No. 22-0002

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

at Charleston

Justice Holdings LLC

Petitioner,

v.

Glade Springs Village Property Owners Association, Inc.,

Respondent.

From the Circuit Court of Raleigh County, West Virginia
Civil Action No. 19-C-481

PETITIONER JUSTICE HOLDINGS LLC'S BRIEF

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INTRODUCTION

While aspects of this action are tedious, technical and disputed, the fundamental and controlling ones are simple, straightforward, compelling and subject to decision by this Court. First, based on undisputed facts regarding the intent of the parties to the recorded Declaration for Glade Springs Village of May 25, 2001 ("Declaration"), the Circuit Court improperly denied the parties the benefit of a statutory exemption they intended mutually to invoke and on which their entire relationship was structured and operated for 18 years without unit owner challenge. If this Court agrees, then the substantive provisions of the Uniform Common Interest Ownership Act ("UCIOA") do not apply to Glade Springs Village ("GSV"), Petitioner's contractual right to be repaid by Respondent, or ("POA") the $11.4 million invested for certain utilities is intact, and Respondent has no right to assess Developer Lots. Second, if this Court disagrees, then it must decide under the record, law and principles of equity, whether the Circuit Court was correct in: a) absolving the Respondent from its obligation to repay Petitioner the $11.4 million; b) awarding Respondent a Judgment of $6.6 million in assessments on exempt Developer Lots; and c) interpreting and applying the statute and law to deny Petitioner relief while granting Respondent's claims.

The Circuit Court's Orders have far-reaching implications beyond this action. This Court's decision will send a clear message to contracting parties generally and developers of common interest communities specifically. It will signal whether West Virginia courts will enforce a party's rights and remedies under written contracts it has fully performed, when counterparties have received the full benefits of the written agreement without any payment or consideration therefor. Respectfully, such a result cannot stand.

ASSIGNMENTS OF ERROR

1. In contravention of longstanding West Virginia law, the Circuit Court committed reversible error by failing to enforce the uncontroverted intent of the parties to the Declaration to exempt GSV from the substantive provisions of UCIOA under W.Va. Code § 36B-1-203(2).

2. In a question of first impression, the Circuit Court committed reversible error by applying UCIOA's substantive provisions to GSV and interpreting W.Va. Code § 36B-3-105 to permit the POA to invalidate and render void an $11.4 million Utilities Loan Petitioner had fully performed and of which unit owners were aware and did not challenge for 18 years.

3. The Circuit Court committed reversible error by failing to employ equity to prevent a grossly unjust result or to fashion an appropriate remedy, by refusing as futile the amendment of the Complaint, and by dismissing the First Amended Complaint.

4. In a question of first impression, the Circuit Court committed reversible error by voiding the Declaration's exemption of Developer Lots from homeowners' assessments and including assessments on other lots which were never a part of GSV or withdrawn, and entering a $6.6 million Judgment for the POA for ten (10) years of retroactive assessments.

5. If the Circuit Court was correct in applying UCIOA to GSV, it committed reversible errors by misinterpreting and applying UCIOA to: a) Authorize the POA to cancel individual provisions of the GSV Declaration, in violation of W.Va. Code §§ 36B-3-103(b) and 36B-2-117(a); b) Refuse to apply UCIOA provisions regarding addition or withdrawal of property subject to the Declaration and assessment under W.Va. Code §§ 36B-2-105 and 36B-2-110; c) Ignore UCIOA's requirements for budgeting and assessing of lot owners under W.Va. Code §§ 36B-3-103(c) and 36B-3-115(a)-(b); d) Ignore the requirements for allocation of common expenses

under W.Va. Code § 36B-3-115(b); e) Refuse to require the POA to recalculate the retroactive assessments using the formula in W.Va. Code § 36B-3-115(b) to include Developer Lots in the total number of lots to which "common expense liability" was allocated each year; and f) Not require the POA to refund or credit surplus payments on future assessments to comply with W.Va. Code § 36B-3-114.

STATEMENT OF THE CASE

This action raises important questions about basic contract law, equity, statutory construction and West Virginia real property law affecting contracting parties generally and every developer seeking to create a common interest community in West Virginia. The Circuit Court's rulings turn basic contract law on its head and deprive Petitioner at law or in equity any recovery from Respondent of more than $11.4 million spent under the Declaration and a related "Utilities Loan" contract with the POA, for its benefit, subject to its obligation to repay. The Circuit Court's Orders: 1) ignore the uncontroverted intent of the parties to the Declaration and Utilities Loan; 2) confuse Glade Springs and GSV and ignore the custom and practice of 18 years of operating history of GSV, its developer and its POA and unit owners; 3) ignore the knowledge of the POA and its unit owners of their obligations under the Declaration and the Utilities Loan and acquiescence thereto; and d) unwind and ignore without any consideration the full benefits conferred by Petitioner and its predecessor on the POA and its unit owners, without requiring the POA to pay therefor. The Circuit Court's Order voiding the exemption from assessment of Developer Lots and corresponding Judgment of $6.6 million for the POA for ten (10) years of retroactive assessments is fatally flawed for the same reasons. Such rulings are inequitable and undermine a party's ability to rely on written, recorded documents that were made a part of every deed to every unit owner in GSV, even when those arrangements are

reasonable, fair and fully disclosed to prospective owners and accepted by them without complaint or protest until almost two decades later.[1] The chilling effect of these rulings on future development in West Virginia is obvious.

The terms "Glade Springs" and "Glade Springs Village" are not synonymous. Glade Springs began in the 1970s. It included homes, Glade Springs Resort, recreational amenities, including a golf course, and maintenance and security provided by Glade Springs Resort. The original development is referred to as "Phase 1". It has its own declaration, has never been a party to this action, and has never merged into GSV. Phase I has never been subject to UCIOA, which was not adopted in West Virginia until 1986. GSV began in 2001 with the filing of its Articles of Incorporation, By-Laws and the Declaration of Covenants of May 25, 2001 ("Declaration"). It is the third residential portion of Glade Springs.[2] The Declaration establishing GSV included a plat of only one (1) acre Declaration Art. II, § 1, App. 851 and did not comply with the requirements to preserve "special declarant rights" in W.Va. Code § 36B-1-103,[3] or

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[1] The POA continues to leverage the Circuit Court's holdings in ways that conflict with West Virginia real property law. While this appeal was pending, the POA filed suit in Raleigh County to enforce its $6 million judgment lien for 2010-2022 assessments on Developer Lots. See *GSVPOA v. Justice Holdings et al.*, Raleigh County no. CC-41-2022-C-57, filed March 4, 2022. The suit requires determination of the relative priorities of a deed of trust recorded in 2014 and the POA's UCIOA judgment lien for unpaid assessments, filed in 2021. It thus presents a direct conflict between West Virginia property law, specifically W.Va. Code § 38-3-7, and the ultra-priority granted to UCIOA liens by W.Va. Code § 36B-3-116(b). It illustrates the slippery slope initiated by the Circuit Court when it ignored the equities and selectively applied UCIOA provisions to the benefit of the POA.

[2] The second development at Glade Springs in called The Farms. It began in 1996. It was structured from inception as a stand-alone UCIOA community, but has never been merged with Phase 1 or GSV. The Phase 1 and The Farms unit owners pay assessments to GSV in exchange for certain access privileges to GSV amenities, but legally cannot be required to do so as each has its own POA, and GSV is required to reimburse Glade Springs Resort for the cost of maintenance and security for Phase 1 unit owners.

[3] "Development rights" include the right to add real estate to a common interest community, create units or common elements within a common interest community, and withdraw real estate from a common interest community. W. Va. Code § 36B-1-103(14). "Special declarant rights" include "rights reserved for the benefit of a declarant to: (i) Complete improvements indicated on [plats] and plans filed with the declaration…; and (ii) exercise any development right…." W.Va. Code § 36B-1-103(31).

W.Va. Code § 36B-2-105(a)(8). For reasons discussed in Section V.B. below, this is fatal to Respondent's assessment argument and related Judgment.

In November 2019, Justice Holdings filed a simple two-count breach of contract action against the POA to enforce a defaulted $11.4 million Loan Agreement and Revolving Note (the "Utilities Loan") of July 1, 2001, between Cooper Land Development, Inc. ("CLD"), as developer of GSV, and the POA, for construction of utility improvements in GSV. See Complaint, App. 1; Utilities Loan documents, App. 416-453. Between 2001 and 2010, CLD advanced for the POA's benefit over $10 million, interest free, for utilities construction at GSV, relying on the POA's repayment obligation under the Utilities Loan. See App. 1298.[4] In October 2010, CLD and Justice Holdings entered into an asset sale/purchase of certain GSV assets. Justice Holdings paid CLD substantial consideration for the assets, which consisted principally of three items: the Utilities Loan; approximately 330 unsold lots ("Developer Lots") and related rights and interests in Phase 1, The Farms and GSV; and a working capital loan to the POA, which had also existed since 2001. App. 4135-36.[5] Between October 2010 and 2016, Justice Holdings advanced additional funds under the Utilities Loan to expand the utilities in GSV, and also provided working capital for GSV to the POA under a separate loan agreement.[6]

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[4] A portion of homeowners' property taxes was also used to fund utilities construction through tax increment financing (TIF). See explanation at App. 1696.

