No. 22-0002

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

at Charleston

Justice Holdings, LLC,

Plaintiff below/Petitioner,

v.

Glade Springs Village
Property Owners Association, Inc.,

Defendant below/Respondent.

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

RESPONSE OF GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.

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INTRODUCTION

The West Virginia Legislature enacted the UCIOA[1] to protect homeowners from abusive land developers and their high-handed practices. The lower court correctly ruled that UCIOA fully regulates Glade Springs Village. In its brief, Petitioner paints a picture of falsehoods to deprive Respondent and its Members of clear and potent consumer protections that UCIOA guaranties to them. Three of Petitioner's falsehoods merit special attention because they are fundamental to Petitioner's demand for equitable relief from Respondent's legal remedies under UCIOA.

First, the record contains no evidence that there are "undisputed facts regarding the intent of the parties" to the Declaration for Glade Springs Village[2] to qualify under the "statutory exemption[3] they intended to mutually invoke and on which their entire relationship was structured and operated for 18 years". Petitioner's Brief at 1. The only evidence Petitioner cites is the May 28, 2020 Affidavit of J. Neff Basore, of Cooper Land Development, Inc., the Arkansas-based declarant of Glade Springs Village. AP 1171-73[4]. But Mr. Basore's statements directly contradict the deposition testimony of his colleague, Kent Burger, Cooper Communities, Inc.'s corporate designee under W. Va. R. Civ. P. 30(b)(7). On March 2, 2020 Mr. Burger was asked: "When Cooper Communities was looking to develop Glade Springs Village, was it aware initially of UCIOA and its provisions?" Mr. Burger's answer: "I don't know." AP 1587-1589. Because Cooper contradicts itself, there cannot possibly be an "undisputed fact" on the "intent" of Cooper

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[1] UCIOA is codified in Chapter 36B of the Code of West Virginia of 1931, as amended. West Virginia's version of UCIOA, published by the Uniform Law Commission (www.uniformlaws.org), to become effective on July 1, 1986. Glade Springs Village was created in 2001.

[2] In this Response and throughout the record, Respondent refers to the GSV Declaration.

[3] "Statutory exemption" refers to the exception in W. Va. Code § 36B-1-203(2) for "limited expense liability planned communities" or LELPCs.

[4] "AP" denotes "Petitioner's Appendix" followed by the page citation.

as the initial declarant and of GSVPOA to "mutually invoke" the statutory exception. There is only evidence that GSVPOA in 2001 had formed no intent. In 2001, Mr. Burger served on GSVPOA's first board of directors while Cooper wholly dominated and controlled GSVPOA. AP 673-678. His lack of knowledge about UCIOA applies to his leadership of GSVPOA too. Nor is there evidence for Petitioner's false claim that their "entire relationship was structured and operated for this purpose for 18 years". Petitioners Brief at 1.

Second, the parties' intent is irrelevant, a red herring. Whether Glade Springs Village qualifies as an LELPC under W. Va. Code § 36B-1-203 is wholly a matter of law because it is a purely statutory construct. Glade Springs Village is not an LELPC because the GSV Declaration does not "provide" that "the annual average common expense liability of all units restricted to residential purposes . . . does not exceed $300 . . ." AP 2542-2543. The legal conclusion is so clear that Petitioner gives up and turns only to equity for relief from it.

Third, Petitioner notably never disputes that Respondent had a right under UCIOA to terminate the Loan Agreement. Rather, Petitioner claims the result is "unfair" because Respondent obtained the loan's "full benefits" without paying for them. Petitioner's Brief at 1. This is a major deception. Petitioner makes only broad conclusions with no citations to a record that contains no evidence that GSVPOA or its Members received any benefits in exchange for the Loan Agreement unilaterally imposed on them. All the utilities infrastructure that Petitioner claims the loan paid for was completed so that the declarant could market and sell Lots for its sole profit. The declarant built the utilities infrastructure under agreements with the electricity, water and sewer companies that required the declarant and GSVPOA to transfer those assets to those companies. AP 172. GSVPOA never profited from nor owned[5] the operating infrastructure. *Id.*

[5] The declarant built the infrastructure in GSVPOA's name and then required GSVPOA to transfer it.

STATEMENT OF THE CASE

Petitioner Improperly Seeks Equitable Relief From Legal Outcomes.

The threshold *legal* issue in this appeal is whether a narrow exception under UCIOA applies to exclude Glade Springs Village, a planned community[6] in Daniels, West Virginia, from all but three of UCIOA's 82 statutory sections. The Raleigh County Circuit Court correctly ruled that Glade Springs Village does not qualify as an LELPC under W. Va. Code § 36B-1-203 (2):

> If a planned community 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 (parties, regulations and building codes) and 1-107 (eminent domain) unless the declaration provides that this entire chapter is applicable.

AP 558.

The lower court concluded that Glade Springs Village is not an LELPC because the "[GSV Declaration] in fact, does *not* provide 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 W. Va. Code § 36B-1-114". AP 2547-49. The lower court explained: "On this textual basis alone, therefore, Glade Springs Village cannot and does not qualify as a limited expenses liability planned community under W. Va. Code § 36B-1-203(2)." AP 2544.

The issue is threshold for this reason: Because Glade Springs Village is not an LELPC, all of UCIOA applies to and serves as the law of this case and gives GSVPOA and Lot owners there protections and remedies against Petitioner as the declarant. Justice Holdings despises this legal

[6] "Planned community", "cooperative" and "condominium" are the three types of common interest community under UCIOA.

outcome and its effects. That is why it wants this Court to direct the lower court to use its equitable power to sweep aside legal outcomes under UCIOA.

