No. 22-ICA-36

ICA EFiled: Jan 17 2023
05:28PM EST
Transaction ID 68910417

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 REPLY BRIEF

Submitted by:

Mychal S. Schulz (WVSB #8174)
Charles F. Saffer (WVSB #7789)
BABST, CALLAND CLEMENTS & ZOMNIR, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301
Telephone: 681-205-8888
Facsimile: 681-205-8814
mschulz@babstcalland.com
csaffer@babstcalland.com

APPELLANT'S REPLY BRIEF

Appellant Charles WV Mall, LLC ("CWVM") replies to the Brief of Appellee Charleston Urban Renewal Authority ("CURA Brief") and the Brief of Appellee UMB Bank, N.A. ("UMB Brief") (together, "Response Briefs").[1]

The Response Briefs, the Appellees engage in a shell game designed to distract attention from the specific legal and factual arguments raised by CWVM. This shell game includes:

- Changing the nomenclature of the operative orders, thereby confusing the nature of these orders. For example, CWVM's initial Brief identified the Circuit Court's Order entered on January 14, 2019, as the "Original Order" to differentiate it from the Order Granting Motion to Reopen Civil Action and Enforce Prior Orders of the Court entered by the Circuit Court on July 8, 2022, defined as the "Final Order" from which CWVM takes this appeal. CURA, however, identifies the "Original Order" as the "Final Order" in the CURA Brief, thereby confusing the nature and import of these orders. See CURA Brief at 2 ("The Circuit Court originally held, in an Order dated January 14, 2019 ('Final Order') . . . ."). In fact, the Original Order was filed over 20 months before the Circuit Court entered an order that dismissed the Civil Action. See App. at 496 and 505.

- Proffering Section 10.9(d)(iii) and Section 10.10(b) of the Construction, Operation and Reciprocal Easement Agreement dated May 10, 1982, and recorded in Book 2002, page 122 with the Kanawha County Clerk (the "COREA") as a basis for the Circuit Court's decision in the Final Order when those COREA sections were not discussed in the hearing and were not referenced, analyzed, or relied upon by the Circuit Court in its Final Order.[2] See CURA Brief at 12-13.

- Referencing Attachment 2 of the Joint Development Agreement dated April 15, 1982, and recorded in Book 2002, Page 1 (the "Former JDA") as a basis for the Final Order when Attachment 2 of the Former JDA was not discussed in the June 13, 2022, hearing and was never referenced, analyzed, or relied upon by the Circuit Court in its Final Order, and which, more importantly, is no longer in effect. See CURA Brief at 16.

- Relying upon a "Parking Lease" that is not referenced in the Final Order, and, more importantly, is no longer if effect. See CURA Brief at 12-13.

[1] CWVM notes that the CURA Brief and UMB Brief largely mirror each other, and significant swaths of each are -- literally -- virtually or actually identical.

[2] This Reply Brief will use capitalized terms as defined in its initial Brief.

- Proffering the "purposes" behind various written documents in order to "explain" their meaning without reference to either any evidence in the record or the actual language of the written documents to support the assertion. See CURA Brief at 3 ("for the purpose of obtaining a $100 million loan in which U.S. Bank was the trustee"); 10 ("The Restated JDA was entered into between U.S. Bank and CURA for the purpose of clarifying the continuing obligations . . . ."); and 12 ("The purpose of those charges is outlined in and authorized by the COREA in the context of the Developer obligation to 'perform or cause the performance of the Parking Lease.'"). In fact, CURA's argument about the "purpose" of the Amended and Restated Joint Development Agreement dated September 8, 2020, and recorded in Book 3077, page 227 (the "Restated JDA"), is contrary to the express, clear, and unambiguous language in the Restated JDA, which states that the Former JDA "is no longer effective for its purpose" and was "superseded and replaced" by the Restated JDA. Restated JDA at 2 and 3 (App. at 667-668).