[5] The POA has filed a separate action to attempt to recover from the Developer monies advanced and repaid pursuant to this working capital loan. See *Glade Springs Village Property Owners Association, Inc. v. Cooper Land Development, Inc. and Justice Holdings, LLC*, No. 21-C-129 (Raleigh County, W.Va., Business Court Div.).

[6] Justice Holdings was required under the terms of its acquisition to place $1.8 million in escrow and contribute an additional $60,000 per month to fund expansion of utilities within GSV. App. 1298.

The POA answered the Complaint and filed multiple counterclaims. App. 11. Justice Holdings moved to dismiss all counterclaims. App. 48. The Circuit Court granted the Motion for claims based on the West Virginia Consumer Credit and Protection Act, but allowed claims based on the West Virginia Uniform Common Interest Ownership Act ("UCIOA") to proceed. App 126.[7] The POA thereafter filed its Second Amended Answer and Counterclaims. App. 131.

On motions by the POA, the Circuit Court found that all provisions of UCIOA, W.Va. Code § 36B-1-101 *et. seq.*, applied to GSV, despite uncontroverted record evidence that: the parties to the Declaration, the controlling and governing document for GSV signed in May 2001 by CLD as Developer and the POA, intended to and believed they had exempted GSV from the substantive provisions of UCIOA, as permitted by W.Va. Code § 36B-1-203(2); CLD would not have developed GSV otherwise; and the parties had operated GSV for 18 years on this basis, with the POA's and unit owners' knowledge and without challenge or complaint. CLD, the initial Developer, had disclosed the obligation of the POA to pay for utilities construction to every prospective buyer in its annual Property Reports for Glade Springs Village, beginning in November of 2001. See App. 1236-96. Justice Holdings continued the disclosures, which the POA acknowledged. See Amended Answer, ¶¶ 61 – 68, App. 147-48; App 1297-1381.

The 2001 Declaration establishing GSV was disclosed to and made a part of every homeowner's deed, was recorded in the Office of the Clerk of Raleigh County, and sets forth the POA's obligation to fund the cost of utility improvements at GSV from homeowner assessments. See Declaration, Art. VI, §§ 1&3, App. 859-60; Art. X, § 2, App 867. The Utilities Loan and incurred debt obligations were discussed by the Developer and POA members at annual

[7] This Order is the subject of a separate appeal pending before the Court. *See GSVPOA v. Justice Holdings LLC*, no. 22-0003.

meetings as early as May 15, 2003, as acknowledged in the Deposition of Claude ("Rennie") Hill. The Utilities Loan also was disclosed in audited financial statements for the POA, App. 1445, and homeowners had a right to review these documents upon request, and did so. See App. 1224-25. POA newsletters discuss the Utilities Loan obligation of the POA and do not question or challenge it in any way. See, e.g., App. 1383.

Notwithstanding this record, the Circuit Court concluded the POA had the right under UCIOA to terminate and void from inception the 2001 Utilities Loan. See Order on Count III, App. 2530, at 2548. The Circuit Court refused to interpret or reform the GSV Declaration to conform to the parties' intent and found that "termination" of the Utilities Loan under 36B-3-105 is retroactive to its inception in 2001, which runs counter to the plain meaning of the statute and West Virginia's definition of "termination" in the Uniform Commercial Code. This ruling has produced, with interest, a $15 million windfall for the POA. The Circuit Court also ruled that Justice Holdings had no legal or equitable claims, protections, rights or remedies to recover these payments incurred for the benefit of the POA and its unit owners in reliance on the POA's promise of repayment in the Declaration and Utilities Loan. CLD as initial Developer, and Justice Holdings as successor Developer, each relied upon and performed in accordance with the Declaration and the Utilities Loan documents. The record is uncontroverted that CLD would not have developed GSV without the POA and unit owner agreement to reimburse the developer for the costs of certain utilities for GSV, or agreeing to the Developer Lot exemption.

The Circuit Court also ruled: a) the Declaration's exemption of Developer Lots from assessment was invalid under UCIOA (App. 2523); b) Justice Holdings must pay the POA over $6.6 million in annual assessments since 2010 on hundreds of unsold Developer Lots (App. 3978); c) Justice Holdings must pay assessments on repossessed or purchased lots ("Justice

Lots"), all of which it already paid as credits against the Utilities Loan prior to the POA's notice of termination (App. 3975; ¶ 71); and e) Justice Holdings must refund $545,000 in POA payments on the Utilities Loan (App. 3978). Justice Holdings objected to each proposed order, which the Circuit Court rejected and denied. See App. 3106, 3635, 3721, 3849, 3906, 3919.

Justice Holdings also filed a Motion to Amend and Amended Complaint, seeking to assert equitable claims, App. 1547, to which the POA objected, App. 1618. The transcript of this motion hearing is attached, App. 4367, and reflects the Court granting the objection to the motion to amend, finding it "futile". Further, the Circuit Court found Justice Holdings had no equitable causes or remedies to assert to enforce repayment of the Utilities Loan because Justice Holdings had legal claims- which the Court had already barred. App. 2648.

Justice Holdings then filed a second Motion to Amend and First Amended Complaint including legal and equitable causes based on the Declaration. App. 2666. The POA again objected. App. 2844. The Court granted the Motion to Amend, but later granted the POA's Motion to Dismiss, App. 3768. It ruled that the Declaration is not a contract, even though: a) the POA admitted the Declaration was a contract and alleged breach of the Declaration in its counterclaims, App. 158; b) the POA sought and the Court granted relief from certain "contractual provisions" in the Declaration, App. 3777-81; and c) Justice Holdings had identified multiple contractual provisions and obligations in the Declaration. App. 3852-57. The Circuit Court also ruled that Justice Holdings had no equitable claims or remedies under the Declaration, stating that any such equitable claims or relief would be inconsistent with UCIOA, App. 3782-85, even though UCIOA expressly preserves supplemental principles of law and equity, and directs that its remedies "shall be liberally administered to put the aggrieved party in as good a position as if the other party had fully performed." *See* W.Va. Code §§ 36B-1-108; 36B-1-

113(a). At common law and by statute, the Circuit Court had the power to reach the legal result urged by Petitioner, or to do so in equity. The Circuit Court refused to do so on any basis.

The result is one that defies West Virginia law and equity, and benefits only the POA and its unit owners, to the extreme detriment, prejudice and expense of Justice Holdings. At no time did the Court interpret or apply any of UCIOA's provisions to benefit Justice Holdings. In fact, of the nine (9) Orders subject to appeal, Justice Holdings filed objections to the Orders tendered by the POA and/or tendered competing proposed orders on six.[8] In every instance, but for correcting a few clerical errors, the Circuit Court accepted verbatim the lengthy, self-serving Orders tendered by the POA and rejected, often with no comment or explanation, every Order tendered by Justice Holdings.[9] Taken to their logical conclusion, the Circuit Court's rulings permit a property owners' association to ignore with impunity compliance with UCIOA, while granting the property owners association the right to strike and terminate any contractual obligation in a Declaration or contract with which the property owners' association no longer wishes to perform or comply, regardless of the performance and compliance by the developer. On every basis, the record requires reversal of the Circuit Court's Orders as a matter of law. In addition, the Circuit Court refused to interpret, apply or enforce properly UCIOA's provisions. These errors led to the POA Judgment, forgave the POA errors in budgeting and assessment, addition and withdrawal of units, and amendment of the Declaration. See Transcript, App. 4582. This appeal followed.

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[8]See App. 2288, 2294, 2300. 2312, 2715, 2831, 2834, 3106, 3464, 3492, 3623, 3737, 3849, 3906.

[9]The Circuit Court sometimes prepared short memoranda regarding its decisions to reject the objections of Justice Holdings and accept the proposed orders of the POA. See App. 2507, 2527, 3635, 3763, 4012.

SUMMARY OF ARGUMENT

The Circuit Court improperly denied Petitioner the benefit of a statutory exemption to the substantive provisions of UCIOA, which the parties to the GSV Declaration intended mutually to invoke and on which their entire relationship was structured and operated for 18 years without unit owner challenge. The rulings of the Circuit Court unjustly allow the POA to repudiate the structure established in the GSV Declaration, retain the benefit of the Utilities Loan investment, and shed the obligation to repay it. The substantive provisions of UCIOA do not apply here and Respondent has no right to terminate the Utilities Loan, or to escape Respondent's repayment obligation of the $11.4 million invested for certain utilities at GSV. Further, the Respondent has no right to assess any Developer Lots, or to a Judgment for $6.6 million for ten (10) years of retroactive assessments on Developer Lots expressly exempt from or not subject to assessment.

