IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Case No. 22-ICA-36

CHARLES WV MALL, LLC,

Defendant Below/Petitioner

v.

Appeal from Final Order of
Circuit Court of Kanawha County
Case No. 17-C-1527

CHARLESTON URBAN RENEWAL AUTHORITY,

Intervenor Below/Respondents
and

UMB BANK, N.A., as Successor Trustee for the Bondholders for the Series 1996C Subordinate Capital Appreciation Parking Facility Refunding Bonds,

Third Party Defendant/Respondent

BRIEF OF RESPONDENT CHARLESTON URBAN RENEWAL AUTHORITY

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I. INTRODUCTION

Petitioner, Charles WV Mall, LLC ("CWVM"), as owner of the interior space of the Charleston Town Center (the "Mall"), asks this Court to overturn the ruling of the Circuit Court of Kanawha County entered on July 8, 2022 ("Order to Enforce") directing CWVM to turn over parking charges it collects from the tenants of the Mall ("Tenant Parking Fees") to the parking garages located at the Charleston Town Center ("Parking Garages"). (Joint Appendix, hereinafter "J.A." 731-751). The Parking Garages located at the Charleston Town Center began construction in 1982. As described more fully below, the Mall, the Parking Garages and the four corner stores that make up the Charleston Town Center each have different owners. Each of the entities that

owned these different real property parcels entered into an agreement known as the Construction, Operation and Reciprocal Easement Agreement dated April 20, 1982, and recorded with the Clerk of the Kanawha County Commission in Book 2002, Page 122 (the "COREA"), which governs the operations of the various parts of the Mall and the Parking Garages. Pursuant to the COREA, and since the opening of the Charleston Town Center in 1984, all monthly parking charges from the tenants of the Mall and collected by the owner of the Mall ("Tenant Parking Fees") have been turned over to the entity that has owned or leased the Parking Garages.

CWVM claims a legal basis to retain the Tenant Parking Fees despite the previous rulings of the Circuit Court. That claim fails as CWVM does not own or operate the Parking Garages, and is, by admission, a party to the COREA. The Circuit Court originally held, in an Order dated January 14, 2019 ("Final Order") (J.A. 408-498), that the COREA authorized charging each tenant in the Mall parking fees, and it required the existing and future owners of the Mall to turn over these Tenant Parking Fees to the owner of the Parking Garages for the maintenance and operation of the Parking Garages.[1]

II. STATEMENT OF THE CASE

A. History of Charleston Town Center

The Statement of the Case as presented by CWVM fails to accurately reflect the complicated history of the real property commonly referred to as the "Charleston Town Center". The Charleston Urban Renewal Authority ("CURA") and the original developer of the Mall ("Developer") entered into various agreements in the early 1980s for the construction,

[1] Capitalized Terms used herein but not otherwise defined herein shall have the meanings assigned to them in the proceedings below.

development, and ownership of the Charleston Town Center ("Town Center"). Those agreements included the COREA as well as a Joint Development Agreement ("JDA") as recorded with the Clerk of the Kanawha County Commission at Book 2001, Page 1, which was entered into between the Developer and CURA to provide for payments to CURA for its role in the development of the Town Center. (J.A. 242-303). The Town Center originally consisted of four anchor stores, who each owned in fee the corner lots of the Town Center, the Mall as owned by the Developer, and the Parking Garages as originally leased by an affiliate of the Developer from Charleston Building Commission ("CBC") and Charleston Urban Renewal Authority.[2]

The ownership arrangement of the Town Center essentially remained in place until 2007 when the Developer[3] transferred its interest to a new entity and affiliate of Developer, Charleston Town Center SPE, LLC ("SPE")[4] for the purpose of obtaining a $100 million loan in which U.S. Bank was the trustee ("U.S. Bank"). SPE, by virtue of its ownership in the Mall and Section 25.11 of the COREA, assumed the obligations of record of the Developer under the COREA as well as the obligations under the JDA. (J.A. 886-887). Throughout 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.