- Proffering "facts" not cited to in the record. For example, UMB – Parking Garage Bonds alleges that "In 1986, the Charleston Building Commission ('CBC') issued the Parking Facility Bonds to fund the construction of three parking structures to serve Charleston Town Center. In 1996, this debt was refinanced by the issuance of approximately $20 million in new bonds. Respondent UMB Bank, N.A. ('UMB') is the current Bond Trustee under an Indenture of Trust dated as of November 1, 1996 ('the Indenture'). There are still over $10 million in Parking Facility Binds in default and outstanding. The revenue from the Parking Garages, including Tenant Parking Charges, are supposed to be applied to maintain and repair the Parking Garages and to pay off the associated bond indebtedness, but CWVM has refused to turn over these Tenant Parking Charges." See UMB Brief at 2. W. Va. R. App. Pro. 10(c)(7) requires in pertinent part that an appellate brief "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Intermediate Court or the Supreme Court may disregard errors that are not adequately supported by specific references to the record on appeal." CWVM objects to all statements of "fact" by UMB – Parking Garage Bonds and CURA in their briefs that are not supported by specific citation and would request the court give them no consideration.

In short, the Response Briefs seek to distract this Court's attention from the actual language of the Original Order, the Final Order, the COREA, the Restated JDA, and the Settlement Term Sheet Agreement dated April 8, 2020 (the "Settlement Agreement"), all of which form the bases for CWVM's appeal in this case. The reason is simple. The clear and unambiguous terms of these written documents do not support the arguments of either the Charleston Urban Renewal Authority ("CURA") or UMB, N.A. as Successor Trustee for the Bondholders for Series 1996C Subordinate

Capital Appreciation Parking Facility Refunding Bonds ("UMB - Parking Garage Bonds"), just like they do not support the decision of the Circuit Court.

CWVM urges this Court to ignore the shell game reflected in the Response Briefs and focus, instead, on the language in the operative (not terminated or superseded) documents, which dictate that the Final Order be reversed.

A. The "History of Charleston Town Center" and "History of CWVM" is not relevant to the issues in CWVM's appeal.

The Response Briefs proffer extraneous "histories" of the Charleston Town Center and of CWVM that go beyond the documents and agreements relevant to the issues in this appeal. For example, the Response Briefs reference a "Parking Lease" throughout. UMB - Parking Garage Bonds even asserts that the "COREA and the Parking Lease require CWVM . . . to pay parking revenue to and for the benefit of the Bond Trustee."[3] UMB Brief at 2. See also UMB Brief at 9 ("the COREA and Parking Lease required those charges to be remitted and applied to the Developer's broader obligation to 'perform or cause the performance of the Parking Lease.'"); 10 ("The Parking Lease obligated the Developer or its parking entity to make payments equal to the total amount due on the Garage Bond indebtedness."); 11 (throughout); 13-14 ("the Developer's obligation to devote all parking-related income to the operation and maintenance of the Parking Garages arises from the COREA and the Parking Lease" and "The Parking Lease incorporated certain obligations set out in the COREA by requiring the Parking Entity to make payments equal to the bond service on the Parking Garage Bonds."). Yet, the Parking Lease no longer exists, which UMB - Parking Garage Bonds eventually admits in the last footnote on the next to last page

[3] UMB Bank holds bonds related to the Parking Garages. To the extent that the UMB Bank believes that the repayment obligations on those bonds are not being met, it could seek recourse by foreclosing on the collateral for those bonds, i.e., the Parking Garages. Notably, it has not.

of its Response. See UMB - Parking Garage Bonds Response at 14, n. 17[4] ("[t]he parties to the Settlement Agreement agreed to release and terminate the Parking Lease"); Restated JDA at 1 ("For avoidance of doubt, neither Mall Owner nor any of its successors [i.e., CWVM] or assigns bears any responsibility for the obligations set forth in the Parking Facility Ground Lease.") (App. at 668). In fact, the Parking Lease terminated in 2020 *before* CWVM acquired its interest the Town Center Mall in May 2021, and CWVM never was a party to the Parking Lease. For these reasons, the Court should ignore any argument premised or bolstered, even in part, upon the Parking Lease.