The Circuit Court refused erroneously to permit Justice Holdings to proceed in contract, or in equity when Justice Holdings sought to do so by Amended Complaint. The Circuit Court went further to grant the POA substantial relief and remedies, even when Justice Holdings had fully performed under the Utilities Loan, the POA had failed to perform, and the Declaration for GSV required the POA to pay and perform. To achieve this result, the Circuit Court: a) ignored the uncontroverted record evidence of CLD's intent and basis in 2001 to invest in West Virginia, develop GSV, create the POA and exempt GSV from UCIOA's substantive provisions; b) ignored the Declaration and GSV's operation and course of conduct and practice from 2001 to 2019 and the POA's knowledge of and the unit owners' implied consent thereto; c) found that all of UCIOA's substantive provisions applied to GSV, but interpreted and applied UCIOA's provisions to benefit only the POA; and d) refused to grant relief in equity to Justice Holdings despite the injustice that resulted from its rulings.

If the Court determines that all of UCIOA's substantive provisions apply, they must be applied evenly to do substantial justice, which dictates Petitioner is entitled legally and equitably entitled to be repaid the $11.4 million advanced for utility construction under the Declaration, has no liability to pay assessments on Developer Lots for multiple legal and equitable reasons, and Respondent is not entitled to the relief and remedies the Circuit Court granted by its Orders.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument under Rule 20, because this case involves purely legal issues, some of which are of first impression, about the application and interpretation of UCIOA, W.Va. Code § 36B-1-101 *et seq.*, including: its application and exemptions; whether a right to terminate a contract under W.Va. Code § 36B-3-105 is prospective or voids the contract *ab initio*; whether a Declaration is an enforceable contract between a developer and an owners' association; and a developer's right to equitable relief under common law and UCIOA's express provisions, including W.Va. Code § 36B-1-108. The case also involves issues of fundamental public importance vital to West Virginia's development future- can a developer of a common interest community in West Virginia rely on the development's foundational documents and receive the benefit of its investment and bargain, and what impact will the Circuit Court's holdings have on future development in the state? Oral argument would significantly aid this decisional process.

STANDARD OF REVIEW

Justice Holdings appeals from the Circuit Court's grants of summary judgment and dismissal. This Court reviews both *de novo*. *See* Syl. pt.1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994); Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Where, as here, there are no genuine issues of material fact

with respect to the Orders on appeal, the Court should reverse the decisions of the Circuit Court and enter judgment for Justice Holdings as a matter of law.

ARGUMENT

I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ENFORCE THE UNCONTROVERTED INTENT OF THE PARTIES TO THE DECLARATION TO EXEMPT GSV FROM THE SUBSTANTIVE PROVISIONS OF UCIOA AS PERMITTED BY W.VA. CODE § 36B-1-203(2).

Justice Holdings provided the Circuit Court with uncontroverted evidence that the parties to the Declaration sought from inception to avoid and exempt GSV from the substantive provisions of UCIOA by qualifying GSV as a "limited expense liability planned community" ("LELPC"), as defined in W.Va. Code § 36B-1-203(2). GSV operated for 18 years on the assumption that UCIOA does not apply. For these 18 years, neither the POA nor its unit owners challenged the non-application of UCIOA's substantive provisions to GSV. See Affidavit of Elaine Butler, ¶ 11, App. 4137. The Circuit Court had the power to reform the Declaration to conform to the intent of the parties, s*ee* Syl. pt. 2, *Hertzog v. Riley*, 71 W.Va. 651 (1913), or to correct a mutual mistake, but refused to do either.[10]

West Virginia Code § 36B-1-203(2) exempts a common interest community from all of UCIOA's substantive provisions if it meets two requirements.[11] First, the annual average

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[10] "It is generally recognized that a mistake as to the legal effect of a contract, though a mistake of law, will be treated as a mistake of material fact where the mistake is mutual, or common to all parties to the transaction, and results in a written instrument which does not embody the 'bargained-for' agreement of the parties." *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97, 100-101 (1996), *quoting Webb v. Webb*, 171 W.Va. 614, 619, 301 S.E.2d 570, 575 n. 5 (1983).

[11] W.Va. Code § 36B-1-203 provides:

> If a planned community:
>
> (1) Contains no more than twelve units and is not subject to any development rights; or

"common expense liability," defined in § 36B-1-104(6) as the liability allocated to each unit, may not exceed $300 as adjusted for cost-of-living ("CPI") and allowing certain other deductions. Second, the Declaration must not provide that UCIOA applies. CLD intended to take advantage of the exemption. Basore Affidavit, App. 1171, ¶¶ 5-11.

To prove the intent of CLD regarding GSV, Justice Holdings secured the Affidavit of J. Neff Basore, Jr., of CLD. ("Basore Affidavit"), App. 1171. The POA never deposed Mr. Basore. The POA never tendered any evidence that contradicted, challenged or refuted the CLD intent to which the Basore Affidavit attests. In fact, the POA never tendered any evidence from any source involved in the formation of GSV regarding the intentions of the parties to the Declaration. In short, the POA produced no evidence or contrary testimony regarding the Developer's intent, process, evaluation and decision about whether to purchase the land to create GSV, or to exempt or subject it to the substantive provisions of UCIOA.

The Basore Affidavit attests that CLD would not have purchased the land and agreed to invest the tens of millions needed to create GSV if it was to be governed by the substantive provisions of UCIOA. App. 1173, ¶¶ 9-11. The reason was simple- it would not have been reasonable or economical to do so. CLD only went forward to purchase the land and develop GSV because of the provision in the statute which permits a common interest community to be exempt from UCIOA's substantive provisions. App. 1172, ¶¶ 5-6. This included the ability to exempt the Developer's inventory from assessment until the lots are sold. App. 1171, ¶ 5. In

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(2) Provides, in its declaration, that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed $300 as adjusted pursuant to section 1-114 (adjustment of dollar amounts), it is subject only to sections 1-105 (separate titles and taxation), 1-106 (applicability of local ordinances, regulations and building codes) and 1-107 (eminent domain) unless the declaration provides that this entire chapter is applicable.

turn, CLD could and did use the money not paid to the POA as assessments on the substantial initial outlays for the development of roads and two golf courses. The golf courses alone cost the Developer over $11 million, but were given for nothing, free and clear to the POA. See App. 4070. This allowed CLD to offer lots at lower prices than it could have if it had needed to bear all the expense of assessments and utility infrastructure- given the uncertainty of the cost associated with drilling or removing the extensive rock throughout the property.

CLD is an Arkansas company. Arkansas has not adopted UCIOA. Before it investigated the possibility of developing GSV, CLD had no familiarity with UCIOA. App. 1171, ¶ 8. CLD learned of UCIOA when evaluating whether to develop GSV and drafted the Declaration to avoid subjecting GSV to UCIOA. Admittedly, the drafting of the Declaration could have parroted the exact statutory language of the exemption. However, the relevant facts on the intent of the parties are undisputed, and they support the relief Justice Holdings requested. West Virginia law clearly permits the Court to reform a document to conform with the intent of the parties. S*ee* Syl. pt. 2, *Hertzog v. Riley*, 71 W.Va. 651 (1913). The Declaration does not mention UCIOA or provide that UCIOA applies. See Declaration, App. 845. CLD complied with § 36B-1-203(2) when the initial assessment was set below the $300 limit, as adjusted.[12] In the Circuit Court's eyes, the problem arose because the Declaration did not limit subsequent years' assessment increases to the CPI, but instead provided for increases by "the greater of" the CPI index or 5%, rather than "the lesser of" the CPI index or 5%.[13] Throughout the 21-year history

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[12] See App. 2530, ¶ 44.

[13] The Declaration provides, in relevant part:

> Until July 1 of the year this Declaration is executed, the maximum Annual Assessment shall be Six Hundred Thirty Dollars ($630) plus applicable sales tax per Lot ..... From and after July 1 of the year this Declaration is executed, the Annual Assessment aforesaid may be increased each

of GSV, (including in two out of the three years since May of 2019 when the member-elected POA Board took office) the POA has increased assessments by 5% per year, and in most years this has exceeded the CPI adjustment.[14] The assessment money was used for the benefit of the POA in paying common expenses or otherwise providing services the POA was committed to pay or reimburse, including for maintenance and security, etc. On this basis, Justice Holdings sought an equitable reformation of the language in the Declaration, changing "greater of" to "lesser of" in Declaration Article X, § 3, to conform to the parties' intent.[15] See Plaintiff's Response, App. 1850, at 1856; Transcript of 10/5/20 hearing, App. 4367, at 4412, 4415.

The Circuit Court's Order granting the POA's motion does not address equitable reformation. See Order on UCIOA, App. 2721. Instead, the Order refers to findings in its prior Order Granting the POA's Motion for Summary Judgment on Count III. See App. 2721-22. In the Order on Count III, App. 2530, the Circuit Court accepted Justice Holdings' assertion that "the threshold of $300 was adjusted under W.Va. Code § 36B-1-114 to be $660 for the applicable period of 2001" (¶ 44); erroneously determined that in order to have qualified as an LELPC, the Declaration would have had to expressly provide that the annual assessment **never**

> year above the Annual Assessment for the previous year by majority vote of the Board of Directors of the Association and without a vote of the membership, provided, however, that such increase shall not in any one year exceed the greater of five percent (5%) or the increase in the Consumer Price Index for the twelve (12) month period ending June 30 of the preceding year ....

Declaration Art. X, § 3, App. 867-68

[14]Affidavit of David McClure, App. 569.