In 2017, SPE defaulted on the outstanding loan obligations with U.S. Bank. In November 2017, as a result of the defaulted loan obligations, U.S. Bank filed a complaint for appointment of a receiver of the Mall. (J.A. 1-233). CURA and the City of Charleston ("City") subsequently filed

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[2] The structures of the Parking Garages are owned by CBC while the land on which the Parking Garages reside is owned by CURA.

[3] The Developer remained in existence and still remains in existence as a separate corporate entity according to the records of the West Virginia Secretary of State.

[4] The SPE still remains in existence as a separate corporate entity according to the records of the West Virginia Secretary of State.

a motion to intervene (J.A. 234-309), which was granted pursuant to an order entered on January 24, 2018. (J.A. 319-320). The Court subsequently entered Consent Orders for the appointment of both a receiver of the Mall ("Mall Receiver") and a receiver of the Parking Garages ("Parking Garage Receiver") on April 27, 2018. (J.A. 322-345). While the receiverships were pending, all parties, except U.S. Bank, filed a Joint Motion to Transfer the Mall Tenant Parking Charges From Mall Receiver to Garage Receiver ("Original Motion") to assure the continued operation and maintenance of the Parking Garages. (*See* J.A. 346-368). The Original Motion was granted as set forth in the Circuit Court's Order entered on January 14, 2019 ("Final Order"). (*See* J.A. 488 - 498). The Final Order entered by the Court found in part, inter alia:

> 3. Mall tenants understood, agreed to, and have been paying parking charges in monthly installments for the operation and maintenance of the adjacent parking garages, based on a dollar amount per square foot and their gross leasable area. Such monthly installments were subject to increase over time. This is seen with clarity in the customary parking charge lease provision:
>
> Section 12.6 – Parking
>
> Landlord agrees to provide parking facilities adjacent to the Shopping Center for parking of motor vehicles. For each calendar year, Tenant agrees to pay Landlord annually, in twelve (12) equal monthly installments, together with the other charges specified in this Article XII, **as additional rental for the operation and maintenance of the garage**, an amount equal to One and 60/100 Dollars ($1.60) per square foot, multiplied by the Premises CLA....
>
> 4. The purpose of the Mall assessing parking charges to tenants was to support the operations and maintenance of the parking garages.
>
> ...
>
> 8. ... Section 10.9 of the COREA concerns the operation of the parking garages and refers to them as the "Parking Facility." Section 10.9(b)(ii) provides that occupants, such as tenants, may be required to pay parking charges pursuant to their respective leases or other separate agreements.
>
> ...

> 10. Beginning in 1984, there has been a uniform custom and practice regarding the handling of tenant parking charges. The Mall collected such charges and remitted them to the parking garage on a monthly basis. These charges were classified as a payable of the Mall and as a receivable of the parking garage.
>
> ...
>
> 18. There is a clear history of more than three decades of the Mall remitting the collected tenant parking charges to the parking garage on a monthly basis to support parking garage operations and maintenance.

(January 14, 2019 Order, FOF ¶¶ 3,4,8,10 & 18, J.A. 490, 493).

After the appointment of the Mall Receiver and Garage Receiver, and after entry of the Final Order, U.S. Bank ultimately foreclosed upon the Mall. The Mall Receiver was terminated. The remaining parties, including the Developer and all of its Affiliates, CURA, the City, and Bond Trustee, but not including U.S. Bank, entered into a Settlement Agreement in April 2020 ("Settlement Agreement"), regarding settlement of the remaining claims and termination of the Parking Garage Receivership. (*See* J.A. 641-665). Upon effectuation of the Settlement Agreement, the Garage Receiver and the Civil Action were terminated by Orders entered September 25, 2020. (*See* J.A. 587 -599). In the Notice of the Parking Garage Receiver's Final Report, the Parking Garage Receiver highlighted that the Mall had turned over Tenant Parking Fees in the amount of $392,418.05 during the pendency of the Parking Garage Receivership. (*See* J.A. 519).