Consider the Petitioner's First Assignment of Error: "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)". Petitioner's Brief at 2. To be sure, Petitioner is not asking this Court to reverse the lower court's *legal* conclusion that Glade Springs Village is not an LELPC based on the declaration creating it. Justice Holdings, never bothering to cite "longstanding West Virginia law", asks this Court to subvert the legal conclusion and direct the lower court to deem Glade Springs Village to be an LELPC when it is not one. *Id.*

Justice Holdings thus casts the First Assignment of Error not as reversible legal error under UCIOA, but rather as an oxymoron: impossibly, an entitlement to an equitable outcome instead of the clear legal one. Petitioner is asking this Court to use equity to reform the GSV Declaration to its desired legal outcome. A judicial decree declaring it to be an LELPC would be improper use of equity to achieve a legal result. Petitioner exposes the untenability of the relief it seeks when it frankly admits that "the drafting of the Declaration could have parroted the exact statutory language of" the exception in W. Va. Code § 36B-1-203 (2). Petitioner's Brief at 14. This is exactly the point. Had the declarant parroted W. Va. Code § 36B-1-203(2) in the GSV Declaration then Glade Springs Village would qualify as an LELPC under that exception. But unlike a squealing bird in a mediocre detective novel, in this *Case of the Missing Exception* the parrot did not speak.

Further, the "intent of the parties" to the GSV Declaration has no bearing on the status of Glade Springs Village that UCIOA determines by operation of law. Nonetheless, Respondent will show below the falsity of the factual premise of the claimed error, that is, the "uncontroverted

intent of the parties". Finally, our Constitution's division of powers clause[7] forbids the judiciary from evading the application of UCIOA to Glade Springs Village. To give Petitioner equitable relief where the Circuit Court's statute-based legal conclusions are undisputed would exceed its jurisdiction where the legislative branch has spoken.

The First Assignment of Error thus collapses. Petitioner's remaining four Assignments of Error then quickly fall away. In the Second Assignment of Error, Justice Holdings again does not dispute that the lower court correctly enforced GSVPOA's statutory remedy under W. Va. Code § 36B-3-105 as written to terminate without penalty a $15 million loan agreement that the declarant forced GSVPOA to enter into while the association was under the declarant's control. Rather, Petitioner asks this Court to jettison Respondent's statutory remedy under W. Va. Code § 36B-3-105 because lot owners "were aware [of the loan agreement] and did not challenge [it] for 18 years". Petitioner's Brief at 2, 16-17. This is yet another request for unmerited equitable relief despite that UCIOA dictates a clear and complete legal outcome. Equity has no rôle.

The Third Assignment of Error is closely related to the Second. Petitioner claims the lower court committed error "by failing to employ equity to prevent a grossly unjust result" after GSVPOA terminated the $15 million loan agreement without penalty, meaning that Petitioner no longer has a contract cause of action against GSVPOA because Respondent voided the loan agreement. Petitioner does not both to explain how the result is "grossly unjust" when Respondent received no benefit from the Loan Agreement. AP 172.

In the Fourth Assignment of Error, Justice Holdings claims that the lower court "committed reversible error" when it enforced UCIOA's plain prohibition that "allocations [of the common expenses for Glade Springs Village] may not discriminate in favor of units owned by" Justice

[7] "The legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others." Article V, *West Virginia Constitution*.

Holdings. Petitioner's Brief at 2, 29-32. For 10 years, Petitioner as the declarant invoked a provision in the GSV Declaration that purported to uniquely exempt the declarant from mandatory Lot assessments for Glade Springs Village's upkeep. For its failure to pay assessments on hundreds of its Lots for a decade, Petitioner owes GSVPOA about $6.5 million. AP 3979. The lower court rightly declared the provision as violative of UCIOA because it discriminated in favor of the declarant merely because it was the declarant. In its June 30, 2021 *Court Memorandum* the lower court explained its reasoning for striking out discriminatory provisions from the GSV Declaration:

> The court's finding that the discriminatory provisions in the Declaration are invalid does not arise from a common-law defect in the contracting process or the Defendant's exercise of the statutory power to terminate certain contracts. It is grounded, rather, on the point that the placement of discriminatory provisions in the Declaration was prohibited by the governing statute[[8]]. The discriminatory provisions were severed because it was not within the power of a Declarant to place them in the Declaration. Those provisions were invalid from the moment the Declaration became effective and they have remained invalid ever since.

AP 3766.

Petitioner further claims, despite all documentary evidence in the record to the contrary, that many of its Lots "were never a part of [Glade Springs Village] or withdrawn" from the planned community, thus, seeking to exempt those lots from mandatory Lot assessments. When a Lot is a "Lot" and whether it is subject to assessments are dictated in the GSV Declaration. Notably, Petitioner cites not a scrap of evidence in the record to support its false claims.

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[8] UCIOA forbids discriminatory treatment in favor of the declarant. "The declaration must state the formulas used to establish allocations of interests. Those allocations may not discriminate in favor of units owned by the declarant . . ." W. Va. Code § 36B-2-105. "[A]ll common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration . . . " W. Va. Code § 36B-3-115(b). "Except as expressly provided in this chapter, provisions herein may not be varied by agreement, and rights conferred may not be waived. A declarant may not . . . use any other device, to evade the limitations or prohibitions of this chapter." W. Va. Code § 36B-1-104.