Likewise, the CURA Response states that, [t]hroughout the history of the operation of the Town Center, whomever was the owner of the Mall, whether Developer or SPE, turned over the Tenant Parking Fees collected from the tenants of the Mall to be used for the maintenance and operation of the Parking Garages." CURA Response at 3. This statement ignores, however, that whether CWVM must remit tenant parking charges ("Parking Garage Tenant Charges") is governed by the current operative written agreements -- not a "history" of the conduct of CWVM's predecessors driven by terminated or superseded agreements. This Court should do what the Circuit Court failed to do, and what both CURA and UMB - Parking Garage Bonds scrupulously avoid doing in their respective response briefs, which is to examine the language of the operative written agreements.

Notably, the "history" of the operation of the Town Center Mall became irrelevant in September 2020 with the entry of the Settlement Agreement. As detailed in Footnote 3 of

[4] After extensive reference to, and arguments based upon, the Parking Lease, UMB Bank justifies its tactic by stating that "payment provisions [of the Parking Lease] remain relevant to understanding the COREA." UMB Response at 14, n. 17. The Circuit Court, however, never relied upon the Parking Lease in its analysis, and it never determined that the COREA was ambiguous, which is the only way that the Parking Lease, as parole evidence, would be relevant to "understanding the COREA."

CWVM's initial Brief, the Settlement Agreement (1) eliminated the Parking Lease; (2) caused the transfer to CURA and UMB - Parking Garage Bonds of more than $5,300,000 in cash and two (2) properties; and (3) released a broad swath of various obligations. Thereafter, CURA and U.S. Bank, which owned the Developer Parcel until acquired by CWVM in May 2021, negotiated the Restated JDA, which became effective in August 2020. App. at 666. The Restated JDA replaced the Former JDA, including the payment obligations under Attachment 4 of the Former JDA, with the result that the specific amounts listed in Section 4.2 of the Restated JDA identifies all of the payment and maintenance obligations of the owner of the Developer Parcel (currently CWVM) for the Parking Parcel arising from payments received by the owner of the Developer Parcel. App. 666-687.

Critically, the parties to the Civil Action agreed -- after consummation of the Settlement Agreement and the Restated JDA -- to entry of the Agreed Order Terminating Parking Garage Receivership and Appointment of Garage Receiver by the Circuit Court on September 25, 2020, which ordered the wind down and elimination of the Parking Receiver *without* requesting that a replacement parking garage receiver be named and without asking that alleged payment obligations from the Original Order be made to a different party. App. 499-505.

Finally, the parties to the Civil Action advised the Circuit Court of the Settlement Agreement and jointly moved dissolution of the Temporary Restraining Order entered by the Circuit Court on March 19, 2018, and for dismissal of the Civil Action *with prejudice.* The Circuit Court then entered the Agreed Order Amending Party Names, Dissolving TRO and Dismissing Civil Action with Prejudice on September 25, 2020, whereby the Circuit Court dismissed the Civil Action with prejudice. App. 506-510.

The net result of this "history" is that the COREA and the Restated JDA represent the only documents that survived and were in effective when CWVM acquired the Developer Parcel in May 2021 -- and neither provide for or require the payments identified in Attachment 4 of the Former JDA nor any payments under the Parking Lease. App. 754-967 and App. 666-687. By examining the clear and unambiguous language of those surviving, *operative* agreements, it becomes clear that the Circuit Court erred in the Final Order.

B. The Response Briefs fail to even argue 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.

As noted in CWVM's initial Brief, the Circuit Court erred by concluding 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." Final Order, Conclusion of Law No. 2 (App. at 736). Instead, CURA blithely states that CMWV "knew of the Civil Action when it purchased the Mall" -- yet fails to cite to anything in support of this statement. CURA Brief at 6. This mirrors the Circuit Court's "Finding of Fact" based on "information and belief" that CWVM "knew and was made aware of obligations relating to the Mall . . . ." App. 734. As detailed in CWVM's initial Brief, however, this "Finding of Fact" in Paragraph 10 of the Final Order, made without the Circuit Court taking any evidence whatsoever, represents an abuse of the Circuit Court's discretion because there is simply no evidence in the record that CWVM had any notice -- actual or otherwise -- of "obligations relating to the Mall" as contained in the Original Order.