[15] The parties to the 2001 Declaration were CLD and the POA. By necessity, the POA representatives at that time were appointed by CLD, because there were no homeowners yet. Appointment of the board by the developer is expressly contemplated by UCIOA. See W.Va. Code § 36B -3-103(d).

exceed $660 (¶ 46) (emphasis added); found that annual assessments for 2001-02 and 2002-03 exceeded $660 (¶ 53); and held that GSV did not qualify as an LELPC (¶ 55).

Justice Holdings objected to this "frozen in time" interpretation, App. 1850, at 1851-52, and provided the Circuit Court with the declaration for another subdivision accepted by this Court as an LELPC in a 2015 decision. *See Fleet v. Webber Springs Owners Ass'n, Inc.*, 235 W.Va. 184, 772 S.E.2d 369 (2015). The Webber Springs Declaration contains the statutory language, rather than a fixed dollar amount. See Webber Springs Declaration, Art. X, ¶ 3, App. 867-68. Justice Holdings asks the Court to confirm that the exemption threshold in W.Va. Code § 36B-1-203(2) is subject to annual increases in accord with W.Va. Code § 36B-1-114, and to reverse the decision of the Circuit Court, direct reformation of the Declaration in accord with the parties' intent, and exempt GSV from the substantive provisions of UCIOA.

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY INVALIDATING AND RENDERING VOID AN $11.4 MILLION UTILITIES LOAN, UNDER WHICH PETITIONER HAD FULLY PERFORMED AND WHICH HAD BEEN DISCLOSED AND UNCHALLENGED FOR 18 YEARS.

Even if this Court applies UCIOA here, which it should not, the Circuit Court's interpretation of "termination" under the statute is clearly wrong and in direct contravention of West Virginia legal and equitable principles, including the Uniform Commercial Code definition of "termination", which is prospective only. The Circuit Court's Order that terminated the Utilities Loan obligation of the POA from its inception in 2001, delivering an $11.4 million principal windfall to the POA, cannot stand legally or equitably for this reason and those which follow.

A. Any termination under W.Va. Code § 36B-3-105 can only be prospective.

Section 36B-3-105 authorizes an executive board elected by the unit owners to terminate without penalty any contract or lease between the association and a declarant that was entered

into during the period of "declarant control."[16] The POA sought in its Motion for Summary Judgment on Count III of the Counterclaims, App. 392, an order declaring valid the POA's "termination" of the Utilities Loan effective in February 2020, by the written notice given under the statute 90 days earlier. See letter, App. 454. In its Order on Count III, App. 2530, the trial court held *inter alia* that the Utilities Loan was "invalid, void and unenforceable" (¶ 63); and concluded, "The Loan Agreement and Revolving Note, both as amended, as of February 16, 2020, were unenforceable and of no further effect, and all remedies that might have been available to Justice Holdings under them or arising out of them, were terminated and were no longer effective as of February 16, 2020." App. 3100, ¶ G. Justice Holdings renewed its objections to the application of UCIOA to the Utilities Loan and objected further on the basis that "termination" of a contract ends the contract at the time termination is effective, not retroactively to void the obligation *ab initio*. See Objections, App. 2288, at 2290 ¶ 16; Transcript of 3/18/21 hearing, App. 4582, at 4672-75. The Court rejected this argument and eliminated any obligation of the POA to repay the Utilities Loan. See App. 2548 ¶¶ F&G.

B. The plain meaning of "termination" is to end a contract at a point in time, preserving any right based on prior breach or performance.

Courts are required to give the language of a statute its plain meaning. Syl. pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). UCIOA does not define "termination," but the

[16] W.Va. Code § 36B-3-105 provides, in relevant part:

> If entered into before the executive board elected by the unit owners pursuant to section 3-103(f) takes office, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to section 3- 103(f) takes office upon not less than ninety days' notice to the other party....

Uniform Commercial Code does so. It states the common understanding of contract termination: "'Termination' occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On 'termination' **all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.**" W.Va. Code § 46-2-106 (emphasis added). This was the meaning applied in *Energy Ctr. LLC v. Falls & Pinnacle Owners' Ass'n* (No. A11-1023, Minn. App. 2012), cited at App. 1166. There, the court upheld an association's termination of a contract for heating and cooling services with the developer, with no mention of refunding amounts paid under the contract prior to its cancellation. The same should be true here. In an analogous situation, W.Va. Code § 36B-2-118, governing termination of common interest communities, preserves the rights of creditors holding liens recorded before termination. *See* W.Va. Code § 36B-2-118(h).

If this Court upholds the Circuit Court's determination that UCIOA applies and the POA validly terminated the Utilities Loan under W.Va. Code § 36B-3-105, it should nevertheless reverse the Circuit Court's holding that the Utilities Loan was "invalid, void and unenforceable." Termination should be defined as in the UCC and operate prospectively from the effective date, February 16, 2020, leaving the POA's repayment obligation prior to that date intact and enforceable.

C. *Genoa Lakes* does not support the POA's argument or the Circuit Court's Order.

To negate its obligation to repay the Utilities Loan, the POA relied heavily on the unpublished order of a Nevada trial court in *Genoa Lakes Resort Homeowners Ass'n v. Genoa Developer Assocs.*, 2015 Nev. Dist. LEXIS 2869* ("*Genoa Lakes*"). See App. 404-09; 4266. The case does not support the Circuit Court's Order granting the POA's motion. Any fair reading of *Genoa Lakes* supports Justice Holdings' right to repayment of the Utilities Loan.

Genoa Lakes, App. 528, involved a $1 million note from a developer to a POA for construction of a fitness center. However, unlike here, the developer of Genoa Lakes: a) failed to mention the fitness center or disclose the note in the public offering statement; b) affirmatively stated there would be no recreational amenities; and c) stated publicly there were no current or expected fees or charges to be paid by the owners of lots for use of the common elements or other facilities related to the Community. *Genoa Lakes* at *5, *19, App 530, 536. Thereafter, the developer represented in a marketing flyer that use and enjoyment of the fitness center were "included." *Id.* at *5-6, App. 530-31. After 27 lots had been sold, and after the fitness center was completed, the developer caused the Genoa Lakes POA to execute a $1,000,000 note, with interest,[17] and a deed of trust in favor of the developer, to pay for the fitness center. *Id.* at *6, *29, App. 531, 539-40. The board of the Genoa Lakes POA later moved to terminate the note obligation under the Nevada equivalent of W.Va. Code § 36B-3-105, and the court found the obligation void and unenforceable. App. 539-40.

The *Genoa Lakes* facts bear no resemblance to the facts before the Court. Here: 1) the obligation of the POA to provide utilities appears at inception of GSV, in its Declaration signed and filed of record in the Raleigh County Courthouse on May 30, 2001, and referenced thereafter in every homeowner's deed (see Dec. Art. X, § 2, App. 867; Deed, App. 4700); 2) the Developer and the POA executed binding legal documents prior to construction of any utilities, confirming the POA's repayment obligation, App. 416-53; 3) the Developer fully and repeatedly disclosed the Utilities Loan obligation to prospective buyers and POA members before, during and after

[17] The Utilities Loan in this case bore no interest from 2001 until June 30, 2018. See App. 449–50; 4235.

construction and installation of the utilities.[18] 4) knowledge and discussion of the Utilities Loan by GSV homeowners is documented as early as 2003;[19] and 5) Neither the POA nor any unit owner questioned the validity of the Utilities Loan or the POA's obligation to repay the amounts advanced by the Developers until late 2018. Affidavit of Elaine Butler, ¶ 11, App. 4137.

The court in *Genoa Lakes* expressly recognized that its holding would not control in a situation like the one before this Court, noting:

> Assuming a scenario of a voidable contract ... Declarant argues that Association should be required to pay Declarant $1,000,000 [the value of the fitness center] plus interest accrued as of the date of termination.
>
> **If Declarant built the Fitness Facility after execution of the Note and Deed of Trust, and in reliance thereon, prior to Association's termination of the Note and Deed of Trust, then Declarant's position might be accurate.** However, those are not the facts of this case. It was Declarant's decision to build the Fitness Center. The Fitness Center was completed prior to the execution of the Note and Deed of Trust .... Under this scenario, allowing Association both to keep the Fitness Center and void the Note does not produce an absurd result.

Genoa Lakes at *29 (emphasis added), App. 539-40. By contrast, allowing the POA in this case both to keep the utilities infrastructure and avoid the obligation to repay the Utilities Loan produces an absurd and unjust result- without any interest, an $11.4 million POA windfall.

D. The Circuit Court erred by nullifying $545,000 in loan payments made by the POA to Justice Holdings prior to termination of the Utilities Loan, and by voiding over $400,000 in assessments Justice Holdings paid in the form of credits against the Utilities Loan balance, because any termination of the Utilities Loan was prospective, and the payments and credits were made prior to termination.

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[18] See, e.g., App. 1236-1381 (Property Reports); App. 1445 et seq. (audited financial statements); App. 1398, 1405, 1413, 1423, 1427-28, 1439, 1440, 1443 (POA Board minutes); App. 1383 (POA newsletter).