Upon dismissal of the Civil Action, the lease of the Parking Garages to the affiliate of Developer was terminated and the sublease of the ground of the Parking Garages to the affiliate of Developer was terminated, leaving CBC as the owner of the Parking Garages with CBC leasing the ground from CURA. CURA is managing the Parking Garages on behalf of CBC, and it has

contracted for the day-to-day operations to be managed by Boyd Real Estate Resources, LLC ("Boyd")[5], the former Parking Garage Receiver in the Civil Action.

B. History of CMWV

Appellant, CWVM, is owned and controlled by Hull Property Group in Augusta, Georgia. Hull Property Group owns over 30 mall properties in the Eastern United States. Hull Property is a sophisticated and experienced purchaser of malls[6]. CWVM purchased the Mall from U.S Bank in May 2021 and knew of the Civil Action when it purchased the Mall.[7] CWVM, by review of the records of U.S. Bank, would have been aware of the monthly turnover of the parking garage tenant charges to the Parking Garages in accordance with the Final Order. CWVM's feigned ignorance of these continuing obligations is a ruse.

CWVM, like Developer, SPE and U.S. Bank, became obligated to fulfill the obligations under the COREA by virtue of these obligations running with the land. (*See* J.A. 886-87, Section 25.11. These obligations include CWVM's responsibilities for the maintenance of the Parking Garages that, until now, have been partially satisfied by the turning over of the Tenant Parking Fees. (*See* Section 10. Of COREA, J.A. 830).

C. Order to Turnover

After requesting the turnover of parking garage tenant charges from CWVM and CWVM refusing to turn them over, CURA and the trustee for the bondholders of the parking garages ("Bond Trustee") requested the Circuit Court enforce its Final Order, based upon the findings

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[5] Following settlement and dismissal of the Civil Action, Boyd was employed by CBC and CURA to continue its management of the day-to-day affairs of the Parking Garages.

[6] This Court may take judicial notice of this information from the Hull Property Group's website. *See* Hull Property Group | Mall Properties, December 27, 2022, at 2, https://www.hullpg.com/mall-properties.

[7] The Civil Action included (i) all of the accounting records of the Mall Receiver which included the turnover of the parking garage tenant charges to the Parking Garages; and (ii) the Final Order. (J.A. 568).

detailed above, to require CWVM to turn over the parking garage tenant charges that it had collected but wrongfully withheld since it acquired the Mall in May 2021. (J.A. 565-574). The Court granted this relief in its Order to Enforce. (J.A. 731-751). The Circuit Court further found in the Order to Enforce that CWVM did not have any rights under the Settlement Agreement as it was neither a signatory nor a successor to a signatory party.[8] (*See* J.A. 736 at ¶ 3).

III. SUMMARY OF ARGUMENT

CWVM seeks to retain the Tenant Parking Fees to which it is not entitled, to the detriment of the maintenance of the Parking Garages. The Circuit Court has ruled that the COREA and the related documents established the mutual obligations of the parties for the construction and operation of the Mall and the Parking Garages. It further found that the documents clearly contemplate dedication of all parking revenue, including Tenant Parking Fees, for the maintenance of the Parking Garages. CWVM's acquisition of the Mall did not erase or excuse CWVM from these obligations as the same run with the land pursuant to the COREA. CWVM's five assignments of error are without merit, as set out below.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents straightforward issues of property law and contract interpretation. The facts and legal arguments will be adequately presented in the briefs and record on appeal, and Respondent does not believe the decisional process would be significantly aided by oral argument.

[8] Interestingly, CWVM, who claims no knowledge of the Court's Final Order, appears to have had knowledge of the Civil Action given its misplaced and erroneous assertion that it is a beneficiary of any of the provisions of the Settlement Agreement.

V. ARGUMENT

A. Standard of Review

To the extent that the Circuit Court abused its discretion in its findings in the Final Order, this Court should review under an abuse of discretion standard. *See* Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996). ("[T]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo."). The parameters of this Court's appellate review under the abuse of discretion standard are well-settled. In West Virginia, an appellate court may reverse for abuse of discretion if "a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court [or lower court] makes a serious mistake in weighing them." *Gentry v. Magnum*, 195 W. Va. 512, 520 n.6, 466 S.E.2d 171, 179 (1995).

