noted that Section 10.9(b)(ii) of COREA merely "provides that occupants, such as tenants, may be required to pay parking charges pursuant to their respective leases or other separate agreements." App. at 491 (Original Order at ¶8, p. 4). Both the Former JDA and the COREA were recorded with the Clerk. The Original Order, however, was not recorded. Accordingly, prospective purchasers and creditors did not have record notice of it under W.Va. Code § 40-1-9.

After entry of the Original Order, Respondents CURA and UMB, N.A. as Successor Trustee for the Bondholders for Series 1996C Subordinate Capital Appreciation Parking Facility Refunding Bonds ("UMB - Parking Garage Bonds"), along with several other parties, entered into

a Settlement Term Sheet Agreement dated April 8, 2020 (the "Settlement Agreement")[3], which led to the dismissal of the Civil Action with prejudice on September 25, 2020 ("Dismissal Order"). App. at 506-510 (Dismissal Order) and (App. at 641-665) (Settlement Agreement).

Before entry of the Dismissal Order, however, U.S. Bank National Association, As Trustee, As Successor in Interest to Bank of America, National Association, as Successor by Merger to LaSalle Bank National Association, as Trustee for the Registered Holders of Bear Stearns Commercial Mortgage Securities, Inc., Commercial Mortgage Pass-Through Certificates, Series 2007-Top28 ("U.S. Bank") (which had acquired ownership of the Developer Parcel by foreclosure) and CURA entered into the Restated JDA, which eliminated the Developer Parcel owner's lease of the Parking Parcel, eliminated Attachment No. 4 of the Former JDA altogether, and completely restructured the arrangement between the owner of the Developer Parcel and the owner of the Parking Parcel with respect to their respective payment and maintenance obligations. App. at 666-687. Specifically, Section 1.1 of the Restated JDA states: "For avoidance of any doubt, and without intending to limit any of the foregoing, the parties hereto acknowledge and agree that Attachment 4 to the Prior Agreement is void and of no further effect and is superseded by this Agreement." App. at 668. Section 4.2 of the Restated JDA also requires that an "Annual Additional Payment" be made by the owner of the Developer Parcel to CURA "based on rents received by Mall Owner from tenants for space in the Town Center Parcel, and *in lieu of any other payments due from Mall Owner on account of rents collected from Town Center Parcel Tenants*

[3] The Settlement Agreement referenced a Trust Instruction Proceeding ("TIP") to be filed and finalized before the entry of the Dismissal Order in the Civil Action. App. at 655-656. CWVM notes that, under the terms of the Settlement Agreement, CURA and UMB - Parking Garage Bonds, collectively, received ~$5.3 million in cash, plus the conveyance of the former Macy's Parcel and the Quarrier Street Parcel, as part of their respective consideration for execution of the Settlement Agreement. See App. at 643, 646, 648-649 (Settlement Agreement at 3 (Section 4), at 6 (Section F.5 and F.6), and at 8-9 (Section G.1, G.2, and G.3).

and/or on account of Mall Owner's maintenance obligations associated with the Parking Parcel…." App. at 670 (emphasis added). Per the terms of the Restated JDA, CURA and U.S. Bank, which owned the Developer Parcel immediately prior to CWVM, renegotiated and compromised all payment obligations related to rents collected on the Developer Parcel, regardless of from where those obligations arose, as reflected in Section 4.2 of the Restated JDA.

On May 10, 2021, CWVM purchased the Developer Parcel from U.S. Bank.

Several months later, on July 13, 2021, CURA demanded that CWVM remit Parking Garage Tenant Charges to Boyd Real Estate Resources, LLC (the former Garage Receiver that had been previously discharged by the Agreed Order Terminating Parking Garage Receivership) per the alleged requirement in the Original Order. In reliance upon the Settlement Agreement and the terms of the Restated JDA, CWVM declined.

On March 24, 2022, CURA and UMB - Parking Garage Bonds filed a Motion to Reopen Civil Action and Enforce Prior Orders of the Court ("Motion to Reopen"). App. at 565-619. CWVM responded to and opposed the Motion. App. at 620-706. The Circuit Court held a 31-minute remote video hearing on June 12, 2022, at which the Circuit Court heard no testimony and took no evidence, and the Circuit Court made no finding on the merits of the Motion to Reopen from the bench. Instead, the Circuit Court requested that all parties submit proposed findings of fact and conclusions of law and provided that the parties could proffer any legal arguments that the parties believed needed to be addressed. App. at 730 (June 13 Hearing Transcript 4-20, p. 27).

CWVM and CURA each submitted their respective proposed findings of fact and conclusions of law, and the Circuit Court entered its Order Granting Motion to Reopen Civil Action and Enforce Prior Orders of the Court ("Final Order") on July 8, 2022, which represented, verbatim, the proposed order submitted by CURA. App. at 731-753. In that Final Order, the

Circuit Court recast the Original Order by eliminating its reliance on the "cornerstone" Former JDA, including Attachment No. 4 to the Former JDA. The Final Order states, instead, that CWVM has a continuing obligation to pay over the Parking Garage Tenant Charges "pursuant to the terms of COREA." App. at 736 (Final Order at ¶4, p. 6). The Order fails to recognize, however, that (1) there is no obligation in the COREA to pay any amount for the operation of the parking garages on the Parking Parcel adjacent to the Developer Parcel or to CURA, and (2) the elimination of Attachment No. 4 to the Restated JDA eliminated the foundational basis for the payment required in the Original Order. In addition, the Final Order also fails to recognize that (1) pursuant to the terms of the Settlement Agreement, CURA and UMB Parking Garage Bonds waived any claim against CWVM -- which, as the current owner of the Developer Parcel, is the successor to Charleston Town Center SPE, LLC, the Former Mall Owner under the terms of the Settlement Agreement -- for payment of any Parking Garage Tenant Charges, and (2) pursuant to the Restated JDA, CURA entered into a negotiated agreement that eliminated the very payments it sought to obtain in the Motion to Reopen.

In this appeal, CWVM asks that the Final Order be vacated and that the Circuit Court be directed to enter an appropriate order that CWVM is not required to pay over any Parking Garage Tenant Charges to CURA, Boyd Real Estate Resources, LLC, or any entity appointed or assigned by CURA to receive these payments. In addition, CWVM asks that this Court direct the Circuit Court to order that CURA or its chosen recipient of the Parking Garage Tenant Charges, Boyd Real Estate Resources, LLC, refund all monies that CWVM has paid pursuant to the Final Order, with interest.

SUMMARY OF THE ARGUMENT.