Last, Petitioner claims a Fifth Assignment of Error divided into six sub-assignments of error. None of these six was either briefed or presented to the lower court for adjudication or ruling. Rule 10(c)(3) of the West Virginia Rules of Appellate Procedure provides that "[i]f the issue was not presented to the lower tribunal, the assignment of error must be phrased in such a fashion as to alert the Court to the fact that plain error is asserted." None of these six is plain error eligible for review by this Court. If this Court concludes that one, some or all of them are eligible for review, Respondent nonetheless will address the points below.

Petitioner claims the lower court's meticulous application of UCIOA to Glade Springs Village resulting in nine separate orders will have a "chilling effect . . . on future development in West Virginia". Petitioner's Brief at 4. If enforcing UCIOA on its terms will have a chilling effect on indifferent, reckless or scofflaw developers, then UCIOA will have done its job. What would be chilling is if this Court would throw UCIOA under the bus in the name of equity.

SUMMARY OF ARGUMENT

Petitioner Fails to Cite Legal Authorities or Pinpoint Citations.

Petitioner's First, Third and Fourth Assignments of Error and each of Sub-Assignments of Error (A), (B), (C), (D), (E) and (F) of the Fifth Assignment of Error substantially fail to cite legal authorities or pinpoint citations to its appendix in compliance with W. Va. R. App. P. 10(c)(7).

Defects in Petitioner's Claimed Errors.

The lower court in each instance of Petitioner's claimed Assignments of Error enforced UCIOA on its plain terms to apply to and serve as the law of the case below. This is a case not about equity, as Petitioner wants, but rather about the application of law and, specifically, UCIOA on its terms. Petitioner shows no reversible or plain error. The Circuit Court rightly resisted Petitioner's repeated calls that it use its equitable powers to relieve Justice Holdings from legal

outcomes under UCIOA, without first showing jurisdiction or basis for equity. The lower court acknowledged our division of powers. This Court must affirm that the judiciary has no jurisdiction or duty but to enforce UCIOA on its plain terms.

The nine orders Petitioner appeals are grounded on UCIOA plainly applied, as they must be. The Legislature declares that "remedies provided by [UCIOA] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." W. Va. Code § 36B-1-113(a). "Any right or obligation declared by [UCIOA] is enforceable by judicial proceeding." W. Va. Code § 36B-1-113(b). "[UCIOA] shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of [UCIOA] among states enacting it." W. Va. Code § 36B-1-110. UCIOA dictates that "[e]xcept as expressly provided in [UCIOA], provisions [in UCIOA] may not be varied by agreement, and rights conferred may not be waived. A declarant may not act . . . use any other device, to evade the limitations or prohibitions of [UCIOA] or the declaration." W. Va. Code § 36B-1-104.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The threshold issues in this case will be decided by enforcing the plain text of UCIOA. Oral argument would not significantly aid the Court's decisions.

STATEMENT OF FACTS

Petitioner's Appendix.

Respondent declined to join in Petitioner's appendix because it failed to honor W. Va. R. App. P. 6(b) that requires that the record "should be selectively abridged by the parties in order to permit the Court to easily refer to relevant parts of the record . . ."

Respondent's Counter-Statement of Facts.

Cooper Land Development, Inc., of Arkansas, as the declarant created Glade Springs

Village in 2001 by recording the GSV Declaration[9] in the Raleigh County Clerk's office on May 30, 2001. AP 845. Cooper Land and later Justice Holdings as the successor declarant filed plats, supplements and amendments to the GSV Declaration that added new Lots or units and Common Property. AP 218. Today Glade Springs Village is sprawling community with thousands of Lots and commonly maintained golf courses and miles of roads.

All of the Lots, except Lots that the declarant owned until the declarant conveyed them, were made subject to the covenant in Article X(6) of the GSV Declaration that Glade Springs Village Lot owners pay assessments to GSVPOA for the upkeep of the Common Property. AP 322, Affidavit of David McClure. In 2010, Justice Holdings became the successor declarant of Glade Springs Village. AP 770, 773. To this day, Justice Holdings owns approximately 400 unimproved lots in Glade Springs Village. AP 217. From the creation of the first Lot in 2001 until the lower court voided the provisions in the GSV Declaration that discriminated in favor of the declarant, the declarant paid no annual assessments on their Lots in inventory. AP 1534.

GSVPOA is the mandatory association[10] of lot owners in Glade Springs Village representing thousands of Members who live or own there. AP 218. GSVPOA on summary judgments against Justice Holdings obtained declaratory relief under UCIOA and then, based on those declarations of rights and obligations, obtained against Justice Holdings' awards of monetary damages totaling about $6.5 million. AP 3978-3980.

Declarant Control of GSVPOA Until May 1, 2019.

The Developer's exclusive power as the sole Class B member of GSVPOA to appoint all of its board members is described in Article III(2) of the GSV Declaration:

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[9] "'Declaration' means any instruments however denominated, that create a common interest community, including any amendments to those instruments." W. Va. Code § 36B-1-103(13). *See generally United Bank, Inc. v. Stone Gate Homeowners Ass'n*, 220 W. Va. 375, 647 S.E.2d 811 (2007).

[10] A common interest community must have an association of its unit owners. W. Va. Code § 36B-3-101.