B. The Circuit Court did not commit reversible error in finding that the Final Order binds CWVM by virtue of its purchase of the Mall from U.S. Bank.

CWVM argues in its initial assignment of error that the Final Order is not enforceable against CWVM because the Final Order was not recorded and CWVM was a bona fide purchaser for value. See CWVM's Brief at 9 *et seq*. The 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-decade precedent of turning over the monthly parking garage tenant charges to the Parking Garages. (J.A. 493 at ¶ 18 of the Final Order). At the time CWVM purchased the Mall from U.S. Bank, CWVM was or should have been aware of the obligations under the COREA as it is of record[9], and the history of

[9] The COREA is recorded with Clerk of the Kanawha County Commission in Book 2002, Page 122.

the turnover of these collected amounts for the support of the Parking Garages was litigated and is of public record within the receivership. CWVM's claim of ignorance of the COREA or the history of the collection of parking garage tenant charges for the benefit of the Parking Garages is simply not credible.

C. The Circuit Court's findings of fact were supported by evidence of record.

CWVM alleges in its second assignment of error that the Circuit Court made five findings of fact that were not supported by evidence, constituting reversible error. See CWVM's Brief at 13 *et seq*. Each of these findings was supported by evidence of record and should be upheld:

1. CWVM's first objection is to Paragraph 7 of the Order to Enforce (*See* J.A. 731), in which the Court found that the parties to this lawsuit engaged in a prolonged mediation of issues relating to the Parking Garages and entered into a Settlement Agreement to which U.S. Bank was not a party. (*See* J.A. 734). CWVM asserts that since the Settlement Agreement included the SPE as the Former Mall Owner, it is entitled to the benefits that were granted to SPE in the Settlement Agreement, even though CWVM did not incur any of the financial responsibilities of the SPE as provided in the Settlement Agreement. CWVM is the successor in interest to the Mall from U.S. Bank, and not a corporate successor in interest to the SPE. (J.A. 641-42 and 662-65). The Circuit Court's finding of fact in Paragraph 7 of the Order to Enforce is correct and supported by evidence of record.[10] (J.A. 734). This issue is further addressed in section E below.

2. Second, CWVM objects to the Circuit Court's finding in paragraph 8 of the Order to Enforce that "CWVM incorrectly relies on Section 4.2 of the [Restated] JDA as a

[10] CWVM also seeks to shoehorn itself into the release by claiming U.S. Bank was a "beneficiary of the general release," (see CWVM's Brief at 14), but cites no authority. There is none. This argument also fails.

release of obligations under the COREA, which continue to run with the land." *See* CWVM's Brief at 14. This objection is a restatement of CWVM's assertion that: 1) the COREA does not impose an obligation on the Mall Owner to pay over Tenant Parking Fees (rebutted in section F below); and 2) the Restated JDA executed by CURA and U.S. Bank eliminated any obligation based on the original JDA (rebutted in section D below.) The Restated JDA was entered into between U.S. Bank and CURA for the purpose of clarifying the continuing obligations due to CURA for its original role in the development of the Mall. (J.A. 666-706). It did not amend or have any impact on the requirement and obligations regarding the Tenant Parking Fees. Further, the COREA states that its covenants run with the land,[11] and makes clear that a purchaser at a foreclosure sale, and its successors and assigns, are bound by the terms of the COREA. (*See* COREA § 16.2(f), J.A. 858-59). Again, CWVM's argument fails, and the failure is demonstrated by the written terms of the agreements that are a part of this matter and are of record in Kanawha County, West Virginia.

3. CWVM objects to the Court's finding in paragraph 10 of the Order to Enforce that "Upon information and belief, CWV 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." *See* CWVM's Brief at 15-16.[12] This objection is meritless as CWVM concedes it is "legally charged with knowing the obligations contained in the Former JDA ... the

[11] J.A. 886-87, Section 25.11 provides:

> It is intended that the covenants, easements, agreements, promises and duties of each Party as set forth in this REA and in the Separate Agreements, shall be construed as covenants and not as conditions and that all such covenants shall run with and be enforceable against both the covenanter and the land or constitute equitable servitudes as between the Parcel of the respective covenanter, as the servient tenement, and the Parcel of the respective covenantee, as the dominant tenement.