The Circuit Court erred in the Final Order when it found that the Original Order entered in January 2019, which was never recorded in the property records with the Clerk for the Developer Parcel, and which was entered in a civil action that had previously been dismissed, with prejudice, applied to CWVM, a good faith purchaser of the Developer Parcel after the Civil Action was dismissed, and who was not a party to the Civil Action. In addition, the Circuit Court erred in making a number of alleged findings of fact that completely ignored the language of the COREA, the Settlement Agreement, and the Restated JDA, and that relied upon nothing more than "upon information and belief" rather than any evidence presented or received or in the record of the case. Further, the Circuit Court erred in not examining the actual language of the COREA before erroneously concluding that the COREA required CWVM to remit Parking Garage Tenant Charges to Boyd Real Estate Resources, LLC -- the property manager hired by CURA to manage the parking garages -- despite the clear and unambiguous language of COREA not containing that obligation. The Circuit Court also erred by concluding that the Settlement Agreement did not release or waive all claims asserted by CURA and NB against CWVM -- despite never citing to the language in the Settlement Agreement that clearly stated otherwise. Finally, the Circuit Court erred in not finding that Section 4.2 of the Restated JDA explicitly replaced and eliminated any prior obligation to pay the Parking Garage Tenant Charges.

Together, these errors require this Court to reverse the Final Order and remand with instructions that the Circuit Court enter an order that (1) CWVM is not obligated to pay any Parking Garage Tenant Charges from the time that it purchased the Developer Parcel, and (2) CURA or its chosen recipient of the Parking Garage Tenant Charges, Boyd Real Estate Resources, LLC, refund all monies that CWVM has paid pursuant to the Final Order, with interest.

VI. STATEMENT REGARDING ORAL ARGUMENT.

CWVM's appeal presents unique factual and procedural issues that merit oral argument under W. Va. R. App. P. 20.

VII. ARGUMENT.

A. Standard of Review.

To the extent that the Circuit Court erred in its factual findings in the Final Order, this Court should review under a clearly erroneous standard. To the extent that the Circuit Court made erroneous conclusions of law or review of written documents in the Final Order, including the Circuit Court's conclusions concerning the terms of the Original Order, the COREA, the Settlement Agreement, and the Restated JDA, this Court's review is *de novo*. See Phillips v. Fox, 193 W. Va. 657, 661, 458 S.E.2d 327, 331 (1995) ("In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.") See also Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W.Va. 97, 468 S.E.2d 712 (1996)) ("Since our decision in Williams v. Precision Coil, Inc., 194 W.Va. 52, 459 S.E.2d 329 (1995), there can be no doubt that it is for a trial court to determine whether the terms of an integrated agreement are unambiguous and, if so, to construe the contract according to its plain meaning. In this sense, questions about the meaning of contractual provisions are questions of law, and we review a trial court's answers to them de novo.").

B. The Circuit Court committed reversible error in finding that the Original Order, which was not recorded in the real estate records and was issued in a previously dismissed civil action, binds CWVM by virtue of its purchase of the Developer Parcel from U.S. Bank.

In the Final Order, the Circuit Court concluded as a matter of law that the "[Original] Order remains enforceable as to CWV[M] by virtue of its purchase of the Mall from U.S. Bank." App. at 736 (Final Order, Conclusion of Law No. 2). This conclusion is erroneous and constitutes reversible error by the Circuit Court because CWVM was a bona fide purchaser for value of the Developer Parcel who was not on notice of the existence of the Original Order pursuant to W. Va. Code § 40-1-9 because it was not recorded in the Office of the Kanawha County Clerk, either before the Civil Action was dismissed, with prejudice, on September 20, 2020, or before CWVM purchased the Developer Parcel on May 10, 2021. Moreover, the Original Order is not a covenant running with the land and should not be treated as binding subsequent owners of the Developer Parcel in perpetuity.

It is a basic tenet of real estate law that purchasers for value are bound by only those matters of which they have record notice, actual notice, or implied notice. Specifically, the Court in Eagle Gas Co. v. Doran & Assocs., Inc., 182 W. Va. 194, 197-98, 387 S.E.2d 99, 102-03 (1989) (citations omitted), held:

> In general a party without actual notice may rely upon record titles in the office of the clerk of the county commission of the county in which the land is located. W. Va. Code, 40-1-9 [1963].[4] Nonetheless, when a prospective buyer has reasonable grounds to believe that property may have been conveyed in an instrument not of record, he is obliged to use reasonable diligence to determine whether such previous conveyance exists.

[4] W. Va. Code § 40-1-9 states as follows: "Every such contract, every deed conveying any such estate or term, and every deed of gift, or deed of trust or memorandum of deed of trust pursuant to section two, article one, chapter thirty-eight of this code, or mortgage, conveying real estate shall be void, as to creditors, and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract, deed, deed of trust or memorandum of deed of trust or mortgage may be."

The Court has further defined constructive notice as:

> [s]uch notice as is implied or imputed by law, usually on the basis that the information is a part of a public record or file, as in the case of notice of documents which have been recorded in the appropriate registry of deeds or probate. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.

In re Williams, 213 W. Va. 780, 584 S.E.2d 922 (2003) (citing John W. Fisher, II, *The Scope of Title Examination in West Virginia: Can Reasonable Minds Differ?*, 98 W.Va. L.Rev. 449, 500 (1996)). Further, "[i]n short, where a document is not recorded, and even in situations where it is not required to be recorded, the question still arises as to whether its existence defeats the rights of a subsequent bona fide purchaser or assignee without notice." U.S. Exploration, LLC v. Griffin Producing Company, 243 W.Va. 318, 325, 844 S.E.2d 89, 96 (2020) (citing State ex rel. U.S. Bank Nat'l Ass'n v. McGraw, 234 W. Va. 687, 769 S.E.2d 476 (2015)).

Here, there is no evidence that the Original Order was ever recorded in the Office of the Kanawha County Clerk. Accordingly, under the West Virginia law, CWVM did not have record or constructive notice of the existence of the Original Order. Therefore, the only way CWVM might have been bound by the terms of the Original Order would be if it had actual notice of its existence or circumstances were sufficient to put it on inquiry of the existence of the Original Order before it purchased the Developer Parcel. Neither CURA nor UMB proffered any such evidence, and there is simply no evidence of this in the record of this case.