[19]Questions about the loan were raised and addressed periodically through the years, and minutes and financial statements were posted to the POA website. See App. 1383, 1398-99, 1405, 1407, 1413, 1420-21, 1423, 1427-28, 1439, 1440, 1443, 1445 *et seq.*

As set out above, any termination of the Utilities Loan under UCIOA must be prospective from the effective date of termination, to give effect to the plain meaning of "termination" and avoid unjust enrichment of the POA. The Circuit Court granted summary judgment for the POA in the amount of $545,000 for payments made by the POA prior to the effective date of termination. See Order on Assessments ¶ B, at p. 34, App. 3945, at 3978-79. The Order recognizes that these payments were made prior to termination of the Utilities Loan. See App. 3877, ¶ 80.[20] This money was paid by the POA to Justice Holdings on a legal obligation that was valid and existing at the time of the payments.[21] The Court's Order to refund it is clearly erroneous and should be reversed.

Similarly, as acknowledged by the POA, Justice Holdings posted credits of over $400,000 to the Utilities Loan prior to the effective date of its termination, representing assessments owed to the POA on 63 Justice Lots. See Counterclaim Count V, ¶ 115, App. 154. (These 63 Justice Lots, on which assessments were due and owing, were lots previously sold. They are not to be confused with the over 330 Developer Lots, which were never sold and were exempt from assessment under the Declaration.) The Circuit Court nevertheless included assessments on the Justice Lots in the calculation of unpaid assessments for years 2010 through 2019. See Order, App. 3945, at 3975, ¶ 71. These credits were made against a valid and existing legal obligation, and the Court erred by failing to exclude these amounts from the total assessments ordered.

III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO EMPLOY EQUITY TO PREVENT A GROSSLY UNJUST RESULT OR TO

[20] Paragraph 80 states that the POA made $545,000 in payments "during the period of declarant control." The period of declarant control ended no later than May 1, 2019, when the homeowner-elected board took office.

[21] Justice Holdings made this argument in its Second Supplemental Filing, App. 3605, based on the Circuit Court's indication, at the March 18, 2021 hearing that it had not found the Utilities Loan void "ab initio."

FASHION AN APPROPRIATE REMEDY, BY REFUSING AS FUTILE THE AMENDMENT OF THE COMPLAINT, AND BY DISMISSING THE FIRST AMENDED COMPLAINT.

A. The Amended Complaint and the First Amended Complaint stated causes of action for equitable relief, which the Court refused to permit.

The Circuit Court committed reversible error when it found that Justice Holdings had not stated colorable equitable claims in the Amended Complaint or First Amended Complaint. See Orders, App. 2714, 3768. These Orders are plainly wrong- legally and factually. Count III of the First Amended Complaint asserts a claim for unjust enrichment, based on the POA's retention of the benefits of the Utilities Loan despite being absolved by the Circuit Court of any obligation to repay the $11.4 million balance. App. 2682-84. Count IV seeks recovery in quantum meruit for the value of the utilities infrastructure built by the Developer for the POA, for which no payment has been made. App. 2684-85. Count V asserts promissory estoppel based on the promises and representations made by the POA in the Declaration, which induced reasonable reliance by Justice Holdings in the form of purchasing the Utilities Loan from CLD and advancing additional funds in reliance on the POA's legal obligation to repay it. App. 2685-87. Count VI seeks recovery in quasi-contract where the Circuit Court refused to enforce the written contract of the parties. App. 2688. Each of these causes of action is well recognized and has been accepted for decades under West Virginia law.

The result Petitioner urges is the same whether or not the Court concludes all of UCIOA applies to GSV. This is true because UCIOA expressly preserves supplemental principles of law and equity, and directs that its remedies "shall be liberally administered to put the aggrieved party in as good a position as if the other party had fully performed." *See* W.Va. Code §§ 36B-1-108; 36B-1-113(a). The Circuit Court erred by refusing to acknowledge that Justice Holdings was the "aggrieved party" in this case. Allowing the POA to retain the principal benefit of $11.4

million in utilities infrastructure while eliminating any repayment obligation under the Utilities Loan results in gross injustice and demands relief in equity, particularly when the POA does not dispute that the Developer has paid and fronted the cost of installing utility infrastructure at GSV. The Declaration places responsibility for water and sewer on the POA. See Art. X, § 2, App. 867. The Loan Agreement and Revolving Note document the legal obligation of the POA to repay the Developer for sums advanced for this purpose. See App. 416-53. Even if the Circuit Court is correct in finding that UCIOA applies, and that Code § 36B-3-105 allows the POA to terminate the Utilities Loan, equity demands repayment of funds advanced under the note prior to termination based upon the amounts expended and benefits conferred.

The Circuit Court repeatedly refused even to consider equitable relief. *See, e.g.,* Order on Count III, App. 2547, ¶ 66 ("Equity has no role in this Court's decision."); Order Denying Motion to Amend Complaint, App. 2718 ("[I]t would be futile to permit Justice Holdings to amend its complaint to assert equitable claims"). It reasoned that permitting Justice Holdings to invoke equitable principles would be "inconsistent with [UCIOA]" App. 2718; would be futile, App. 2718, App. 3785; and that claims in equity "may not be interposed to defeat the legal remedy provided by the Legislature for this function and purpose." App. 2718, 3785.

This denial of equitable remedies is error for several reasons. First, the Circuit Court found, incorrectly, that under West Virginia law, a party could not have a legal remedy and an equitable one. See App. 2718, 3784. This Court stated plainly in 1912:

> The mere existence of a legal remedy is not of itself sufficient ground for refusing relief in equity by injunction; nor does the existence or non-existence of a remedy at law afford a test as to the right to relief in equity. It must also appear that it is as practical and efficient to secure the ends of justice and its prompt administration as the remedy in equity.

Syl. pt. 1, *Buskirk v. Sanders,* 70 W.Va. 363, 73 S.E. 937 (1912). West Virginia law recognizes that legal and equitable claims and relief may exist side by side. *See, e.g., Annon v. Lucas*, 155 W.Va. 368, 185 S.E.2d 343, 352 (1971) (equitable relief against unjust enrichment is not affected by fact that plaintiff has a cause of action a law); *St. Luke's United Methodist Church v. CNG*, 222 W.Va. 185, 663 S.E.2d 639, 647 (2008) ("In ruling that rescission is not a proper remedy in the event a legal remedy exists, the trial court was misguided").

Second, the Circuit Court had eliminated Justice Holdings' legal remedy by voiding the Utilities Loan and striking "contractual provisions" from the Declaration. Cases denying equitable relief where there is an adequate remedy at law are inapposite. "If [the legal remedy] does not reach the end intended and actually compel performance of the duty, the breach of which is alleged, it cannot be said to be fully adequate to meet the justice and necessities of the case." *Jennings v. Southern Carbon Co.*, 73 W.Va. 215, 223, 80 S.E. 368 (1913) (internal citations omitted). Despite this compelling authority, the Circuit Court refused to act in equity, or to find that a jury should consider Justice Holdings' equitable claims and causes.

Third, under W.Va. Code § 36B-1-108, UCIOA expressly preserves the principles of law and equity except to the extent inconsistent with UCIOA. The Circuit Court concluded erroneously that granting relief to Justice Holding in equity would be inconsistent with allowing the POA to terminate the Utilities Loan under section 36B-3-105. See App. 2718, 3784. Justice Holdings submits that even if termination is permitted, the proper remedy is to fix termination at the expiration of the 90 days after notice, rather than *ab initio*, which would fulfill the intent of the statute and provide an equitable result by not delivering a massive windfall to the POA.

The Circuit Court, whether by denying the original Amended Complaint as futile, by finding no equitable remedy could exist where there is a legal remedy-even one eliminated by

the Circuit Court, or by dismissing the First Amended Complaint because the "Declaration is not a contract" and finding Justice Holdings has no equitable remedy thereunder, ignored and gave no weight to the 18-year course of conduct by the Developer, the POA and unit owners, and the substantial benefits conferred by the Developer to the POA and its unit owners; their knowledge of the POA's commitment to pay for utilities construction; and the absence of any complaint, challenge, or attempt to alter it until April of 2020. See Second Amended Answer and Counterclaims App. 131. It is unfair and unreasonable for the Circuit Court to nullify this obligation of the POA and its unit owners 18 years after the fact, in the face of repeated disclosures, and POA and unit owners' knowledge of the agreements and relationships with the Developer and the various obligations flowing therefrom. Whether analyzed under UCIOA, West Virginia real property law, or the common law, this case merits relief in equity.

Further, West Virginia law is clear that a party may not delay the assertion of a right or claim or a challenge to the known actions of another when the delay is unreasonable and prejudicial to the party against whom the right, claim or challenge is asserted. *See Province v. Province*, 196 W.Va. 473; 473 S.E.2d 894, 904 (1996). In assessing whether a party's inaction is excused or fatal to that party's asserted claims, "Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to these particulars which may be inferred to be within their reach." *Slack v. Kanawha Cnty. Hous. & Redev. Auth.*, 188 W.Va. 144, 423 S.E.2d 547, 553 (1992) (citations omitted). "The equitable doctrine of laches is based upon the maxim that equity aids the vigilant and not those who slumber on their rights." *Maynard v. Bd. Of Educ.*, 178 W.Va. 53, 357 S.E.2d 246, 253 (1987) (citation omitted).