[12] Note that CWVM does not object to the Court's finding in the same paragraph that, "CWV was also provided or had access to the record in this Civil Action."

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." *See* CWVM's Brief at 15. The COREA provides sufficient basis for the Order to Enforce and CWVM admits it had proper notice of the COREA.

4. CWVM next objects to the Circuit Court's finding in paragraph 13 of the Order to Enforce that "CWV 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 from the prior Mall Entities nor is it a corporate successor to the prior Mall Entities." (J.A. 735). Again, the Circuit Court's finding is accurate. In paragraph H(1) of the Settlement Agreement, CURA and others released "the Former Mall Owner, Developer and the Parking Garage Entity" and their successors and assigns. (Settlement Agreement, "SAR" ¶ A(6), J.A. 650-51). As used in the Settlement Agreement, "Former Mall Owner" is a defined term meaning Charleston Town Center SPE, LLC. (SAR ¶ A(7), J.A. 642). "Developer" means Charleston Town Center Company, Limited Partnership. *Id.* "Parking Garage Entity" means Charleston Town Center Parking Limited Partnership. *Id.* CWVM is not a successor to any of these three parties. It is a successor in interest to property of U.S. Bank, and U.S. Bank was not a party to the Settlement Agreement, nor was it a party to, or beneficiary of, any of the releases contained therein. CWVM cannot claim to be the beneficiary of or released by being the successor to a party that was not released.

5. Finally, CWVM objects to the Circuit Court's use of the phrase "based on information and belief" and its finding in paragraph 14 of the Order to Enforce that "CWV states that it is not bound by the COREA." CWVM argued in its Response to the Motion to Reopen that the Settlement Agreement and Restated JDA superseded the COREA and JDA. (J.A. 635).

Counsel for CWVM also stated at the June 13, 2022 hearing that the Restated JDA "changes the obligation under the COREA." Transcript at 24:1-3.[13] As with the Court's finding in paragraph 10 of the Order to Enforce, this argument fails as CWVM now acknowledges it is bound by the COREA, which was the basis of the Circuit Court's legal conclusions. (J.A. 734).

D. CWVM is obligated to turn over Tenant Parking Fees to the Parking Garages, and the Circuit Court did not abuse its discretion in so finding.

The Circuit Court concluded as a matter of law that its Final Order directing the Mall Receiver to remit Tenant Parking Fees to the Parking Receiver remains enforceable against CWVM by virtue of CWVM's purchase of the Mall from U.S. Bank. (*See* Paragraph 2, J.A. 734). It further found that CWVM was "not released from any continuing obligations arising from the COREA or JDA" and that the Restated JDA "did not release any obligations due and owing from CWV, as those obligations arise under the COREA." (*See* CWVM's Brief at 18; J.A. 736). CWVM urges this Court to find that these conclusions were reversible error because these terms are not contained in the COREA, and because the Circuit Court's reliance on the parties' course of conduct was improper absent a finding of ambiguity. (*See* CWVM's Brief at 19).[14]

CWVM has no independent legal basis to charge the tenants in the Mall a parking fee. It does not own or operate the Parking Garages. Why would a tenant pay a fee to CWVM for parking when CWVM does not own the garages? The reason is that when CWVM acquired the mall, it acquired the existing leases that include Tenant Parking Fees. The purpose of those 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." (*See* COREA § 10.10(b), J.A. 840). The

[13] The transcript is not included in the Joint Appendix in its entirety, but it is available to the Court on its own motion under W.Va. R. J.A. Pro. 6(b).

[14] Petitioner's third contention that CURA released the owner of the developer parcel in section 4.2 of the Restated JDA, is addressed in section E below.

expectation that all revenue is intended to fund the Parking Garages is further reflected in the COREA's statement in section 10(d)(iii) that "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.[15] (J.A. 838-39). These COREA provisions support the Circuit Court's finding by clearly describing the purpose of the obligation. CWVM's argument that the obligation to pay over the Tenant Parking Fees to the Parking Garages is not an obligation that arises under the COREA is without merit and clearly fails when the totality of the COREA is examined.