The issue, therefore, is whether "reasonable diligence" would have led CWV to learn of the existence of the Original Order and that such order was intended to bind all future owners of the Developer Parcel. As noted above, CWVM acquired the Developer Parcel by Deed dated May

10, 2021. App. at 716-727. Prior to that date, if CWVM had reviewed the docket available for this Civil Action it would have seen an entry (Docket line 474-475 among 478 total Docket lines) for an order entitled "Order Amending Party Names, Dissolving TRO and Dismissing Civil Action with Prejudice" entered on September 25, 2020; i.e., the Dismissal Order. App. at 506-510. Upon reading the Dismissal Order, CWVM would have learned that the prospective seller of the Developer Parcel, U.S. Bank, was a party to a lawsuit that had been dismissed, with prejudice, and that no order arising from that lawsuit had been recorded in the real estate records of Kanawha County and no *lis pendens* had been filed in the Civil Action. The Dismissal Order did not reference or even mention the Original Order, and there would have been no reason to review the other entry items in the 478-line docket, including the Original Order buried as entry 255-256 in the docket. Based upon the available filings and lack of recorded instruments, therefore, a reasonably diligent party would have concluded that the Civil Action had been resolved without imposing an ongoing encumbrance upon the Developer Parcel.

In addition, even if CWVM was charged with constructive notice of the terms of the Original Order, a separate question exists as to whether the Circuit Court properly imposed a covenant running with land binding upon all subsequent owners of the Developer Parcel. In McIntosh v. Vail, 126 W.Va. 395, 396, 28 S.E.2d 607, 608 (1943), a tract of land was sold, and the seller reserved the oil and gas estate but agreed to "yield and pay to parties of the second part or their assigns, one full sixteenth (1/16) of the oil and gas produced and marketed from said lands." The court held that this covenant was personal because the conveyance did not vest an interest in the oil and gas in place with the parties of the second part. McIntosh, 126 W.Va. at 398, 28 S.E.2d at 610. Accordingly, the obligation to simply collect money from one party and pay it

to another was determined to be a personal covenant. Id. In the present case, the Original Order states:

> In the event the Mall is sold by the Substitute Trustee, the Court ORDERS the new Mall owner to both remit to the Garage Receiver all tenant parking charges collected or received after the Mall sale date, and also to provide a written report to this Court and all counsel of record as to the amounts collected or received and then paid to the Garage Receiver.

App. at 495. The crux of the Original Order is that it obligates one party (the Developer Parcel owner at the time) to pay over money it collects (in the form of Parking Garage Tenant Charges) to another party (the Garage Receiver), if and when it receives that money. Based on the holding in McIntosh, the obligation in the Original Order to collect and pay over funds represents a personal obligation of the then-Developer Parcel owner -- not an obligation that runs with the land.[5] This conclusion is buttressed by the fact that the Circuit Court ended the receivership of Boyd Real Estate Resources, LLC, the Garage Receiver, by Agreed Order on the same day, September 25, 2020, that it entered the Dismissal Order without designating anyone to receive the Parking Garage Tenant Charges in the Original Order.

The Circuit Court's conclusion that its Original Order was binding on CWVW by virtue of CWVM's purchase of the Developer Parcel is erroneous and constitutes reversible error. The Original Order was an interim order entered in a civil action that was later dismissed with prejudice. Between entry of the Original Order on January 14, 2019, and entry of the Dismissal Order on September 25, 2020, CURA and the owner of the Developer Parcel the parties compromised their positions by execution of both the Settlement Agreement and the Restated Joint Development Agreement. No *lis pendens* or order was ever recorded with the Kanawha County

[5] CWVM also notes that it is aware of no decision by the Supreme Court of Appeal of West Virginia in which an unrecorded document was found to impose a covenant running with the land.

Clerk concerning the Civil Action prior to the Civil Action being dismissed with prejudice. CWVM had no actual record notice of the Original Order, nor did circumstances put it on constructive notice of the same. Moreover, the Circuit Court's attempt to impose a covenant running with land on the Developer Parcel via the unrecorded Original Order represents a personal obligation under West Virginia law, and not one that can run with the Developer Parcel because it was not timely recorded.

C. The Circuit Court committed reversible error in making numerous findings of fact for which no evidence was submitted or heard by the Court, which was an abuse of the Court's discretion.

As noted above, the Circuit Court entered its Final Order without holding an evidentiary hearing on CURA's Motion to Reopen. App. at 732 (Final Order at 2 ("The Court heard opening remarks and arguments by counsel for CURA and [CWVM].")).

Nonetheless, in Paragraph 7 of the Final Order, the Circuit Court states:

> In January 2020, all of the remaining parties to the Civil Action, except U.S. Bank, entered into a prolonged mediation of issues relating to the Parking Garages. After many months, the parties entered into a Settlement Agreement in April 2020. U.S. Bank was not a party to the Settlement Agreement ("Settlement Agreement").

App. at 734. Yet, per the terms of the Settlement Agreement, all claims now asserted by CURA against CWVM were released. In the Settlement Agreement, CURA, among others,

> on behalf of itself and its respective owners, officers, directors, shareholders, employees, principals, agents, partners, members, managers, representatives, parent companies, subsidiary companies, affiliates, predecessors, successors, and assigns *hereby releases, discharges and covenants not to sue the Former Mall Owner, Developer* and the Parking Garage Entity, *and their respective* owners, officers, directors, shareholders, employees, principals, agents, partners, members, managers, representatives, parent companies, subsidiary companies, affiliates, predecessors, *successors*, and assigns *(collectively, the "CTC/Garage Entities") from and with respect to any and all* claims, liabilities, *obligations*, damages, causes of action, suits, rights, demands, costs, taxes,

> expenses, losses and interest (including prejudgment interest, post-judgment interest, statutory interest and any other type of interest), *which it has ever had, may now have, or may have in the future with respect to the CTC/Garage Entities***,** or any of them, whether known or unknown, asserted or not asserted, whenever occurring, *including but not limited to claims that arise from or relate in any way whatsoever*, indirectly or directly, *to CTC, the Mall*, the Mall Loan, *the Parking Garages, JDA, the COREA*, Parking Garage Lease Documents, including without limitation the Parking Ground Lease and Sublease, the Guaranty, and any other document of record with the Clerk of the Kanawha County Commission related to CTC, *and all claims that were or could have been asserted in the Civil Action*[.]