If the Circuit Court is correct that CLD as original developer and Justice Holdings as successor developer are charged with knowledge of UCIOA **from inception of GSV**, even if neither intended or thought UCIOA applied or did not in fact know all the substantive provisions of UCIOA applied to GSV, the same must be true of the POA and its GSV unit owners. See Order Granting Motion to Dismiss First Amended Complaint, App. 3768, at 3784. Separately, all of the documents necessary to make the POA's claims here have been available to the POA and all GSV unit owners on the POA website for ALL members for at least fifteen (15) years. See App. 4074-76. There is nothing equitable about the Circuit Court's denials and refusals.

B. Justice Holdings stated a claim for promissory estoppel and the Circuit Court erred in finding that Justice Holding failed to allege reliance on any statement by the POA to support its claim of promissory estoppel.

The Circuit Court erred when it found in the October 23, 2020 Order Denying Plaintiff's Motion to Amend Complaint, App. 2719, and again in the July 19, 2021 Order Dismissing the First Amended Complaint, App. 3784, that Justice Holdings failed to allege that it relied on any statement by the POA to support its claim of promissory estoppel. Justice Holdings set out in detail the provisions of the Amended Complaint and the First Amended Complaint that allege such reliance in its October 23, 2020 Objections to the POA's Proposed Order Denying Justice Holdings LLC's Motion to Amend Complaint, App. 2827, and in Plaintiff's Objections to the July 19, 2021 Order, App. 3862 - 63, respectively. Again, the Circuit Court neither addressed, analyzed, or refuted the content or substance of the Justice Holdings objections.

As set out more fully in Justice Holdings' Objections to the Proposed Order Denying Motion to Amend Complaint, App. 2827, both the Motion and the proposed Amended Complaint repeatedly alleged reliance on the POA's written statements in the Loan documents and the

Declaration, and on written and oral acknowledgments of the POA's obligation. For example, the proposed Amended Complaint stated in ¶¶ 52-56 of Count V: Promissory Estoppel:

> 52. Defendant GSVPOA made a promise to repay the Loan consistent with its authority under its Bylaws, and as authorized by its Articles of Organization.
>
> 53. Cooper [CLD] relied reasonably and to its detriment on the promise of the GSVPOA to pay its obligations under the Declaration, particularly related to the Utility Improvements.
>
> 54. Justice Holdings, in acquiring from Cooper [CLD], the right to receive payment from the GSVPOA for the Utility Improvements, relied reasonably and to its detriment on the promise of the GSVPOA to pay its obligations under the Declaration.
>
> 55. Defendant GSVPOA should reasonably have expected to induce action by Cooper [CLD] and then by Justice Holdings, with the GSVPOA promise to pay, by the construction and installation of Utility Improvements, essential for Glade Springs Village.
>
> 56. Defendant GSVPOA's promise to repay the Loan did in fact induce Cooper [CLD] and Justice Holdings to spend almost $20 million to construct the Utility Improvements. Neither would have done so without the promise of the GSVPOA to pay therefor.

App. 1560. The Circuit Court ignored these facts and Petitioner's arguments made at the hearing on the motion as reflected in the transcript, App. 4367, and granted the POA's motion to dismiss the Amended Complaint. See Order, App. 2714. It committed reversible error by so doing.

C. Voiding the POA's repayment obligation under the Utilities Loan unjustly enriches the POA.

There is no question that the Circuit Court's rulings and Orders which voided, *ab initio*, all causes, rights and remedies of Justice Holdings to recover anything from the POA, has unjustly enriched the POA. The POA has paid nothing for the utilities for which it had the obligation to pay under the Declaration and Utilities Loan documents. Such a result runs contrary to basic contract law and offends basic notions of fairness and justice and cannot stand.

D. The Declaration is a contract between the Developer and the POA.

West Virginia law holds that, "a complaint that asserts the existence of a contract and a breach thereof with damages is sufficient to survive a motion to dismiss." *State ex rel. State Auto Prop. Ins. Co. v. Stucky,* No. 15-1178, 2016 WL 3410352 (W.Va. June 14, 2016), *citing Harper v. Bus Lines*, 117 W.Va. 228, 185 S.E.2d 225 (1936). The Circuit Court ignored this guidance and dismissed Justice Holdings' contract claim based on the Declaration. See App. 3768, p. 1.[22] The POA itself asserted breach of contract claims against Justice Holdings for alleged failures to pay assessments under the Declaration. See App. 158, ¶¶ 143-145. The Circuit Court found, incorrectly, that the Declaration is not a contract. App. 3768, pp. 1-7. As alleged in the First Amended Complaint, the Declaration contains mutual promises by the Developer and the POA, both of which had the legal capacity to enter into agreements.[23] It was supported by consideration in the form of millions of dollars invested by the Developer to build and market the community.[24]

This Court has not addressed directly whether a declaration is a contract, but that assumption is apparent in *Foster v. Orchard Dev. Co.*, 227 W.Va. 119, 705 S.E.2d 816 (2010) (per curiam). There, a homeowner, Foster, sought to block construction of certain villas within his UCIOA

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[22] Justice Holdings filed detailed objections to the Circuit Court's findings in the Order dismissing the First Amended Complaint on September 10, 2021. See App. 3849. The Circuit Court received these objections, made timely, after it entered the Order. See Transcript, App. 4445, at 4447 - 48. Following review of Plaintiff's objections, the Court let its Order stand. App. 4448.

[23]Unit owners' associations have the power to make contracts and incur liabilities under UCIOA, see W.Va. Code § 36B-3-102(5).

[24] See discussion in Plaintiff's Objections, App. 3849, at 3852-53. Obligations under the Declaration include the POA's obligation to pay for installation of the water and sewer system (Art. VI, § 3) and maintain the "Common Property" (Art. VI, § 1); the Developer's obligation to construct a championship golf course and a lake (Art. VI, § 5); and the Developer's obligation to convey the Common Properties to the POA (Art. VIII, § 3). See Declaration, App. 845.

community, alleging that they were less than the minimum size required by the subdivision's Design Guidelines. 705 S.E.2d at 822. This Court upheld the circuit court's finding that the Design Guidelines were not binding on the developer where the guidelines were not part of the declaration and were not recorded. *See id.* at 826. The implication is they would have been binding had they been part of the recorded declaration- as are the utility construction and installation obligations of the POA in the GSV Declaration. Other courts around the nation have confirmed the binding contractual nature of a declaration. *See, e.g., Bragdon v. Bayshore Prop. Owners Ass'n, Inc.*, 251 A.3d 661, 680 (Del. Ch. 2021) (association breached the declaration by failing to give homeowner opportunity to remove antenna bracket); *Grand Cent. Lofts Phase I Condo. v. Grand Cent. Lofts Master Ass'n* (Minn. App. 2020), at 10 (accepting trial court determination that Master Declaration was a contract); *Cantonbury Heights v. Local Land Dev.*, 873 A.2d 898, 904 (Conn. 2005) (declaration operates in the nature of a contract, in that it establishes the parties' rights and obligations); *Harbour Pointe, LLC v. Harbour Landing Condominium Assn., Inc.*, 14 A.3d 284, 288 (Conn. 2011) (interpretation of condominium declaration, which operates as contract, is a question of law); *Tierra Ranchos Homeowners v. Kitchukov*, 165 P.3d 173, 177 (Ariz. App. 2007) (restrictive covenants in a recorded declaration create a contract between associations and individual lot owners). The Circuit Court's conclusion that the Declaration is not a contract was clearly erroneous and should be reversed.

IV. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FINDING THE POA IS ENTITLED TO $6.6 MILLION IN RETROACTIVE HOMEOWNER ASSESSMENTS ON DEVELOPER LOTS THAT WERE EITHER EXEMPT FROM ASSESSMENT UNDER THE EXPRESS TERMS OF THE DECLARATION, OR NOT PROPERLY A PART OF GSV.

The GSV Declaration expressly exempts Developer Lots from assessment until their initial sale. See Art. X, §§ 6 and 9, App. 869-71. This provided the Developer the ability to carry

readily available inventory for sale thereby leading to a faster roll-out and development of GSV. The POA never complained about this exemption until it filed its "Second Amended Answer and Counterclaims in April 2020. App. 131. This was almost one year after the member-elected POA Board was in place. At no time before this date in the then 19-year history of GSV was the exemption ever the subject of a complaint, dispute, or challenge. It cannot now be subject of one for the reasons that follow. Moreover, the Circuit Court included assessments against Phase 1 and The Farms Developer Lots, which were never a part of GSV and ignored the failure to properly reserve certain Special Declarant Rights, which preclude the assessments and liens imposed.

A. The Developer was justified in relying on the exemption stated in the Declaration and could have structured the addition of lots differently to avoid assessments on undeveloped land, if the Developer had reason to know the exemption was not valid.