Likewise, CURA attempts to justify the Circuit Court's conclusion on this issue by stating that "[t[he Final Order concluded that its findings were binding on subsequent purchasers of the Mall, not by virtue of the Final Order but by virtue of the obligations which run with the land under the COREA, which established a three-decades precedent of turning over the monthly parking

garage tenant charges to the Parking Garages." CURA Brief at 8. Of course, a "three-decades precedent" of conduct is simply not relevant to a subsequent bona fide purchaser of the Town Center Mall, like CWVM, which can only reference and rely upon the written covenants that run with the land, like the COREA, the Former SDA, and the Restated JDA. See W.Va. Code 40-1-9. And, remarkably absent from the Response Briefs, the Original Order, and the Final Order is any reference to any actual language in the COREA that requires CWVM to remit Parking Garage Tenant Charges to anyone. CWVM initial Brief at 18-23. In short, the notion that the Final Order was "not binding" on CWVM "by virtue of" the terms of the Final Order stretches credulity past the breaking point.[5]

In fact, the Response Briefs fail to directly address, much less refute, the legal arguments in CWVM's initial Brief that the Circuit Court erred in concluding in both the Original Order and the Final Order that the Original Order was binding on CWVW by virtue of CWVM's purchase of the Developer Parcel. Rather, the Original Order was an interim order entered in a civil action that was later dismissed with prejudice over 20 months after entry of the Original Order -- and before CWVM purchased the Town Center Mall. For the reasons stated in CWVM's initial Brief, therefore, which are never addressed, much less refuted, in the Response Briefs, the Original Order represents an unrecorded personal obligation under West Virginia law, and the Circuit Court's attempt to convert it to a covenant running with land on the Developer Parcel fails because it was never recorded. As a result, the Circuit Court's conclusion in the Final Order that the Original Order was binding on CWVM and future owners of the Developer Parcel in perpetuity represents reversable error.

[5] Notably, CURA and UMB Bank filed a Motion to Reopen Civil Action and Enforce Prior Orders of the Court ("Motion to Reopen"). App. at 565-619. They did not file a Motion to Enforce the COREA. The reason is obvious. CURA and UMB Bank seek to have the Original Order enforced against all future purchasers of the Developer Parcel in perpetuity.

C. CURA's Response Brief ignores the plain and unambiguous language of the Settlement Agreement, which fundamentally altered the obligations of the Developer Parcel owner, including its subsequent successor owner, CWVM.

Not surprisingly, CURA ignores the actual language of the Settlement Agreement in arguing that the Circuit Court correctly determined that the Settlement Agreement did not impact its analysis in the Original Order. Specifically, CURA makes the statement that "CWVM cannot benefit from an agreement it has no connection to either through privity or as a successor." CURA Brief at 13. Remarkably, however, the Response Briefs (and the Final Order) fail to do what CWVM's initial Brief does -- examine the actual language of the Settlement Agreement.

Specifically, CURA claims that "CWVM is the successor in interest to the Mall from U.S. Bank, and not a corporate successor in interest to the SPE." CURA Brief at 9. This distinction, which is not contained in the Settlement Agreement, makes no difference because the Settlement Agreement clearly released claims of CURA and UMB - Parking Garage Bonds against, among others, "Former Mall Owner" and "successors" of the "Former Mall Owner," which are collectively defined as "CTC/Garage Entities." [6] Settlement Agreement at Section H (App. 650-651). As detailed in CWVM's initial Brief, 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