App. at 650-651 (Settlement Agreement at 10-11, Section H.1) (emphasis added). UMB - Parking Garage Bonds made a similarly broad release in a subsequent paragraph of the Settlement Agreement. App. at 652 (Settlement Agreement at 12, Section H.3). While U.S. Bank may not have been a "party" to the Settlement Agreement, it was a direct beneficiary of the Settlement Agreement as the successor to Charleston Town Center SPE, LLC, defined as the "Former Mall Owner" in the Settlement Agreement. App. at 734 (Final Order at 4). As CWVM purchased the Developer Parcel from U.S, Bank, it, in turn, is also a beneficiary of the general release in the Settlement Agreement as the successor to U.S. Bank. These releases, however, were ignored by the Circuit Court, which failed to include any language from the Settlement Agreement in the Final Order -- entered verbatim from the draft order submitted by CURA.

In a similar fashion, Paragraph 8 of the Findings of Fact in the Final Order references the Amended JDA, correctly notes that the Amended JDA "did not amend any of the obligations arising out of or from the COREA," but then states -- as a "Finding of Fact" -- that "CWVM incorrectly relies on Section 4.2 of the [Restated] JDA as a release of obligations under the COREA which continue to run with the land." App. at 734. *This statement ignores that the COREA contains no language that obligates CWVM to pay the parking garage payments to CURA or*

anyone else. Notably, the Original Order recognized this fact by identifying Attachment No. 4 of the Former JDA as the "cornerstone document" on which the Circuit Court based its conclusions in the Original Order, which quoted the entirety of Attachment No. 4 and stated that "[t]he plain text of Attachment No. 4, read in its entirety, makes clear that additional income shall be derived from the Mall tenants for the benefits of the parking garages . . . ." App. at 490-491, 494 (Original Order at 3-4, 7). In short, CWVM has never "relie[d] on Section 4.2 of the [Restated] JDA as a release of the obligations under the COREA[,]" and characterizing that as a "Finding of Fact" is not only erroneous and untrue, but it detracts from the simple fact that the COREA does not mandate payment of the Parking Garage Tenant Charges. In short, CWVM relies upon the fact that (1) the "cornerstone document" primarily relied upon by the Circuit Court in its Original Order no longer exists as the Former JDA has been replaced by the Restated JDA, which eliminated Attachment No. 4; and (2) Section 10.9 of the COREA -- no text of which, tellingly, is contained in either the Original Order or the Final Order -- simply does not require CWMV, as the owner of the Mall, to pay any monies to CURA related to the parking garages. The Circuit Court, therefore, committed error in making the finding of fact contained in Paragraph 8 of the Final Order.

Paragraph 10 of the Final Order makes the remarkable "Finding of Fact" that "[u]pon information and belief, CWV[M] knew and was made aware of the obligations relating to the Mall, including, but not limited to, the JDA and COREA as the same run with the land and are of record." App. at 734. In fact, CWVM is legally charged with knowing the obligations contained in the Former JDA (rendered inoperative by the Restated JDA), the COREA, and the Restated JDA as those documents were recorded and available in the property records at the time that CWVM purchased the Developer Parcel in May of 2021. However, as detailed in Section VII.B above, there is absolutely no evidence that CURA, UMB - Parking Garage Bonds, or anyone else recorded

or otherwise filed the Original Order such that the obligations in the Original Order "run with the land" like the Restated JDA and COREA. To overcome this complete lack of evidence, the Circuit Court made a "Finding of Fact"[6] based on "information and belief" that CWVM "knew and was made aware of obligations relating to the Mall . . . ." App. 734. The reason for this language is obvious -- CURA seeks to have the Original Order enforced against all future purchasers of the Developer Parcel in perpetuity despite the Original Order never having been recorded in the land records for the Developer Parcel. At a minimum, making the "Finding of Fact" in Paragraph 10 without having taken any evidence whatsoever represents an abuse of the Circuit Court's discretion.

Paragraph 13 of the Final Order states that CWVM "falsely claims that it is a beneficiary of the releases in the Settlement Agreement by way of successorship to the prior Mall Entities even though it did not purchase the Mall form the prior Mall Entities nor is a corporate successor to the prior Mall Entities." App. at 735. However, as detailed in Section VII.E, below, this alleged "Finding of Fact" simply flies in the face of the clear and unambiguous language of the Settlement Agreement, in which CURA (among others) released "Former Mall Owner, Developer . . . and their respective . . . predecessors, successors, and assigns . . ." from all "claims that arise from or relate in any way whatsoever, indirectly or directly, to the Mall, . . . the Parking Garages, JDA, the COREA, . . . and all claims that were or could have been asserted in the Civil Action[.]" App. at 651. This language is clear and unambiguous, yet the Circuit Court, through a "Finding of Fact" that fails to even mention the language in the Settlement Agreement, inserts the word "corporate" before "successor" and otherwise mischaracterizes and incorrectly describes the impact of the

[6] To be clear, the Final Order was prepared by CURA's counsel, not the Circuit Court, but because the Final Order was signed by the Circuit Court, CWVM must assume the Circuit Court was aware of the remarkable wording in Paragraph 10 of the "Findings of Fact."

Settlement Agreement as something that CWVM "falsely claims." Even if the scope and meaning of the terms of the Settlement Agreement are somehow ambiguous (which they are not), they must be construed in favor of CWVM, which had no role in the preparation of the Settlement Agreement, and against CURA and UMB - Parking Garage Bonds, who did. See State ex rel. Richmond Am. Homes of W. Virginia, Inc. v. Sanders, 228 W. Va. 125, 140, 717 S.E.2d 909, 924 n.61 (2011) (citing Syl. Pt. 3, Auber v. Jellen, 196 W.Va. 168, 469 S.E.2d 104 (1996)). In short, the Circuit Court abused its discretion in making the "Finding of Fact" contained in Paragraph 13 of the Final Order.

Finally, Paragraph 14 of the Final Order is not only misleading, but it falsely characterizes CWVM's position in such a way that CWVM appears disingenuous. The Circuit Court, again in this paragraph, makes a "Finding of Fact" based upon "information and belief" in substitution for hearing or taking any actual evidence, which itself represents an abuse of discretion. Further, CWVM never "state[d] that it is not bound by the COREA" as reflected in Paragraph 14, which CWVM agrees was recorded. Rather, CWVM contends, correctly, that the terms of the COREA do not obligate CWVM to remit parking garage payments to CURA (or its assignee) because (1) there is no provision in the COREA that requires payment of any parking rents from the Developer Parcel owner to CURA or anyone else; (2) CURA settled and released all claims for such payments in the Settlement Agreement; and (3) CURA released all claims for payment of any Parking Garage Tenant Payments in Section 4.2 of the Restated JDA. In addition, Attachment No. 4 of the Former JDA -- the "cornerstone document" to the Circuit Court's analysis in the Original Order -- was eliminated by the Restated JDA, which means the only basis for CURA's claimed right to Parking Garage Tenant Payments is the COREA, which contains no such right or obligation, and which, even if it did, was released in the Settlement Agreement and Restated JDA. All of this reveals that

the "Finding of Fact" in Paragraph 14 is demonstrably not true from the text of the documents and, therefore, constitutes an abuse of the Circuit Court's discretion.