> The Class B member shall be solely entitled to appoint the members of the Association's Board of Directors and to perform other acts as provided in this Declaration or the Bylaws. The Developer shall continue to have the right to cast votes as aforesaid even though it may have contracted to sell the Lot or Living Unit and may have retained a purchase money security interest. Class B Membership shall continue until all Lots or Living Units in the Developer's remaining inventory have been sold and its active sales and marketing effort is discontinued or until the Developer in its sole discretion determines to terminate such membership at which time its membership shall be converted to Class A Membership.

AP 464-465.

From GSVPOA's inception in March 2001, Cooper Land exercised its reserved right to appoint all of the members of GSVPOA's board of directors. AP 511 at ¶ 4. Justice Holdings became the successor declarant and exercised the Developer's reserved right under the GSV Declaration as the sole Class B member of GSVPOA to appoint all of the members of GSVPOA's board of directors through April 30, 2019. AP 666 at ¶ 12. Thus, the declarant, whether Cooper Land or Justice Holdings, exercised complete dominion over and control of GSVPOA's board of directors through April 30, 2019. *Id.* at ¶¶ 11-12.

Declarant Coerced GSVPOA to Enter Into $15 Million Loan Agreement.

On or about July 1, 2001, Cooper Land, as both declarant and lender, coerced GSVPOA, as association and borrower, to enter into a loan agreement for an interest-free credit line facility for "funding the construction and installation of the water, wastewater, and electric utilities to serve the Village of Glade Springs for up to $8,000,000.00 to meet these responsibilities" . . . (the "Loan Agreement") AP 419-420. The Loan Agreement required GSVPOA to give a "Revolving Note" for $8 million. AP 416. Justice Holdings in its own complaint alleges that "Defendant GSVPOA entered into a Loan Agreement dated July 1, 2001 ("Loan"), with Cooper Land Development, Inc., ("Cooper") as a matter of contract". AP 5. There were no Lot owners other than Cooper Land when

Cooper Land and GSVPOA signed the Loan Agreement and GSVPOA made the Revolving Note. AP 419-420.

The declarant controlled GSVPOA's board of directors. AP 512 at ¶ 6. GSVPOA's declarant-controlled board of directors took no corporate action to authorize the Loan Agreement, to make the Revolving Note or to enter into a deed of trust or into any security agreement to perfect liens on, encumbrances against or pledges of GSVPOA's assets. AP 513 at ¶ 9. GSVPOA's declarant-controlled board of directors did not submit the Loan Agreement, the Revolving Note or any loan document to GSVPOA's Members to obtain the consent of "at least eighty percent of the votes in the association, including eighty percent of the votes allocated to units not owned by a declarant" as W. Va. Code § 36B-3-112(a) requires. AP 514 at ¶ 14.

On March 1, 2008, Cooper Land again coerced GSVPO to enter into the First Amendment to Loan Agreement, which increased the maximum credit line to $15 million. AP 421. GSVPOA's declarant-controlled board of directors failed to disclose to GSVPOA Members its plan to increase the principal of the Revolving Note from $8 million to $15 million. AP at 514 at ¶ 17. On July 1, 2009, Cooper Land again coerced GSVPOA to enter into the Second Amendment to Loan Agreement, extending the draw period to June 30, 2011. AP 428. GSVPOA's declarant-controlled board of directors took no corporate action to amend the Loan Agreement and never notified the Lot owners of its plans or decisions to do so. AP at 514 at ¶ 14.

Not once did GSVPOA's declarant-controlled board of directors give a proposed annual budget for GSVPOA to Members or give Members their statutory right to consider and approve (or disapprove) the budget as W. Va. Code § 36B-3-103(c) requires. AP 515 at ¶ 24.

In 2010, Cooper Land transferred to Justice Holdings all of its interests, including reserved

land and Lots in inventory in Glade Springs Village, together with its reserved declarant rights as the Developer under the GSV Declaration. AP 773. Cooper Land, as the Assignor, and Justice Holdings, as the Assignee, entered into an October 20, 2010 Assignment and Assumption of Utility Loan Agreement, dated October 20, 2010, by which Cooper assigned all of its rights, duties and obligations under a purchase agreement to Justice Holdings, including the Loan Agreement and the Revolving Note. AP 436.

After Justice Holdings became the declarant, Justice Holdings coerced GSVPOA to amend the Loan Agreement at least six more times, including, among other things, extending the due date several times for repaying the alleged indebtedness under the Loan Agreement. AP 437-453.

GSVPOA's Class A Members[11] had no knowledge about nor decision-making role in entering into the Loan Agreement and each amendment, including the last amendments imposing an interest rate where none had existed before. AP 512 at ¶ 6, 513 at ¶ 8, and 514 at ¶ 14.

GSVPOA's First Independent Board Elected After 18 Years.

In April 2019, GSVPOA's Members (*i.e.*, the Class A Members) elected its first independent board of directors. *Id.* at ¶ 14. On May 1, 2019, Justice Holdings surrendered control of GSVPOA's executive board. *Id.* at ¶ 15. During April 2019, GSVPOA's Class A Members were given the first opportunity in the history of Glade Springs Village to elect persons to GSVPOA's board of directors. AP 512 at ¶ 4. In 2019, for the first time since Glade Springs Village was created, GSVPOA's board of directors submitted a budget and the Annual Assessment for the 2019-2020 fiscal year for GSVPOA's Members' approval. AP 666 at ¶ 16.

Justice Holdings commenced the Civil Action below on November 6, 2019, with claims

[11] That is, persons who were GSVPOA Members other than the declarant, the Class B Member.

against GSVPOA for moneys allegedly owed to Justice Holdings out of the Loan Agreement, approximating $11.4 million, plus interest. AP 1.