E. CWVM is neither a beneficiary of the Settlement Agreement nor a legal successor to any party to the Settlement Agreement.

As noted above, CWVM is not a successor to any party to the Settlement Agreement. CWVM is the successor in an interest in the Mall by virtue of its purchase of the property from U.S. Bank. U.S. Bank purchased the Mall in foreclosure. The parties to the Settlement Agreement are clearly identified in the agreement. U.S. Bank is not a party. CWVM cannot benefit from an agreement it has no connection to either through privity or as a successor. 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. (J.A. 645). The Circuit Court's

[15] Section 10(c) of the COREA, at J.A. 837, authorizes one or more anchor tenants to replace the Developer or other operator of the Parking Garages under certain circumstances. In this context, section 10(d)(iii) states:

> [I]f the Revenues from the Parking Facility are not sufficient to pay the Operator's fees and the rents to be paid under the Parking Lease, neither the Operator nor the Majors shall be responsible for the payment of any such deficiency. ... The Developer shall remain responsible for the payment of any such deficiency under the Parking Lease .... The Majors and the Developer shall not be relieved from performing their several obligations under this REA ...."

COREA, § 10(d)(iii), J.A. 838-39.

finding of fact in Paragraph 7 of the Order to Enforce is correct and supported by evidence of record.[16] (J.A. 734).

Contrary to its assertions, CWVM had no privity of contract as it relates to the Settlement Agreement under West Virginia law. The basic definition of "[p]rivity of contract" is "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." Black's Law Dictionary, PRIVITY (11th Ed.2019). Further, the rule in West Virginia is that "in order for a contract concerning a third party to give rise to an independent cause of action in the third party, it must have been made for the third party's sole benefit." *Casto v. Dupuy*, 204 W. Va. 619, 623, 515 S.E.2d 364, 368 (1999) (quoting *Robinson v. Cabell Huntington Hosp., Inc.*, 201 W.Va. 455, 456, 498 S.E.2d 27, 32 (1997)). CWVM does not meet any of these terms. It was not a party to the contract, it did not have privity in any way, and it was not a successor to any party that did. CWVM cannot be a party to and a beneficiary of an agreement it was not a part of. Further, it cannot be the beneficiary of an agreement when its predecessor in interest was not a party to the agreement. CWVM's argument fails on this issue.

F. Section 4.2 of the Restated JDA replaced the prior payment arrangement for the "Annual Additional Payment" to CURA, but it did not confer upon CWVM a legal right to collect and retain Tenant Parking Fees.

In 2020, CURA and U.S. Bank executed an Amended and Restated Joint Development Agreement ("Restated JDA"). (*See* J.A. 666). CWVM argues the terms of the Restated JDA extinguishes any obligation to pay over Tenant Parking Fees based on the language of section 4.2

[16] CWVM also seeks to shoehorn itself into the release on the basis that U.S. Bank was a "beneficiary of the general release," *see* CWVM's Brief at 14, but cites no authority. Again, none exists, and this argument fails.

of this document and its statement that Attachment 4 to the JDA is void and superseded. (See CWVM's Brief at 30.

To understand the Restated JDA, it requires an understanding of the evolution of the Charleston Town Center. The JDA is a real estate agreement between CURA and the Developer, which obligated CURA to sell the "Developer Parcel" to the Developer for construction of the Mall, and to lease the "Parking Parcel" to the Developer for development of the Parking Garages. (*See* JDA §§ 201, 316, J.A. 250-51 and 257). It says very little about construction or operation of the garages, as detailed below.