Each of these alleged "Findings of Fact" actually represent CURA's arguments wrapped around legal positions and presented as "facts" for which no party presented evidence at the hearing held before entry of the Final Order. Perhaps no better evidence of this exists than the admission that the "Findings of Fact" in Paragraphs 10 and 14 were based upon "information and belief" and not evidence. For the reasons stated above, therefore, the Final Order should be reversed because the Findings of Fact identified above represent an abuse of the Circuit Court's discretion.

D. The Circuit Court committed reversible error in finding that CWVM is contractually obligated under the COREA to pay over/remit parking fees collected under tenant leases to the manager of the parking garage.

In its Final Order, the Circuit Court found as a matter of law that "[t]he [Restated] JDA did not release any obligations due and owing from CWVM as *the same arise under the COREA*." App. at 736 (emphasis added).[7]

The Circuit Court further ordered as follows:

> CWV[M] is hereby ORDERED to turn over the Parking Garage Tenant Charges it has collected since its acquisition of the Mall in May 2021 to Boyd within ten (10) days of entry of this Order, and to continue such collections and payments monthly for as long as it owns the Mall *pursuant to the terms of the COREA*.
>
> CWV[M] is hereby ORDERED to provide a full and detailed accounting of the Parking Garage Tenant Charges (including receipt dates and names of tenants) along with copies of any tenant leases which provide for the Parking Garage Tenant Charges to Boyd [the

[7] In fact, that is exactly the effect of Section 4.2 of the Restated JDA. The payment of the specified "Annual Additional Payment" amounts in Section 4.2 of the Restated JDA -- $0 for 2020, $48,000 per year for 2021-2025, $68,000 per year for 2026-2028, and $83,000 for 2029 -- are "in lieu of any other payments due from Mall Owner on account of rents collected from Town Center Parcel Tenants and/or on account of Mall Owner's maintenance obligations associated with the Parking Parcel." App. at 670-671.

> manager of the Parking Garage] within twenty (20) days of the entry of this Order.

App. at 736 (emphasis added). These Conclusions of Law are erroneous and constitute reversible error because they impose contractual terms that are new and different from those actually contained in the COREA itself. They also directly contradict the release of the owner of the Developer Parcel owner in Section 4.2 of the Restated JDA. In addition, the Circuit Court erred in relying upon a course of conduct in construing the COREA because it never found any language in the COREA to be ambiguous.

The COREA is a 135-page agreement, within which a single provision addresses tenant parking charges: "(b) No charge of any type shall be made to or collected from any Occupant or other Permittee for parking in the Parking facility, except (i) as provided in Exhibit G [parking regulations and hourly rates] and (ii) Occupants may be required to pay Developer or Operator parking charges pursuant to their respective Leases or Separate Agreements…." App. at 836 (COREA at Section 10.9(b)(ii)).[8]

This language represents the sole provision of the COREA cited by the Circuit Court in both its Original Order and in the Final Order with regard to tenant parking charges.[9] Examining

[8] "Occupants" are defined in Section 1.21 of the COREA as "each Major, Developer and any other Person entitled by Lease to use and occupy Floor Area within the Center or one or more of them." (App at 773); "Developer" was originally the Charleston Town Center Company LTD and is now CWVM by virtue of its purchase of the Developer Parcel. "Operator" is defined in Section 1.23 of the COREA as "the Person responsible for the operation and maintenance of the Parking Facility under the provisions of Article X and the Parking Lease." App. at 773. Pursuant to the fifth recital paragraph in the Restated JDA, "[f]or avoidance of doubt, neither Mall Owner nor any of its successors or assigns bears any responsibility for the obligations set for the in the Parking Facility Ground Lease[,]" and the obligation of the Developer Parcel owner and its assigns for maintenance of the parking facilities on the Parking Parcel was limited in Section 4.2 of the Restated JDA to the limited Annual Additional Payment.

[9] The Final Order also cites Section 16.2 of the COREA for the proposition that a purchaser at a foreclosure sale is deemed to have assumed and be bound to perform the obligations of a party to the COREA. App. at 735. As noted, CWVM does not dispute that it is bound by COREA; however, Section 16.2 does not address parking charges in any manner.

the record from the beginning reveals that the Joint Motion (which led to the Original Order) asked the Circuit Court to issue an order requiring the Mall Receiver to pay over parking funds to the Parking Garage Receiver pursuant to Attachment No. 4 of the Former JDA and Section 10.9(b) of the COREA, but the true focal point of the Joint Motion was Attachment No. 4 of the Former JDA. App. at 348 (Joint Motion at ¶ 1, Page 3). Specifically, the Joint Motion states: "CURA and the Mall Developer are parties to the underlying JDA executed in 1982. *Attachment #4 to the JDA calls for the Mall Developer to collect and transfer additional income to the Parking Facility from tenants who pay rent. In particular, the attached pages 4 and 5 of Attachment #4 sets forth this obligation and prescribe the rate to be followed in computing the Mall Tenant Parking Charges to be paid by tenants*.") App. at 348 (emphasis added). The COREA is secondarily referenced in the Joint Motion for the proposition that it contemplates that tenant parking charges *might* be collected and paid over pursuant to a separate agreement (i.e., the Former JDA). In its response to the Joint Motion, the Mall Receiver specifically stated that "it appears the only documentation which could create a legal obligation for the Mall Receiver to pay the Parking Revenue to a third-party is Attachment 4…." App. at 374 (Mall Receiver CBRE, Inc's Response to Joint Motion at ¶12, p. 5). The Mall Receiver also asserted that Attachment No. 4 of the JDA was ambiguous, and any course of dealing should be tested through discovery. App. at 373-377 (Id. at ¶¶ 9-28, pp. 4-8). The Circuit Court, however, found that "*[t]o the extent there is any ambiguity in Attachment No. 4*, contractual intent can be gleaned from the parties' course of conduct." App. at 493 (Original Order at Finding of Fact ¶ 16, p. 6 (emphasis added)). At no point in the Joint Motion, the Mall Receiver's response, or the Original Order did any party or the Circuit Court assert or find that the COREA itself was ambiguous or that it, by itself, created an affirmative obligation to collect and transfer tenant parking charges.