Loan Agreement's Termination Without Penalty Under W. Va. Code § 36B-3-105.

Invoking W. Va. Code § 36B-3-105[12], GSVPOA sent Justice Holdings a November 18, 2019 letter, referred to as "Termination of Loan Agreement", as follows:

> This letter is directed to you in your capacity as Justice Holdings, LLC's ("Justice Holdings") designated agent for service of process. Under W. Va. Code § 36B-3-105, Glade Springs Village Property Owners Association, Inc. ("GSVPOA") hereby notifies Justice Holdings that GSVPOA by unanimous consent of the executive board of directors has elected to terminate and hereby does terminate the Loan Agreement dated July 1, 2001, by and between Justice Holdings, as assignee of Cooper Land Development, Inc. ("Cooper"), and GSVPOA, as amended, and also hereby terminates each and every amendment, written or otherwise, to the Loan Agreement, together with all related revolving promissory notes. The termination of each and every such agreement is hereby made effective upon 90 days after the date of this notice of Justice Holdings. For purposes of this termination, the date of notice is and shall be presumed to be the date of this letter stated above. Upon the effective date, please surrender the original promissory note or notes to our law firm at our mailing address.

AP 454.

Article X(6) of the GSV Declaration Covenant to Pay Assessments.

Under the GSV Declaration, "the Developer, 'subject to the provisions hereinafter set forth,' including Art. X, § 6, and each 'Owner . . . other than the Developer,' covenant and agree

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[12] "If entered into before the executive board elected by the unit owners pursuant to [W. Va. Code § 36B-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 [W. Va. Code § 36B-3-103(f)] takes office upon not less than ninety days' notice to the other party. . . ."

to pay Annual and Special Assessments for the purposes set out in Art. X, §§ 2 and 4." Article X(6) of the GSV Declaration, entitled "Date of Commencement of Assessments", provides in part:

> 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 Development 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 any public and/or governmental authority or agency . . .

AP 479.

"Assessment" is defined in the GSV Declaration as "such amounts as are required by the Association for payment of Common Expenses and levied against the members by the Association in accordance herewith." Article I(2) of the GSV Declaration. AP 457. "Common Expenses" means "all expenses incurred by the Association for the construction, maintenance, repair, replacement, operation, management and administration of Glade Springs Village and the Common Property, including any reasonable reserve, together with any expenses which are the specific responsibility of an individual Owner which are paid by the Association and charged to the responsible Owner as a personal charge for reimbursement." Article I(5) of the GSV Declaration. AP 457. "Common Property" means "any property, real, personal or mixed, owned or leased by the Association or in which the Association otherwise has possessory or use rights, those areas, reflected as such upon any recorded subdivision plat of Glade Springs Village, and those areas so designated from time to time by the Developer and intended to be devoted to the common use and enjoyment of the members." Article I(6) of the GSV Declaration. *Id.* Thus, Lot owners within Glade Springs Village as mandatory GSVPOA Members by virtue of their

ownership of those Lots are obligated to pay expenses for the maintenance or improvement of other real estate described in the GSV Declaration. Article X(2) of the GSV Declaration. AP 477.

Thus, the GSV Declaration required every Lot owner *other than the declarant* to pay assessments to GSVPOA for the upkeep of common property, including golf courses and roads. AP 469-470. Since October 2010, Justice Holdings has paid no assessments on the lots it owns, amounting to more than $6 million in still-unpaid assessments exclusive of interest and statutory attorneys' fees and cost under W. Va. Code § 36B-3-116(f). AP 3979.

ARGUMENT

Standard of Review.

This Court states: "We review a circuit court's grant of summary judgment *de novo*, Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), "'and, therefore, we apply the same standard as a circuit court,' reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party." *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 698 (1996) (citations omitted). Additionally, "In general, this Court will apply a *de novo* standard of review to a circuit court's order granting a motion to dismiss." *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 123 (2008). "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189.

Petitioner Fails to Cite Legal Authorities or Pinpoint Citations.

Petitioner's Brief substantially fails to cite legal authorities or pinpoint *relevant* citations to its Appendix Record. Petitioner's First, Third and Fourth Assignments of Error and each of Sub-

Assignments of Error (A), (B), (C), (D), (E) and (F) of the Fifth Assignment of Error do not comply with W. Va. R. App. P. Rule 10(c)(7):

> The brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on . . . [and] *must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.* The Court may disregard errors that are not adequately supported by specific references to the record on appeal. (Emphasis added).
>
> Additionally, in an Administrative Order entered by this Court on December 10, 2012, Re: Filings That Do Not Comply With the Rules of Appellate Procedure, we noted that "[b]riefs that lack citation of authority [or] fail to structure an argument applying applicable law" are not in compliance with this Court's rules. Further, "[b]riefs with arguments that do not contain a citation to legal authority to support the argument presented and do not 'contain appropriate and specific citations to the record on appeal . . .' as required by rule 10(c)(7)" are not in compliance with this Court's rules. *Id.*
>
> This Court has repeatedly emphasized that issues that are not supported with pertinent authority will not be considered on appeal.