[6] UMB - Parking Garage Bonds makes the specious assertion that "Paragraph H.(3) is a broad release of the CTC/Garage Entities, but it extends no farther and *makes no reference to successors and assigns*. CWVM has no basis to claim any release to its obligations to the Bond Trustee based on the Settlement Agreement." UMB Brief at 6 (emphasis added). This argument simply fails to acknowledge that "CTC/Garage Entities" represents a term defined in Section H.(1) of the Settlement Agreement, which expressly includes "Former Mall Owner, Developer and the Parking Garage Entity, *and their respective* owners, . . . agents, . . . predecessors, *successors*, and assigns (collectively, the 'CTC/Garage Entities') . . . ." App. 650-651 (emphasis added). So, by expressing adopting in Section H.(3) the definition of "CTC/Garage Entities" from Section H.(1), UMB – Parking Garage Bonds knowingly extended the broad release in Paragraph H(3) to the successors of Former Mall Owner and Developer -- including CWVM.

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" as defined in the Settlement Agreement. The benefits accruing to successors of Charleston Town Center SPE, LLC, under the Settlement Agreement, therefore, accrued to CWVM as a "successor" to the Former Mall Owner -- including as a "successor" to the releases and covenants not to sue contained in Section H of the Settlement Agreement.

In the face of the clear and unambiguous language in the Settlement Agreement, CURA seeks to inject a definition of "successor" in Section H that is simply not there. Specifically, CURA wants this Court to differentiate between a "successor in interest to the Mall" and a "corporate successor" when reviewing the language of the Settlement Agreement, much as the Circuit Court did in the Final Order. App. at 735 (Final Order at 5) (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."). The Settlement Agreement does not, however, contain a reference to a "corporate successor" or a "direct" or "immediate" successor. This Court should reject CURA's effort to rewrite the terms of the Settlement Agreement to include these words because, under West Virginia law, this 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."). Instead, the Settlement Agreement uses the word "successors" in a broad release that includes the negotiated settlement of disputes concerning agreements and obligations that run with the land, and the "successors" in the Settlement Agreement necessarily include the "successor" owners of that land, such as CWVM.

In addition, both CURA and UMB -- Parking Garage Bonds assert that each reserved rights against U.S. Bank. See UMB Brief at 11 ("U.S. Bank was not a party to the Settlement Agreement, and the Settlement Agreement clearly states that CURA, the Parking Garage Receiver and the Bond Trustee expressly reserve rights as to any contract obligations related to the Mall."); CURA Brief at 13 ("Further, the Settlement Agreement clearly states that CURA, the Parking Garage Receiver and the Bond Trustee expressly reserve rights as to any contract obligations related to the Mall."). Neither, however, quote from the text of the Settlement Agreement itself because the actual language negate the argument of both CURA and UMB - Parking Garage Bonds: "*Subject to the releases set forth in Section H below*, CURA, the Parking Garage Receiver and the Current Parking Garage Bond Trustee expressly reserve rights as the same pertain to any contract obligations related to the Mall." App. at 645 (emphasis added). This language reveals that the releases in Section H are very broad, and they subsume the claims CURA and UMB – Parking Garage Entities now raise against CWVM.

Notably, no party, including CURA and UMB - Parking Garage Bonds, claims that any term in the Settlement Agreement, including in Section H, is ambiguous. Indeed, 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.").

CURA also clearly foresaw that it would potentially modify the Former JDA when it entered into the Settlement Agreement on April 8, 2020: "CURA, the City and CBC agree not to create, amend, modify, or revise any document, including but not limited to the [Former JDA], the

[COREA], and any contemplated lease, sublease, assignment, or other agreement regarding the Parking Garages in a way that conflicts with the terms of this Agreement." Settlement Agreement at Section L.5 (App. 658). As CURA entered the Restated JDA after signing the Settlement Agreement, the elimination of Attachment 4 (and inclusion of Section 4.2 in the Restated JDA) is consistent with the release by CURA and UMB - Parking Garage Bonds of all claims against the "Former Mall Owner" and its "successors" 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. Unlike CURA's approach, which requires this Court to ignore the plain and unambiguous language in the Settlement Agreement and other operative agreements and to rewrite or inject words into certain sections of those documents, CWVM's argument results in a harmonious interpretation of the actual language used in the Settlement Agreement, the COREA, and the Restated JDA, which is required by West Virginia law. See gen. Ashland Oil, Inc. v. Donahue, 159 W. Va. 463, 469, 223 S.E.2d 433, 437 (1976) (citation omitted) ("[i]t is a well-recognized principle of law that, even though writings may be separate, they will be construed together and considered to constitute one transaction when the parties are the same, the subject matter is the same and the relationship between the documents is clearly apparent.").