Under West Virginia law, courts are required to interpret contracts based upon their plain and unambiguous meaning. See Cotiga Development Co. v. United Fuel Gas Co., 147 W.Va. 484, 128 S.E.2d 626, Syl. Pt. 1 (1962): [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." Furthermore, courts are not permitted to re-write or create new agreements between parties: "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract *or to make a new or different contract for them*." See Cotiga, 147 W.Va. at 484, 128 S.E.2d 628, Syl. Pt. 3 (emphasis added).

With respect to the COREA, the language relied upon by the Circuit Court states: "(b) No charge of any type shall be made to or collected from any Occupant or other Permittee for parking in the Parking facility, except (i) as provided in Exhibit G [parking regulations and hourly rates] and (ii) Occupants *may be required* to pay Developer or Operator parking charges pursuant to their respective Leases or Separate Agreements …." App. at 836 (emphasis added). The provision is unambiguously permissive because it uses the term "may." It imposes no affirmative obligation or covenant upon any party. It simply contemplates that "Occupants" of the Mall property "may" be required to pay parking charges to the Developer or the Operator (of the parking facilities) pursuant to their *separate agreement*[10] or lease. There is no separate agreement between the owner of the Developer Parcel and the owner of the Parking Parcel. The COREA does not require any party to collect and pay over any funds for parking, and it does not require any type of accounting between the parties concerning parking.

[10] The "Separate Agreements" are defined in Section 1.34 of the COREA as "the separate written agreement between Developer and each Major setting forth among other matters the agreement between the Developer and each Major with respect to such Major's Allocable Share."

Nonetheless, in its Final Order, the Circuit Court interpreted the language in the COREA to impose affirmative obligations upon CWVM, which it termed conclusions of law:

> CWV[M] is hereby ORDERED to turn over the Parking Garage Tenant Charges it has collected since its acquisition of the Mall in May 2021 to Boyd within ten (10) days of entry of this Order, and to continue such collections and payments monthly for as long as it owns the Mall *pursuant to the terms of the COREA*.
>
> CWV[M] is hereby ORDERED to provide a full and detailed accounting of the Parking Garage Tenant Charges (including receipt dates and names of tenants) along with copies of any tenant leases which provide for the Parking Garage Tenant Charges to Boyd [the manager of the Parking Garage] within twenty (20) days of the entry of this Order.

App. at 736 (emphasis added). The provision of the COREA cited by the Circuit Court as the basis for its conclusions of law does not impose any affirmative covenant upon the Developer (i.e., CWVM) to turn over funds to any other party, and nor does it require any type of accounting by the Developer.[11] Accordingly, the Final Order imposes new contractual terms between the parties (and a non-party), which violates the principles set forth in Cotiga.

Furthermore, the Circuit Court also erred by relying upon course of conduct evidence to impose an affirmative obligation upon CWVM under the terms of the COREA. Under West Virginia law, a court is prohibited from using the parties' course of conduct to change the legal effect of clear and unambiguous contract language:

> The rule relating to practical construction of provisions of a written instrument by the conduct of the parties thereto, like other rules of construction, may be resorted to by a court only when the parties have failed to express their intent in clear and unambiguous language; *and such rule of construction can never be used to change the legal effect of clear and unambiguous language*.

[11] In addition, it is noted that Boyd Real Estate Resources, LLC, is the current manager of the Parking Garage, but it is neither the garage receiver nor a party to either the COREA or the Restated JDA.

See Cotiga, 147 W.Va. at 485, 128 S.E.2d at 628, Syl. Pt. 4 (emphasis added). Critically, the Circuit Court never made a finding that any language in the COREA was ambiguous. However, in its conclusions in the Final Order, the Circuit Court relied on "longstanding custom, practice, and course of performance" in finding that the COREA requires CWVM to pay over/remit parking fees collected under tenant leases to the manager of the parking garage. App. at 733. As noted above, the cited language of the COREA is unambiguously permissive and imposes no affirmative obligation or covenant regarding the payment, collection or paying over of tenant parking charges. Accordingly, the Circuit Court's reliance on prior course of conduct was directly contrary to Cotiga and is reversible error.

For the reasons stated above, the Circuit Court committed reversible error in finding that CWVM is contractually obligated under the COREA to pay over/remit parking charges collected under tenant leases to the manager of the parking garage and to provide an accounting for those charges. The plain and unambiguous terms of the COREA do not impose such an obligation, and it was error for the Circuit Court to read terms into the COREA that are simply not there. Furthermore, the Circuit Court's use of course of conduct to create terms under the COREA was also in error as there was never a finding that the COREA itself is ambiguous.

E. The Circuit Court committed reversible error in finding that CWVM is not a beneficiary of or successor to the Settlement Agreement, which resulted in the dismissal of the Civil Action in 2020.

As noted above, the Circuit Court concluded in the Final Order that CWVM "is not a successor or third-party beneficiary to the Settlement Agreement and, therefore, CWV is not released from any continuing obligations arising from the COREA or [Restated] JDA[12]." App at

[12] The Final Order unfortunately used "JDA" to identify both the Former JDA and the Restated JDA, which is, at best, confusing. The reference to "JDA" in the Conclusions of Law in the Final Order, however, necessarily refers to the Restated JDA as that document "superseded and replaced" the Former

736 (Final Order at 6). This conclusion is not only erroneous, but it ignores both the clear and unambiguous language of the Settlement Agreement and West Virginia law.

It is axiomatic under West Virginia law that "[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." Toppings v. Rainbow Homes, Inc., 200 W. Va. 728, 490 S.E.2d 817, Syl. Pt 2 (W. Va. 1997. Here, CURA, UMB - Parking Garage Bonds, and Charleston Town Center SPE, LLC (identified in the Settlement Agreement as "Former Mall Owner"), were signatories to the Settlement Agreement. App. at 641-642 (Settlement Agreement at Section A.1 and A.6). Section H of the Settlement Agreement contains a number of releases by CURA and UMB - Parking Garage Bonds that extend not only to "Former Mall Owner" but also to the "successors" of the "Former Mall Owner" and define them together as "CTC/Garage Entities." App. at 650-651 (Section H.1 and Section H.2 of the Settlement Agreement). As detailed above, U.S. Bank became the successor to the Former Mall Owner's interests in the Developer Parcel and the Settlement Agreement (identified within the definition of "CTC/Garage Entities") when it foreclosed on the Developer Parcel on January 24, 2019 ("the deed of such foreclosure sale is of record with the Clerk of the Kanawha County Commission at Deed Book 3023, Page 657"). App. at 667 (Restated JDA, recital paragraph on page 2). When U.S. Bank sold the Developer Parcel to CWVM, CWVM met the definition of CTC/Garage Entity, and the benefits accruing to successors of Charleston Town Center SPE, LLC, under the Settlement Agreement accrued to CWVM as a "successor" to the Former Mall Owner -

JDA, including Attachment No. 4. App. at 668 (Restated JDA at Article I, Section 1.1 ("For avoidance of any doubt, . . . the parties hereto acknowledge and agree that Attachment 4 to the Prior Agreement is void and of no further effect and is replaced and superseded by this Agreement.")).