The GSV Declaration exempts from assessment all lots owned by the Developer prior to their initial sale ("Developer Lots"). See Art. X, §§ 6 and 9, App. 869-71.[25] The GSV Declaration was recorded in the Raleigh County Clerk's records at Book 5004, p. 6485 on May 30, 2001, has been available to all GSV homeowners since that time, and is referenced in every deed to property in GSV. See, e.g., App. 1824 and 4700. Since 2001, the POA has computed

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[25] Declaration Art. X, § 6 addresses assessment in general. It provides this exception for Developer Lots:

> The Annual Assessments shall commence and become due and payable as to each Lot, Living Unit and Certificate Membership on the date fixed by the Board of Directors of the Association for commencement, **provided, however, that no Assessments shall be applicable to or payable with respect to any Lot, Living Unit or Certificate Membership until the first day of the second month following execution of a contract of sale by the Developer** with respect to such Lot, Living Unit or Certificate Membership and, further provided, no Assessment shall commence upon a Lot, Living Unit or Certificate Membership where such contract of purchase is terminated by reason of a failure of down payment or rescission thereof pursuant to any right granted by any public and/or governmental authority or agency.

App. 869 (emphasis added). Article X, § 9(f) again states the exemption for Developer Lots. App. 870.

assessment amounts based on its annual budget and the number of Class A members of the POA and never included any Developer Lots, whether in GSV, Phase 1 or The Farms. Order on Count VII, App. 2520, ¶ 33. Neither did the elected unit owner POA board when it took office in May 1, 2019. Counterclaim Count VII, first asserted in April 2020, alleges the exemption in the GSV Declaration discriminated against the POA in violation of W.Va. Code § 36B-2-107(b). It does not mention any discrimination regarding Developer Lots in Phase 1 or The Farms. See Amended Answer, App. 155-57, ¶¶ 128-134.[26] Even so, the Circuit Court struck the exemption for Developer Lots from the GSV Declaration and declared it "void, invalid and unenforceable" and entered an assessment Order and Judgment which included the Phase 1 and The Farms Developer Lots See Order on Count VII, App. 2510, ¶¶ 39, 42, and A-D.

The Circuit Court's ruling is plainly wrong and overreaches. It includes non-GSV Developer Lots and is crushingly unfair to Justice Holdings, which did nothing wrong, followed to the letter the GSV Declaration written in 2001, and adhered to the unchallenged practice of its predecessor, CLD. There is nothing unfair or improper about a Developer exempting lots in inventory from assessment. See W.Va. Code §§ 36B-2-105(a)(8); 36B-1-103(14). This is particularly true where the POA and all unit owners receive a copy of the Declaration, including the exemption, prior to any sale. *See* GSV Declaration Art. X, §§ 6, 9(f), App. 869-70.

CLD believed the substantive provisions of UCIOA did not apply to GSV. Basore Affidavit, ¶¶ 10, 11, App. 1173. Justice Holdings held the same view from and after its purchase of the GSV assets in October 2010. No one disputed this view at any time from inception of GSV in 2001 until April of 2020, when the POA filed its Second Amended Answer and Counterclaims.

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[26]The POA's initial Answer and Counterclaims, App. 11, do not include any challenge to or cause of action based upon the Developer Lot exemption.

If the POA or unit owners had challenged the exemption (which they did not), or CLD had believed a court could strike down the exemption from assessment for Developer Lots, CLD could have left various parts of GSV as undeveloped land until there were buyers for it, rather than adding the lots to GSV and exempting them from assessment until first sold. As for Justice Holdings, it could have done the same, or withdrawn lots from inventory sale, as it did with 41 lots in 2013 and 107 lots in 2016, due to lack of a market for them. See App. 3123-24, ¶¶ 5(b) & (c). Justice Holdings followed the Declaration and justifiably did not consider the GSV Developer Lots subject to assessment. Even though no one ever challenged the exemption for Phase 1 or The Farms Developer Lots, they were included in the assessment Order and Judgment over the objection of Petitioner. App 3975, ¶¶ 71-72.

B. Imposition of assessments on Developer Lots is barred by the equitable doctrines of laches and estoppel, and the Circuit Court's Order results in unjust enrichment.

The Circuit Court's ruling that over $6.6 million in assessments on Developer Lots for the years 2010 through 2021 is now due and owing also cannot stand and is barred by the equitable doctrines of laches, estoppel and unjust enrichment. This is true for all Developer Lots whether in GSV, Phase 1 or The Farms. Laches has two elements: unreasonable delay and prejudice, both of which are present here. *See Province v. Province*, 196 W.Va. 473; 473 S.E.2d 894, 904 (1996). It is difficult to imagine a longer delay or greater prejudice than the 18 years and $6.6 million in surprise assessments presented in this case, not to mention the fact that Justice Holdings reasonably believed, based on the Declaration, that the Developer Lots were exempt from assessment when it bought its interest in GSV. *Barber v. Magnum Land Services*, No. 1:13CV33, 2014 WV 5148575 (N.D. W.Va. Oct. 14, 2014), is a case in point. There, the federal district court held that laches barred Plaintiffs' claims based on four years' delay bringing suit, and prejudice to the buyer of mineral leases, who would not have purchased the leases had

plaintiffs filed timely. *See id.*, slip op. at 29, 32. There is no basis to dispute that Justice Holdings would not have purchased for a substantial sum the assets of CLD in late 2010, if Justice Holdings believed or could have known such an assessment claim could be levied against the Developer Lots. Justice Holdings is entitled to rely on the 18- year absence of any complaint about the Developer Lot exemption from assessment by any unit owner. Surely, the undisputed lack of any unit owner complaint about the Developer Lot assessment exemption until almost 19 years after it had been in place, observed, followed and evident from the financial records of the POA published and available to all unit owners, must foreclose a retroactive challenge to it now. The enormity of the inequity in the Circuit Court's retroactive ruling and ten year reach-back on this point cannot be ignored or permitted to stand.

Similarly, the POA is barred from issuing assessments for years prior to the Circuit Court ruling invalidating the exemption for any Developer Lots by the doctrine of equitable estoppel. The POA signed the GSV Declaration, and was empowered by state law and its own Bylaws to borrow money and incur debt. W.Va. Code § 36B-3-102(a)(5); Deposition of David McClure, App. 4079, at 98:20-22. Justice Holdings reasonably relied on the POA's representation in GSV Declaration Art. X, §§ 6 and 9 that Developer Lots would be exempt from assessment. See Declaration at App. 869-71. This reliance was part of the inducement to purchase the interest of CLD. Justice Holdings also relied on this exemption in computing its annual budget. "Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syl. pt. 2, *Ara v. Erie Ins. Co.*, 387 S.E.2d 320, 182 W.Va. 266 (1989). By following the Declaration and sleeping on its rights for 19 years, the POA and unit owners concealed material facts on which Justice Holdings relied to its detriment.

Further, forcing Justice Holdings to pay $6.6 million in retroactive assessments will unjustly enrich the POA, given that POA assessments each year have been based on a budget for common expenses, divided among the total number of units in GSV, not including the Developer Lots and the funds collected were used for the direct benefit of the POA and its unit owners. See discussion in section V.E below.

V. IF ALL OF UCIOA APPLIES TO GSV, THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY INCORRECTLY APPLYING UCIOA, OR ENFORCING ITS REQUIREMENTS.

Because the GSV Declaration was drafted in the belief that it exempted GSV from UCIOA, the Developer, POA and unit owners operated for almost two decades on the assumption that UCIOA did not apply. The Circuit Court's holding that GSV is subject to all provisions of UCIOA applies a different standard and set of rules to GSV than the ones on which the Developer, POA and its unit owners lived, worked, operated and ran GSV for almost 20 years. In effect, the Circuit Court's rulings attempt to re-write the basis on which GSV was developed and superimpose findings, rulings and calculations of assessments, including under the Circuit Court's November 3, 2021 Order, that violate UCIOA and ignore the application of UCIOA to the surplus POA funds created by the award of retroactive assessments. Justice Holdings alerted the Circuit Court to these and other unintended consequences of its rulings, several instances where the POA was overreaching as to the assessment issue, POA failures to act or violations of UCIOA, and the inequity that resulted to the detriment of Justice Holdings from the Circuit Court's application or interpretation of UCIOA. In each instance when Justice Holdings brought these consequences to the attention of the Circuit Court, it: refused to alter its interpretation or application of UCIOA, or its scope; refused to require the POA to comply with UCIOA; or permitted the POA to eliminate contractual provisions from the Declaration with which the POA

no longer wished to comply, or which it complained would have a negative impact on the POA or invalidate its prior actions. If UCIOA applies it must be applied evenly and interpreted equitably. The Circuit Court failed to do so and it Orders must be reversed and vacated.

A. UCIOA does not authorize termination of individual provisions within a contract or declaration, and does not allow changes to a declaration without the approval of the owners of 67% of the units.

The Circuit Court's ruling that the POA may "terminate" select provisions in the Declaration violates the express language of W.Va. Code § 36B-3-105, which allows only the termination of **contracts or leases** with the declarant, not portions thereof.[27] This holding has allowed the Board of the POA effectively to jettison any obligation or provision it does not like or want to perform and to amend the Declaration without adhering to the requirements for amending a declaration in W.Va. Code § 36B-2-117(a). That section requires the approval of the owners of 67% of the units to effect an amendment. Moreover, UCIOA expressly prohibits the Board alone from amending the Declaration. *See* W.Va. Code § 36B-3-103(b) and 36B-2-117(a). The Circuit Court's reading of section 36B-3-105 to allow the Board to terminate select provisions within the Declaration is in direct conflict with these provisions, and is clearly erroneous.