Birchfield v. Zen's Dev., LLC, 245 W. Va. 82, 89, 857 S.E.2d 422, 429 (2021) (emphasis supplied). "'[J]udges are not like pigs, hunting for truffles buried in briefs[,]' *State Department of Health v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995), and the same observation may be made with respect to appendix records." *Wilkinson v. W. Va. State Office of the Governor*, 245 W. Va. 107, 118 n.18, 857 S.E.2d 599, 610 (2021) (*citing Multiplex, Inc. v. Town of Clay*, 231 W. Va. 728, 731 n.1, 749 S.E.2d 621, 624 n.1 (2013)). For these claimed errors, Petitioner's brief substantially lacks citations of authorities; fails or largely fails to structure an argument applying applicable law; and fails in instances to cite "appropriate and specific citations to the record", all as W. Va. R. App. P. 10(c)(7) require. These specific errors do not merit this Court's review.

Equity Unavailable Where Law Gives Clear and Complete Remedies.

Petitioner repeatedly asks the Court to invoke equity despite that UCIOA gives adequate, certain and complete legal remedies. "As a general rule equity has no jurisdiction, when there is a plain adequate and complete remedy at law." Syl. Pt. 1, *Miller v. Miller*, 25 W. Va. 495, 502 (1885). Respondent asks this Court to be mindful that

> [e]quity will never cancel or rescind a contract, agreement, or other written instrument, except upon some recognized principle of jurisdiction belonging to the court of chancery. It is generally accepted doctrine that equitable relief, for the purpose of cancelling a contract, will not be granted in a case where the injured or defrauded party has an adequate, certain and complete remedy at law. The usual instances wherein equity interposes here are to remove a cloud upon title to real estate; to cancel deeds or other contracts because of fraud, mistake, undue influence, fraudulent concealment, inadequacy of consideration, mental incapacity and infancy, and because of contracts obtained by persons in confidential relationship with others." In *Oelrichs v. Spain*, 82 U.S. 211, 15 Wall. 211, 231, 21 L. Ed. 43, it is said: 'Where there is a complete remedy at law, a bill in equity must be dismissed. This objection is regarded as jurisdictional, and may be enforced by the court, *sua sponte*, though not raised by the pleadings nor suggested by counsel.' *See note* 9 Am. St. R. 859.

Gall v. Bank, 50 W. Va. 597, 599-600, 40 S.E. 390, 391-92 (1901).

First Assignment of Error.

Turning to its substantive argument, Petitioner claims in the First Assignment of Error that "[t]he 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)." Thus, even by Petitioner's account, no reversible legal error exists.

Glade Springs Village Does Not Qualify as an LELPC as Matter of Law.

To be sure, Petitioner notably does not claim that the lower court committed reversible

error on the threshold legal issue: That Glade Springs Village is an LELPC thus subjecting Glade Springs Village, Justice Holdings, GSVPOA and its Members to the whole of UCIOA. Petitioner perhaps elected not to claim the contrary because Glade Springs Village is so obviously and indisputably not an LELPC under W. Va. Code § 36B-1-203(2):

> If a planned community 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.

W. Va. Code § 36B-1-203(2).

"'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.'" Syl. Pt. 2, *Univ. Commons Riverside Home Owners Ass'n v. Univ. Commons Morgantown, LLC*, 230 W. Va. 589, 741 S.E.2d 613 (2013) (*citing* Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)). There is no need to construe or interpret a plainly written statute that instead should be applied as enacted. *See Concept Mining, Inc. v. Helton*, 217 W. Va. 298, 303, 617 S.E.2d 845, 850 (2005) (*per curiam*) (*citing DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) ("Where the language of a statutory provision is plain, its terms should be applied as written and not construed.")); *Ashby v. City of Fairmont*, 216 W. Va. 527, 531, 607 S.E.2d 856, 860 (2004) (holding that when addressing a statutory provision the "Court is bound to apply, and not construe, the enactment's plain language.").

UCIOA applies to all common interest communities "created within this state after the effective date of this chapter." W. Va. Code § 36B-1-104. The effective date of UCIOA is July 1,

1986. Glade Springs Village was created in 2001 when Cooper Land recorded the GSV Declaration in the Raleigh County Clerk's office. Glade Springs Village is a common interest community because it comprises "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in" the GSV Declaration. W. Va. Code § 36B-1-103(7). The obligation to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate in Glade Springs Village is found in Article X(6) of the GSV Declaration. Glade Springs Village is a "planned community" type of common interest community because it is neither a "condominium" nor a "cooperative" as W. Va. Code §§ 36B-1-103(8) and (10) defines those terms. *See* W. Va. Code § 36B-1-103(23).

With these basic legal conclusions undisputed, the Circuit Court ruled that Glade Springs Village is not an LELPC in its October 6, 2020 Order:

> 44. Justice Holdings asserts that the threshold of $300 stated in W. Va. Code § 36B-1-203(2) is adjusted under W. Va. Code § 36B-1-114 for 2001 to $660. GSVPOA does not contest Justice Holdings' conclusion that the threshold of $300 was adjusted under W. Va. Code § 36B-1-114 to be $660 for the applicable period of 2001 under that provision. Thus, this Court for purposes of its decision on this point, assumes that $660 was the correct statutory threshold under W. Va. Code § 36B-1-203(2).
>
> 45. UCIOA provides in W. Va. Code § 36B-1-104: "Except as expressly provided in this chapter, provisions herein may not be varied by agreement, and rights conferred may not be waived. A declarant may not act under a power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration."
>
> 46. For Cooper Land as the declarant of Glade Springs Village to have qualified Glade Springs Village as a limited expenses liability planned community when it was created in May 2001, it would have had to have expressly provided in the GSV Declaration that 'the annual average common expense liability of all units restricted to residential purposes, exclusive of option user fees and

> any insurance premiums paid by the association many not exceed' $600.
>
> 47. *There is no such textual restriction or limitation in the GSV Declaration.*
>
> 48. The Court is obligated to apply the plain meaning of legislative enactments to the cases before it. Without question, Glade Springs Village does not quality under W. Va. Code § 36B-1-203(2) as an exception from the general applicability of all of UCIOA to the planned community, its declarant, its association and its units.