- including as a "successor" to the releases and covenants not to sue contained in Section H of the Settlement Agreement.

That CWVM is a successor to U.S. Bank as it pertains to the Settlement Agreement and to the benefits and obligations in recorded documents related to the Developer Parcel, which in turn was a successor to Charleston Town Center SPE, LLC, as "Former Mall Owner", cannot reasonably be contested, and in fact, is the foundation for CURA's argument that CWVM is bound by the Final Order despite CWVM not being a party to the Civil Action in which the Final Order was entered. CURA cannot reasonably claim that CWVM is the successor to Charleston Town Center SPE, LLC, for purposes of the obligations under the Final Order, but at the same time deny that status for purposes of the releases in the Settlement Agreement. More importantly, however, this Court need only review and apply the clear and unambiguous terms of Section H of the Settlement Agreement, which releases all claims that CURA and UMB - Parking Garage Bonds Respondents had, has, or ever will have against CWVM as a "successor" to "Former Mall Owner" for all "claims that arise from or relate in any way whatsoever, indirectly or directly, to the Mall, . . . the Parking Garages, JDA, the COREA, . . . and all claims that were or could have been asserted in the Civil Action[.]" App at 650-651.

Notably, the Final Order not only fails to conduct any analysis of the Settlement Agreement's language, it attempted to reframe the meaning of Section H by stating that CWVM "falsely claims that it is a beneficiary of the releases in the Settlement Agreement by way of successorship to the proper Mall Entities even though it did not purchase the Mall from the prior Mall Entities nor is it a corporate successor to the prior Mall Entities." App. at 735 (Final Order at 5). In doing so, the Circuit Court (1) injected the word "corporate" before "successor" in Section H, thereby fundamentally changing the scope and meaning of those provisions, and (2) created an

ambiguity in the meaning of those contractual provisions where none existed, both of which violate fundamental principles of West Virginia law. First, a court should not rewrite the terms of a written contract by injecting or otherwise changing the terms used in the contract. See Motorists Mut. Ins. Co. v. Zukoff, 244 W. Va. 33, 37, 851 S.E.2d 112, 116 (2020) ("We will not rewrite the terms of the policy; instead, we enforce it as written."). Second, "[a] contract is ambiguous when it is reasonably susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction." Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329, 342 n.23 (W. Va. 1995). Here, the parties do not contest the existence and validity of the Settlement Agreement. Instead, they disagree about the meaning of certain provisions within Section H of the Settlement Agreement. Finally, to the extent any ambiguity exists (and CWVM does not believe it does), this Court must construe any ambiguous language against CURA and UMB - Parking Garage Bonds, who were drafters and signatories to the Settlement Agreement, as opposed to CWVM, which was not. See Harrell v. Cain, 242 W. Va. 194, 205, 832 S.E.2d 120, 131 (2019) ("an axiom of contract law" is that "an ambiguous document is always construed against the drafter.").

Here, without any analysis of the Settlement Agreement, the Circuit Court made a legal conclusion masquerading as a "Finding of Fact" that CWVM was not a "successor" to the "Former Mall Owner" under the Settlement Agreement because "it did not purchase the Mall from the prior Mall Entities[,]" which is a term not defined in either the Original Order or the Final Order. App. at 735 (Final Order at 5). Section H, however, does not limit the release to the "immediate" successor of the Former Mall Owner, nor does it limit the release to the "successor" that directly purchased the Developer Parcel from the Former Mall Owner. Instead, the release language in Section H extends to the "successors" of Former Mall Owner, and that includes CWVM. Likewise,

Section H does not limit the release to the "corporate successor" of the Former Mall Owner, and the term "corporate successor" is not even found within the Settlement Agreement. Again, the language refers simply to the "successors" of the Former Mall Owner, which includes CWVM.

Finally, it must be noted that the Final Order referenced the Circuit Court's Finding of Fact in the Original Order that "there is a clear history" of Developer Parcel tenants paying parking charges that are remitted to CURA (or its assignee). App. at 733 (Final Order at 3) and 493 (Original Order at 6).[13] As detailed above, however, this finding is of no legal significance here. Specifically, this "course of conduct" cannot possibly be used to interpret Section H of the Settlement Agreement as the Settlement Agreement was entered *after* the Original Order. Likewise, the Circuit Court specifically found in the Original Order that the language in Section 10.9 of the COREA was clear and unambiguous, thus eliminating the need to reference or rely upon parole evidence. App. at 493-494. Finally, to the extent that this course of conduct was used to support the meaning of Section 10.9 of the COREA, such evidence was rendered not relevant by the Settlement Agreement and subsequent purchase of the Developer Parcel by CWVM.

In short, the Circuit Court abused its discretion in making Findings of Fact concerning the Settlement Agreement and in concluding that CWVM was not a successor to the Former Mall Owner under that agreement, and therefore not a beneficiary of the release provision in Section H of the Settlement Agreement.

F. The Circuit Court committed reversible error in not finding that Section 4.2 of the Restated JDA replaced the prior payment arrangement concerning parking fees collected under tenant leases.

[13] The Final Order references to "Paragraph 6, Findings of Fact, of the Order." This language, however, is actually found in Paragraphs 17and 18 of the Findings of Fact in the Original Order. App. at 493 (Original Order at 6).

In the Final Order, the Circuit Court found as a matter of law that "[t]*he JDA did not release any obligations due and owing from CWV* as the same arise under the COREA." App. 736 (emphasis added). The Circuit Court erred in reaching this conclusion, however, because it ignores the plain and unambiguous language of the Restated JDA, which expressly voided and superseded the provisions in the Former JDA (that obligated the owner of the Developer Parcel to remit Parking Garage Tenant Charges) or any other document and replaced that obligation with a flat payment that is "in lieu of any other payments due from Mall Owner on account of rents collected from Town Center Parcel Tenants and/or on account of Mall Owner's maintenance obligations associated with the Parking Parcel…." App. at 670.