In short, this Court need only review and apply the clear and unambiguous terms of Section H of the Settlement Agreement -- language that CURA scrupulously avoids examining in its Response brief -- 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. This language demonstrates that the Circuit Court erred in finding 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."[7]

D. Attachment 2 of the Former JDA is no longer in effect because the Restated JDA "superseded and replaced" the Former JDA.

In a remarkable sleight of hand, both CURA and UMB - Parking Garage Bonds begrudgingly admit that the Attachment 4 of the Former JDA was superseded by the "Restated JDA", but then argue that Attachment 2 of the Former JDA -- a document never referenced in prior pleadings filed in the Circuit Court and, more importantly, not referenced (much less relied upon) by the Circuit Court in either the Original Order or the Final Order -- obligates "the Developer to pay over all Tenant Parking Fees as the Developer's obligation to devote all parking-related income to the operation and maintenance of the Parking Garages arises from the COREA, as set out in Attachment 2 of the JDA." CURA Brief at 16. See also UMB Brief at 14.

This statement ignores that the Former JDA, including Attachment 2, was "superseded and replaced by this Agreement and all Attachments attached hereto." Restated JDA at Section 1.1 (App. at 667.). This clear and unambiguous language reflects that the Restated JDA completely replaced the Former JDA, which is now void and has no force or effect. Period. In fact, CURA recognized that the Former JDA should no longer be in effect: "WHEREAS, the [Former JDA] is no longer effective for its purpose, and the parties wish to enter into this Agreement." Restated JDA at 2 (App. 667).

[7] 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 JDA. App. at 668 (Restated JDA at Article I, Section 1.1.

In light of this language in the Restated JDA, the contention of CURA and UMB - Parking Garage Bonds that Attachment 2 of the Former JDA supports the Circuit Court's position as reflected in the Final Order is simply disingenuous, at best, and should be disregarded by this Court. Notably, the Final Order does not reference Attachment 2 of the Former JDA as neither CURA nor UMB - Parking Garage Bonds cited to Attachment 2 of the Former JDA. In short, Attachment 2 of the Former JDA represents a red herring thrown up to distract this Court from the import and meaning of the Restated JDA.

E. CURA and UMB - Parking Garage Bonds rely upon language of the COREA that the Final Order does not address and that references the Parking Lease, which no longer exists.

Continuing a pattern of ever-shifting grounds for its arguments, the CURA Response references Sections 10.10(b) and Section 10.9(d)(iii) of the COREA -- even though neither the Original Order nor the Final Order referenced those sections of the COREA, and both of those sections are grounded in obligations under the Parking Lease, which the parties agree has been terminated.

As noted above, the Response Briefs fail to address the actual language from the COREA that would independently require the owner of the Developer Parcel to pay the monies demanded as no language in the COREA requires that CWVM remit Tenant Parking Garage Charges to anyone, including CURA or its designee. As detailed in CWVM's initial Brief, 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))

(emphasis added). This language represents the sole provision of the COREA cited by the Circuit Court in both the Original Order and the Final Order with regard to tenant parking charges, and at no point in prior pleadings, in the Original Order, or in the Final 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.[8]

Yet, CURA and UMB - Parking Garage Bonds now argue that "[t]he purpose of [Tenant Parking Garage Charges] is outlined in and authorized by the COREA in the context of the Developer's broader obligation to 'perform or cause the performance of the Parking Lease.'" CURA Response at 12. See also UMB Response at 9. This language, contained in Section 10.10(b) of the COREA (App. at 839-340), explicitly references a "covenant" of the "Developer" with respect to a document, the Parking Lease, that no longer exists. Restated JDA at Section 1.1 (App. 668). In addition, the Parking Lease was between CURA and the Charleston Building Commission; hence, as acknowledged by CURA, CWVM has no "responsibility for the obligations" of the Parking Lease. For these reasons, CURA's reference to Section 10.10(b) of the COREA is simply not relevant and makes no sense.