AP 2542-2543 (emphasis supplied).

The lower court additionally found that, "[n]ot only does the GSV Declaration contain no such restriction or limitation, the GSV Declaration, in fact, gives GSVPOA's executive board the express broad and unlimited authority to unilaterally increase the Annual Assessment up to five percent over the previous year's Annual Assessment." October 6, 2020 Order at ¶ 49; AP 2543. "Moreover, on the executive board's recommendation to its Members, the GSV Declaration also gives GSVPOA Members the authority to increase the Annual Assessment by any amount they want "without limitation on the amount of such change." *Id.* "On these two points," the lower court continued, "Section 3 of Article X of the GSV Declaration provides:

> From and after July 1 of the year this Declaration is executed, the Annual Assessment aforesaid may be increased each year above 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 using the "All Urban Consumer, U.S. City Average" for "General Summary", All Items"* as promulgated by the Bureau of Labor Statistics of the U.S. Department of Labor . . . . From and after July 1 of the year this Declaration is executed, the Annual Assessment may be changed prospectively from the amounts hereinabove set forth in any year, *without limitation on the amount of such change, on the recommendation of the Board of Directors of the Association and approved by a majority vote of each class of*

> *Members who are voting in person or by proxy at a meeting duly called for this purpose . . .*

AP 2543-44 (emphasis original).

> 51. On this textual basis alone, therefore, Glade Springs Village cannot and does not qualify as a limited expenses liability planned community under W. Va. Code § 36B-1-203(2).
>
> 52. It is irrelevant to the foregoing analysis and legal conclusion the actual annual average common expense liability for Glade Springs Village and, thus, the average annual assessment of all units restricted to residential purposes for Lots within Glade Springs Village. Nonetheless, the Court takes notice that the record in this case discloses that the declarant-controlled executive board increased the annual assessment for Glade Springs Village Lot owners by five percent each budget year until Lot owners other than Cooper Land and Justice Holdings elected the first executive board under W. Va. Code § 36B-3-103(f) in April 2019.

AP 2544.

Petitioner Appeals Not Legal Conclusions But Demands Equitable Relief

Despite these unassailable legal conclusions, or likely because of them, Petitioner asks this Court on appeal nonetheless to declare Glade Springs Village to be an LELPC based on the "uncontroverted intent of the parties" to the GSV Declaration "to exempt GSV from the substantive provisions of UCIOA". Petitioner's Brief at 2, 12-16. This is solely a request for equitable relief where Petitioner does not bother even to show conditions for jurisdiction in equity.

First, the intent of the parties to the GSV Declaration is irrelevant. A West Virginia planned community cannot magically qualify as an LELPC because of its declarant's mere intent.

Second, although irrelevant, the intent of the parties to the GSV Declaration, Cooper Land and GSVPOA, is not uncontroverted, as Justice Holdings claims. *Id.* Petitioner misstates the record on this point to this Court. For evidence of Cooper Land's intent to evade UCIOA, Petitioner cites only to the Affidavit of J. Neff Basore, Jr., a Cooper Land executive who helped develop Glade

Springs Village in the early 2000s. AP 1171-73. The Basore Affidavit rates as a sham containing self-serving statements with no foundation on contemporaneous documents. Meanwhile, Mr. Basore's statements directly contradict the deposition testimony of his colleague, Mr. Burger, Cooper Communities, Inc.'s corporate designee under W. Va. R. Civ. P. 30(b)(7). Mr. Burger was asked: "When Cooper Communities was looking to develop Glade Springs Village, was it aware initially of UCIOA and its provisions?" Mr. Burger's answer: "I don't know." PA 1587-1589. Similarly, at best Mr. Burger's claim of ignorance is the best evidence in the record about GSVPOA's intent because he served as one of GSVPOA's initial directors. The premise of the First Assignment of Error therefore is false.

Third, the Basore Affidavit is *parol* to the GSV Declaration. "Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration." Syl. Pt. 1, *Cardinal State Bank, Nat'l Ass'n v. Crook*, 184 W. Va. 152, 153, 399 S.E.2d 863, 864 (1990). To admit *parol* first requires a finding that the GSV Declaration is ambiguous on the point. Petitioner has not argued that the GSV Declaration is ambiguous. The lower court has not considered nor ruled that it is ambiguous.

Fourth, for now more than 20 years, thousands of purchasers bought Lots within Glade Springs Village without knowledge of the declarant's alleged intent to qualify their planned community as an LELPC. It would be grievously unfair and unjust to them, including all of the thousands of current Lot owners, if a court declared Glade Springs Village to be an LELPC.

Fifth, for more than 18 years, while under Petitioner's dominion and control GSVPOA imposed and collected millions of dollars of assessments against thousands of Lots (excluding, of

course, its own Lots) well in excess of the statutory cap in W. Va. Code § 36B-1-203(2) allowed for an LELPC. If Glade Springs Village somehow by judicial decree is declared to be an LELPC after the fact, will GSVPOA's past and present Member have a cause of action against GSVPOA for wrongly imposing and collecting assessments in excess of the statutory cap? Will a court also decree that Petitioner must indemnify and protect GSVPOA from those claims?