West Virginia law requires that contracts with plain and unambiguous language must be construed according to their "plain and natural meaning". See Fraternal Order of Police, Lodge No. 69 v. City of Fairmont, 196 W.Va. 97, 101, 468 S.E.2d 712, 716 (1996) ("One such canon teaches that contracts containing unambiguous language must be construed according to their plain and natural meaning." (Internal citations omitted)). Moreover, "[c]ontract language usually is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." Fraternal Order, 196 W. Va. at 101, 468 S.E.2d at 716.

Here, the Former JDA contained the following language in Attachment No. 4:

> In addition to the receipts derived from the Operation of the Parking Facility, the Developer shall provide additional income for the Parking Facility from the Mall Tenants in the Retail Center in the amount of a minimum of contribution of sixty cents per square foot of gross leasable area of the Mall Space escalated every five years by an additional ten cents per square foot, all payments for parking received by the Developer from Mall Tenants in excess of said sixty cents per square foot of gross leasable area of Mall Space and payments, if any, for parking received by the Developer from Department Stores in the Retail Center.

App. at 415-416. This provision formed the basis for the Joint Motion and was cited by the Circuit Court in the Original Order as a "cornerstone document." Moreover, the Circuit Court concluded in the Original Order that "[t]he plain text of Attachment No. 4, read in its entirety makes clear that additional income shall be derived from the Mall Tenants for the benefit of the Parking Garages…." App. at 494.

Critical to this appeal is that, following the Settlement Agreement and immediately before entry of the Dismissal Order, U.S. Bank and CURA entered into the Restated JDA, which eliminated Attachment No. 4 of the Former JDA altogether and eliminated any payment to CURA or any subsequent owner of the Parking Parcel based on the rents received from the Developer Parcel. As explicitly stated in Section 1.1 of the Restated JDA, "[f]or avoidance of any doubt, and without intending to limit any of the foregoing, the parties hereto acknowledge and agree that *Attachment 4 to the Prior Agreement is void and of no further effect and is superseded by this Agreement*." App. at 668 (emphasis added).

Likewise, Section 4.2 of the Restated JDA explicitly states that the fixed "Annual Additional Payment" from the owner of the Developer Parcel to CURA "based on rents received by Mall Owner from tenants for space in the Town Center Parcel[.]" Critically, this "Annual Additional Payment" is "*in lieu of any other payments due from Mall Owner on account of rents collected from Town Center Parcel Tenants and/or on account of Mall Owner's maintenance obligations associated with the Parking Parcel*…." App. at 670 (emphasis added).

In addition to ignoring the impact of the Restated JDA (and Settlement Agreement) on the Original Order, the Circuit Court also ignored other developments in the Civil Action related to the obligations to pay Parking Garage Tenant Charges. For example, the Circuit Court terminated the parking garage receivership on September 17, 2020, and the Garage Receiver filed its last

report on November 9, 2020. App. at 502 (Agreed Order Terminating Parking Garage Receivership, ¶11) and App. 511-564 (Notice of Parking Garage Receiver's Final Report). Neither of those documents modified the terms of the Original Order that required the Parking Garage Tenant Charges to be paid to the Garage Receiver. App. at 494-495 (Original Order at 7-8). As a result, the Circuit Court's findings that (1) "the [Original] Order was never amended, revoked, terminated or appealed," and (2) "subsequent to entry of the [Original] Order and dismissal of the Civil Action, U.S. Bank dutifully turned over and accounted for the Parking Garage Tenant charges to the Parking Garage Receiver during the Parking Garage Receivership for the benefit of the parking garages," ignore that the Civil Court terminated the Garage Receiver -- and hence there was no entity to pay the Parking Garage Tenant Charges to under the Original Order after September 17, 2020. (App. at 730-731) (Final Order at 3-4, ¶ 6). These findings also ignore that, around the same time that the Circuit Court terminated the Parking Receiver in an Order dated September 25, 2020, CURA entered into the Restated JDA (August 26, 2020), the Settlement Agreement (September 17, 2020, and the Dismissal Order (September 25, 2020). Given all of these events, there was simply nothing left to amend, revoke, terminate or appeal at that point.

The clear and unambiguous effect of these provisions is: 1) to void and make Attachment No. 4 of no further effect; 2) to compromise the payment arrangements under the Original Order; and 3) to require an annual lump sum payment from the Developer Parcel owner to CURA in lieu of any other "payments . . . on account of rents collected from [Developer Parcel] tenants and/or on account of [] maintenance obligations" for the Parking Garages. Accordingly, the Circuit Court's conclusion that "[t]he JDA did not release any obligations due and owing from CWV as the same arise under the COREA" is directly contrary to plain and unambiguous language of the Restated JDA and constitutes reversible error.

VIII. CONCLUSION

As detailed above, the Circuit Court erred in numerous ways when it reopened the Civil Action that had been dismissed, with prejudice, for almost 2 years in order to subject a non-party purchaser of the Developer Parcel to the terms of an order entered in the Civil Action over 3 years earlier. To reach that result, the Circuit Court made purported "Findings of Fact" that were either unsupported by the record, relied upon "information and belief" instead of evidence, or were simply untrue. It also failed to consider and apply the clear and unambiguous terms of the COREA (which does not require payment of the Parking Garage Tenant Charges), the Restated JDA (which eliminated the Parking Garage Tenant Charges), and the Settlement Agreement (which released any claims related to the Parking Garage Tenant Charges) -- all of which predated entry of the Dismissal Order (which dismissed the Civil Action with prejudice) and the Final Order.

Together, these errors require this Court to reverse the Final Order and remand with instructions that the Circuit Court enter an order that (1) CWVM is not obligated to pay any Parking Garage Tenant Charges from the time that it purchased the Developer Parcel, and (2) CURA or its chosen recipient of the Parking Garage Tenant Charges, Boyd Real Estate Resources, LLC, refund all monies that CWVM has paid pursuant to the Final Order, with interest.

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By Counsel

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No. 22-ICA-36

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
At Charleston

CHARLES WV MALL, LLC,

Petitioner,

v. **Case No. 22-ICA-36**

CHARLESTON URBAN RENEWAL AUTHORITY, UMB, N.A., AS SUCCESSOR TRUSTEE FOR THE SERIES 1996C SUBORDINATE CAPITAL APPRECIATION PARKING FACILITY REFUNDING BONDS,

Respondents.

From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 17-C-1527

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2022, I caused service of the foregoing **APPELLANT'S BRIEF** to be made upon all counsel of record via electronic delivery through File & Serve Xpress as follows:

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