The Restated JDA was entered into between U.S. Bank and CURA to clarify the continuing obligations due to CURA from the Mall Owner regarding those original obligations for the development of the Mall. A reading of section 4.2 of the Restated JDA requires an understanding of defined terms. Section 4.2 restates the "Annual Additional Payment" to CURA. The Annual Additional Payment was part of the purchase price for the "Retail Parcel", or the Mall as used herein. (J.A. 298-300). The "Retail Parcel" is the land under the Mall. (J.A. 249). The Retail Parcel has nothing to do with the Parking Garages. The "Parking Parcel", not the Retail Parcel, is the land under the Parking Garages, which is still owned by CURA. *Id.* Section 4.2 states:

> **Annual Additional Payment.** The Mall Owner, its successors, and assigns, in accordance with the Chart set forth below, shall pay the Authority an annual additional payment ("Annual Additional Payment") based on rents received by the 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 and/or on account of Mall Owner's maintenance obligations associated with the Parking Parcel as follows: ....

(J.A. 670). This language does not implicate Tenant Parking Fees. CBC owns the Parking Garage structures and CURA owns the land beneath the Parking Garages so CURA could not amend, restate or terminate any of these ongoing obligations. It addresses only rents charged for space in

the Mall and any maintenance obligations associated with the land upon which the Parking Garages are built ("Parking Parcel").

CURA owns the Parking Parcel underneath the garages and was entitled to rent under the Parking Facility Ground Lease as due from the affiliate of Developer who leased and operated the Parking Garages subsequent to the construction of the Parking Garages. The Restated JDA simply clarifies that the Mall Owner and its successors did not have the obligation for the Parking Facility Ground Lease. (J.A. 666). This does not affect the Tenant Parking Fees included in the Mall tenant leases purchased by CWVM.

As for Attachment 4, it is true the Restated JDA declares it void and superseded. (*See* Restated JDA § 1.1, J.A. 668). This does not eliminate the obligation of 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.[17] Moreover, neither U.S. Bank nor its successor had any legal basis for claiming a right to revenue from the Parking Facility in any form, as the Developer does not own the Parking Garage but is obligated to provide parking under the COREA. In fact, U.S. Bank

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[17] Attachment 2 in turn refers to the COREA and the Parking Lease:

> The Developer at no expense to the Authority shall operate and maintain to the satisfaction of the Authority the Parking Facility, subject to mutually agreed upon controls and conditions to assure the availability of said Facility for short term parking for patrons and the public. Conditions, restrictions and other provisions relating to the use, operation, maintenance, costs, etc. of the Parking Facility **shall be set forth in the REA and in a Lease of the Parking Parcel** to be agreed to and entered into by the Authority and the Developer.

(JDA Attachment No. 2, ¶ G, J.A. 293 (emphasis added).

continued to turn over the parking garage tenant charges to the Parking Garages even after entering into the Restated JDA. The Restated JDA replaced the prior payment arrangement between CURA and the Developer, but it did not confer upon CWVM a legal right to collect and retain Tenant Parking Fees.

The ruling of the Circuit Court should be upheld. The Circuit Court in its Order to Enforce reaffirmed its previous findings from the Final Order that certain obligations run with the land, including those found in COREA, which bind purchasers of the Mall, like CWVM to be obligated for the maintenance and operation of the Parking Garages. Nothing that occurred subsequent to the entry of the Final Order, altered or amended those continuing obligations. The Order to Enforce correctly found that CWVM is not a successor to any of the former Mall entities whereby it can claim the benefits of releases contained in the Settlement Agreement, since CWVM purchased the Mall from U.S. Bank and U.S. Bank was not a party to Settlement Agreement.

VI. CONCLUSION

For these reasons and others apparent to the Court, the court should uphold the Order to Enforce of the Circuit Court.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
Case No. 22-ICA-36

CHARLES WV MALL, LLC,

Defendant Below/Petitioner

v.

Appeal from Final Order of Circuit Court of Kanawha County Case No. 17-C-1527

CHARLESTON URBAN RENEWAL AUTHORITY,

Intervenor Below/Respondents

and

UMB BANK, N.A., as Successor Trustee for the Bondholders for the Series 1996C Subordinate Capital Appreciation Parking Facility Refunding Bonds,

Third Party Defendant/Respondent

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2022, I caused service of the foregoing *Brief of Respondent Charleston Urban Renewal Authority* to be made upon all counsel of record via electronic delivery as follows:

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