In the same way, CURA and UMB - Parking Garage Bonds also argue that Section 10.9(d)(iii) of the COREA created an "expectation that all revenue is intended to fund the Parking Garages[,]" and "'if the Revenues from the Parking Facility are not sufficient to pay the [[Parking Facility]] Operator's fees and the rents to be paid under the Parking Lease,' the Developer would remain responsible for the payment of any deficiency." CURA Brief at 12-13.[9] See also UMB

[8] 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 in its initial Brief, CWVM does not dispute that it is bound by COREA; however, Section 16.2 does not address parking charges in any manner.

[9] CURA references "section 10(d)(iii)" of the COREA, which does not exist. CWVM assumes this is a typo and that CURA intended to reference Section 10.9(d)(iii).

Response at 10. Again, however, the language in Section 10.9(d)(iii) cited by CURA specifically references the Parking Lease, to which CWVM is not a party, and which no longer exists.

CURA's reliance on sections of the COREA that depend upon a Parking Lease that no longer exists, much like CURA's dependence on Attachment 2 of the Former JDA, which no longer exists, reflects their broader issue with CURA's position throughout this case -- it depends upon expectations contained in documents that have been superseded by written, intervening agreements (the Settlement Agreement and the Restated JDA) that govern the rights and obligations of CWVM, CURA and UMB – Parking Garage Bonds. CURA is left to reference and argue about an "expectation" that no longer exists because the "expectation" was built upon written agreements that were negotiated away by CURA and UMB – Parking Garage Bonds and that no longer govern -- a position that the Circuit Court erroneously adopted in its Final Order.

F. The operative documents and agreements reflect that the sole payment due from CWVM to CURA is the Annual Additional Payment contained in Section 4.2 of the Restated JDA.

Section 4.2 of the Restated JDA explicitly states that the fixed "Annual Additional Payment" from the owner of the Developer Parcel to CURA is "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).

CURA again asks this Court to ignore the plain and unambiguous language of Section 4.2 in favor of a tortured reading that "requires an understanding of the evolution of the Charleston Town Center" that, in turn, depends upon uncited parole evidence and a nonsensical reading of Section 4.2. CURA Response at 15. Specifically, CURA asserts that the "Annual Additional

Payment" in Section 4.2 is "part of the purchase price for the 'Retail Parcel' and "has nothing to do with the Parking Garages." CURA Response at 15.[10] Section 4.2, however, clearly and unambiguously states that the "Annual Additional Payment" is "in lieu of" either (1) "payments due from Mall Owner on account of rents collected from Town Center Parcel Tenants" or (2) payments "on account of Mall Owner's maintenance obligations *associated with the Parking Parcel.*" App. at 670 (emphasis added). The term "Retail Parcel" is not used in Section 4.2 nor anywhere in the Restated JDA. The land now owned by CWVM is defined in the Restated JDA as the "Mall Parcel." Restated JDA at 1, ¶2 (App. at 666). Likewise, a "purchase price" is not mentioned in Section 4.2 nor anywhere in the Restated JDA. Rather, CURA's tortured reading of the plain language used in Section 4.2 refers back to language used in the Former JDA -- which has been superseded and is not in effect. In addition, once again, no party, including CURA, has ever claimed that Section 4.2 is ambiguous such that reference to other documents is necessary. CURA's argument, therefore, relies upon some uncited "understanding" that the provisions of Section 4.2 are simply a continuation of the purchase agreement for the "Retail Parcel" from the now superseded Former JDA signed in 1982. This is nonsense, and the Court should recognize it as such.

G. CWVM has the legal right to collect all monies due under existing tenant leases at the Town Center Mall, and neither CURA nor UMB - Parking Garage Bonds has a legally cognizable interest in either the leases or monies from those leases.