B. The Circuit Court wrongfully refused to enforce UCIOA requirements for addition or withdrawal of property subject to the GSV Declaration.

CLD's initial filing establishing GSV in May 2001 included a plat of only one (1) acre. Declaration Art. II, § 1, App. 851. UCIOA requires the inclusion of specific Declaration provisions in order to add property to a common interest community. "Development rights" and

[27] UCIOA defines "declaration" in W.Va. Code § 36B-1-103(13), and sets out a procedure for amending a declaration in § 36B-2-117. It stands to reason that if the legislature had intended § 36B-3-105 to apply to declarations, it would have so provided.

other "special declarant rights," defined in W.Va. Code § 36B-1-103,[28] must be reserved in the Declaration, "together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each must be exercised...." W.Va. Code § 36B-2-105(a)(8). There is no dispute the GSV Declaration reserves the right to add property by Supplemental Declaration (Art. II, § 2), but it does not comply with UCIOA's requirements that the declaration state a maximum number of units, W.Va. Code § 36B-2-105, and a time limit by when development rights must be exercised, W.Va. Code § 36B-2-105(8). If UCIOA applies to GSV, the effect of these infirmities is real, substantial and fatal to the assessment claim.

CLD did not properly reserve development rights under the statute, because it did not believe UCIOA applied to GSV. This failure renders invalid under UCIOA the subsequent addition of 2,800 lots at GSV that occurred and was completed long before Justice Holdings acquired the GSV assets in 2010. As such, none of these lots was ever added properly to GSV and therefore, none was properly subject to assessment and/or each could have been withdrawn from GSV property subject to the Declaration at any time- without any POA consent, vote, or approval. Justice Holdings made each of these points to the Circuit Court and discussed the impact the Circuit Court's findings regarding UCIOA had on GSV once all of the substantive portions of UCIOA were applied to GSV. The Circuit Court failed and refused to acknowledge these realities, anomalies and unintended consequences, or to evaluate them in the context of determining which lots were subject to assessment. See Supplemental Filing, App. 3106; Transcript, App. 4582, at 4717-28. If the Circuit Court had strictly applied UCIOA to this

[28] "Development rights" include the right to add real estate to a common interest community, create units or common elements within a common interest community, and withdraw real estate from a common interest community. W.Va. Code § 36B-1-103(14). "Special declarant rights" include "rights reserved for the benefit of a declarant to: (i) Complete improvements indicated on [plats] and plans filed with the declaration...; and (ii) exercise any development right...." W.Va. Code § 36B-1-103(31).

portion of the action, it would have eliminated the POA's argument related to assessments on Developer Lots and undercut any basis for awarding the POA any Judgment, let alone one for $6.6 million, plus interest and attorneys' fees.

The Circuit Court also erred by ordering Justice Holdings to pay assessments on Developer Lots it owns in Phase 1 of Glade Springs and The Farms. See Order on Assessments, App. 3945, at 3967-71. Neither Phase 1, nor The Farms is a part of GSV, nor was either ever merged into the GSV POA. Each has its own POA. Moreover, the "special declarant right" to merge or consolidate with another common interest community must be reserved in the declaration. W.Va. Code § 36B-2-105(8); 36B-1-103(31)(vi). The GSV Declaration does not reserve this right and therefore GSV has no right under UCIOA to merge or consolidate with other communities. Moreover, the addition of units in The Farms and Phase I to the property subject to the GSV Declaration did not comply with the requirements of either 36B-2-117(a) (amending the declaration) or 36B-2-105(a) (8) (exercise of a "special declarant right") and therefore neither is properly subject to GSV POA assessments. Each of these alone is significant. Taken together, they doom the assessment Judgment and claim and cause significant prejudice, unfairness and inequity to Justice Holdings, which has performed to the letter of the Declaration.

C. The Circuit Court ignored noncompliance with UCIOA requirements for budgeting and assessing of unit owners under W.Va. Code §§ 36B-3-103(c); 36B-3-115(a)-(b).

If as the Circuit Court found all of UCIOA's substantive provisions apply to GSV, then UCIOA's requirements for budgeting and assessment in W.Va. Code §§ 36B-3-103(c) and 36B-3-115(a)-(b) applied and must have been followed. They were not followed because no one, including the Developer, POA or unit owners believed they applied. They should not be re-

written. If the history of GSV is to be erased and rewritten in compliance with UCIOA, then the POA and unit owners should not receive a windfall.

D. The Circuit Court ignored noncompliance with UCIOA requirements for allocation of common expenses under W.Va. Code § 36B-3-115(b).

UCIOA provides that, with certain exceptions, all common expenses (defined in § 36B-1-103) must be assessed against all units in accordance with the allocations required to be set forth in the declaration pursuant to §§ 36B-2-107. *See* W.Va. Code § 36B-3-115(b). Section 36B-2-107 mandates that the declaration allocate a fraction or percentage of the common expenses of the association to each unit. The GSV Declaration does not provide a formula for allocation of common expenses and is therefore violates UCIOA. Affidavit of David McClure, ¶ 4, App. 323.

E. The Circuit Court erred by refusing to require the POA to recalculate the retroactive assessments using the formula in W.Va. Code § 36B-3-115(b), and include Developer Lots in the total number of lots to which "common expense liability" was allocated each year.

If the Circuit Court was correct in applying all provisions of UCIOA to impose retroactive assessments for ten (10) years on Developer Lots in contravention of the express exemption in the Declaration, it erred by refusing to require the POA to recalculate the retroactive assessments using the formula in W.Va. Code § 36B-3-115(b) and include Developer Lots in the total number of lots to which "common expense liability" was allocated each year. With certain exceptions not applicable here, UCIOA directs that, "[A]ll common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to section 2-107(a) and (b)." The GSV Declaration does not comply with the statutory requirement of a formula, but the POA's practice has always been to allocate common expenses to all units equally. See McClure affidavit, App. 323. Now that the Circuit Court has ordered

Justice Holdings to pay assessments on approximately 400 additional units each year, section 36B-3-115(b) requires re-computation of the annual per-unit assessment.[29]

F. The Circuit Court erred by not requiring the POA to refund surplus payments or credit them against future assessments to comply with W.Va. Code § 36B-3-114.

If Justice Holdings is required to pay Developer Lot assessments, plus any other relief granted by the Circuit Court, that money is a windfall, for which UCIOA has a procedure:

> Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.

W.Va. Code § 36B-3-114. The GSV Declaration has no such procedure. If this Court allows the Circuit Court's Order Granting GSVPOA's Motion for Summary Judgment on Counts V, VII, VIII and IX of its Counterclaims on Unpaid Assessments and Unjust Enrichment, App. 3945, to stand, it should direct the Circuit Court to order the POA to refund or credit all such payments to the unit owners, including the Developer in proportion to its unit ownership.

CONCLUSION

Based on the foregoing and other matters of record, Justice Holdings prays that this Court enter an Order which vacates the Circuit Court's Orders under review and finds: 1) GSV is not governed by any of the substantive provisions of UCIOA and reforms the Declaration as necessary to so comply; 2) the POA has no right to terminate the Utilities Loan and any notice thereof is of no force or effect; 3) Petitioner is entitled to recover under the Utilities Loan; or in the alternative, under the Declaration, each of which the Court finds are enforceable contracts, or

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[29] If, for example, common expenses of $2 million were assessed against 2,000 units, each would pay $1,000. If 400 units are added retroactively, each unit should only be responsible for $2,000,000 divided by 2,400 units, or $833.

under the equitable doctrines of promissory estoppel, quantum meruit, or unjust enrichment to which Petitioner is also entitled; and 4) the POA has no right to void any specific provisions of the Declaration, including but not limited to its express exemption for Developer Lots from assessment and the Judgment therefor is void, invalid and of no force or effect as are any liens filed thereon or future attempts to assess or lien these Developer Lots. In the alternative, if the Court applies UCIOA to GSV, any termination of the Utilities Loan is prospective only and the POA's obligation remains to pay Justice Holdings for all unpaid amounts advanced or paid by CLD or Justice Holdings for utility improvements at GSV; only the first recorded GSV lots are subject to assessment and any contrary Order and the Judgment must be vacated; Justice Holdings is entitled to credit for money paid and to retain loan payments received; there can be no termination or alteration of any Declaration provision, unless it complies fully with UCIOA's requirements for amendment of a declaration; and Ordering such other relief as the Court deems just and proper.

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No. 22-0002

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
at Charleston

Justice Holdings LLC
Petitioner,
v.

Glade Springs Village Property Owners Association, Inc.,

Respondent.

From the Circuit Court of Raleigh County, West Virginia
Civil Action No. 19-C-481

CERTIFICATE OF SERVICE

I, Shawn P. George, do hereby certify that I served Petitioner Justice Holdings LLC's Brief and an original and (1) copy of the Appendix with Volumes 1 - 7 on counsel of record, via *Hand Delivery*, this 4th day of April, 2022 as follows:

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