The Response Briefs assert that CWVM has "no independent legal basis to charge the tenants in the Mall a parking fee" (CURA Response at 12) and that CWVM "has no basis to charge and retain a parking fee" (UMB Response at 9). This assertion ignores the plain fact that CWVM

[10] Notably, the purchase of the "Retail Parcel" took place in or about 1982, while the Restated JDA was signed in 2020. There is no evidence that the Restated JDA had anything to do with a purchase that took place 38 years prior.

is the lessor under various leases for space within the Town Center Mall, and per the terms of those leases, CWVM has the legal right to negotiate and set the terms of the leases and to collect all amounts owed under those leases.

Conversely, neither CURA nor UMB - Parking Garage Bonds have privity with, nor rights against any of CWVM's lessees. Accordingly, the assertions of CURA and UMB - Parking Garage Bonds are plainly wrong.

In addition, UMB - Parking Garage Bonds states that, "[f]rom the beginning, all income from the Parking Garages was pledged to the Trustee to secure payment of the Parking Facility Bond . . . ." UMB Response at 10-11. Yet, UMB - Parking Garage Bonds fails to cite any evidence, including any security agreement, by which CWVM or the prior owners of the Town Center Mall granted any security interest to the Bond Trustee (i.e., UMB - Parking Garage Bonds) in revenues collected under tenant leases. As a result, UMB - Parking Garage Bonds' insinuation that it has some type of security interest in CWVM's lease income from CWVM's tenants is wholly unsupported and means nothing.

H. Conclusion.

As detailed above and in CWVM's initial Brief, the Circuit Court erred in numerous ways when it reopened the Civil Action that had been dismissed, with prejudice, for almost two years in order to subject a non-party purchaser of the Developer Parcel to the terms of an interim order entered in the Civil Action over three 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" rather than 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 by the owner of the Developer Parcel of the Parking Garage Tenant Charges), the Restated JDA (which eliminated the

Parking Garage Tenant Charges), and the Settlement Agreement (which released any claims by CURA and UMB – Parking Garage Bonds against the owner of the Developer Party 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.

The Response Briefs perpetuate the Circuit Court's errors by (1) proffering "facts" without citation to the Record; (2) referencing and depending upon documents and written agreements that have been superseded or waived and released; and (3) ignoring the clear and unambiguous language of the only operative documents that CWVM had notice of prior to its purchase of the Town Center Mall. Together, these documents -- the COREA and the Restated JDA (along with the Settlement Agreement) -- reveal that no legal or contractual duty exists for CWVM to remit Tenant Parking Garage Charges to CURA, UMB - Parking Garage Bonds, or anybody else.

CWVM asks, therefore, that 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.

CHARLES WV MALL, LLC

By Counsel

/s/ *Mychal S. Schulz*
Mychal S. Schulz (WVSB #8174)
Charles F. Saffer (WVSB #7789)
BABST, CALLAND CLEMENTS & ZOMNIR, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301
Telephone: 681-205-8888
Facsimile: 681-205-8814
mschulz@babstcalland.com
csaffer@babstcalland.com
Counsel for Petitioner Charles WV Mall, LLC

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 January 17, 2023, I caused service of the foregoing **APPELLANT'S REPLY BRIEF** to be made upon all counsel of record via electronic delivery through File & Serve Xpress as follows:

Ann R. Starcher, Esquire
Tom L. Casto, Esquire
Anna Casto, Esquire
Lewis Glasser PLLC
P.O. Box 1746
Charleston, WV 25326
Counsel for Charleston Urban Renewal Authority

Shawn P. George, Esquire
Jennie O. Ferretti, Esquire
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
Counsel for Crews & Associates, LLC and UMB Bank, N.A.

/s/ Mychal S. Schulz
Mychal S. Schulz (WVSB #8174)
Charles F. Saffer (WVSB #7789)
BABST, CALLAND CLEMENTS & ZOMNIR, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301
Telephone: 681-205-8888
Facsimile: 681-205-8814
mschulz@babstcalland.com
csaffer@babstcalland.com