Sixth, Petitioner cites to no evidence in the record to form the basis for a court to give it equitable relief in the manner of reformation of the GSV Declaration. Petitioner asks this Court to force the lower court to reform the GSV Declaration to change Article X(3) from "greater of" to "lesser of" "to conform to the parties' intention". Petitioner's Brief at 14-15; AP 1850, AP 1856, AP 4367, AP 4412, AP 4415. Petitioner complains that the Circuit Court "does not address equitable reformation." Petitioner's Brief at 15; AP 2721. The Circuit Court did state that it would not resort to equity when the law results in a complete remedy. AP 3783-3786.

Seventh, even if a court would improperly reform the GSV Declaration as Petitioner seeks, it would not prevent GSVPOA and its Members from nonetheless exercising their unfettered right under Article X(3) of the GSV Declaration to increase the Annual Assessment by any amount they desire. AP 477-478. Petitioner's requested reform of the GSV Declaration by itself would not qualify GSV as an LELPC. It would be an exercise in futility.

The number of objections underscores the absurdity of Petitioner's request.

This Court's Consideration of W.Va. Code § 36B-1-203(2) is Irrelevant.

Petitioner "asks the Court to confirm that the exemption[13] 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

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[13] West Virginia Code § 36B-1-203(2) provides for an "exception" to all but three of UCIOA's 82 sections, not an "exemption" from UCIOA as Petitioner claims.

parties' intent, and exempt GSV from the substantive provisions of UCIOA". Petitioner's Brief at 16. First, Petitioner has not perfected an assignment of error in its appeal that seeks this Court to make "confirmation 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 (adjustment of dollar amounts).

Second, Petitioner tendered no evidence in the proceedings below to contradict Respondent's evidence on the effects of the adjuster contained in W. Va. Code § 36B-1-114 on the GSV Declaration since 2001. Respondent's evidence on the effects of the adjuster is uncontested.

Third, it is unnecessary to confirm the so-called "exemption threshold". What difference does the statutory adjuster make to the First Assignment of Error, which concerns only the parties' intent to qualify Glade Springs Village as an LELPC irrespective of reality and extraneous to the fact that the GSV Declaration does not qualify as an LELPC under W. Va. Code § 36B-1-203(2).

Petitioner's request for equitable relief has no merit on this point.

Second Assignment of Error.

Petitioner, now assuming the applicability of the whole of UCIOA to Glade Springs Village, claims the Second Assignment of Error: "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." Petitioner's Brief at 2, 16-20. The few facts are simple. In a November, 18, 2019 letter to Justice Holdings, Respondent exercised its statutory right under W. Va. Code § 36B-3-105 to "terminate" the Loan Agreement "without penalty". AP 454. That statute provides in part:

> If entered into before the executive board elected by the unit owners pursuant to [W. Va. Code § 36B-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 [W. Va. Code § 36B-3-103(f)] takes office upon not less than ninety days' notice to the other party. . . [14]

W. Va. Code § 36B-3-105.

The Circuit Court granted GSVPOA's Motion for Summary Judgment seeking adjudication that its termination of the Loan Agreement was effective, ruling:

> D. Because Glade Springs Village is a 'common interest community' that is not a 'limited expenses liability planned community', then GSVPOA's executive board was entitled to exercise the statutory right to terminate, without penalty, the Loan Agreement and the Revolving Note, both as amended, in accordance with W. Va. Code § 36B-3-105(ii).
>
> E. GSVPOA's November 19, 2019, Notice of Termination complied substantially with W. Va. Code § 36-3-105 to perfect and exercise its statutory right to terminate the Loan Agreement and the Revolving Note, both as amended.
>
> F. The effective date of the termination of the Loan Agreement and Revolving Note, both as amended, was February 16, 2020.
>
> G. The Loan Agreement and Revolving Note, both as amended, as of February 16, 2019, 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.

October 6, 2020 Order AP 2548.

It is important to pause here to note that Petitioner neither disputes nor alleges as error the Circuit Court's ruling that GSVPOA had the clear statutory right to terminate the Loan Agreement

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[14] West Virginia's version of Section 3-105 is lifted *verbatim* from the 1982 model act of the same name. (www.uniformlaws.org). The three types of contract subject to Section 3-105 are categorized by subject matter, parties and conditions: (i) contracts depending on their subject matter, irrespective of the parties and conditions; (ii) contracts depending on their parties — "any other contract or lease between the association and a declarant . . . " — irrespective of subject matters and conditions; and (iii) contracts depending on their conditions — whether they are *bona fide* or unconscionable — irrespective of their subject matters or parties.

without penalty. Rather, Justice Holdings claims as reversible error only the legal effect of GSVPOA's exercising that right.

Petitioner argues that "[a]ny termination [of the Loan Agreement] under W.Va. Code § 36B-3-105 can only be prospective". Petitioner's Brief at 16-17. There is no textual basis in W. Va. Code § 36B-3-105 for Petitioner's claim. Section 3-105 does not distinguish between retrospective and prospective termination. First, the term "termination" is commonly understood. "In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connotation in which they are used." *Guido v. Guido*, 222 W. Va. 528, 532, 667 S.E.2d 867, 871 (2008) (citing Syl. Pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941)(overruled on other grounds by *Lee-Norse Company v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982)). "With respect to a lease or contract, [termination] refers to an ending, usually before the end of the anticipated term of the lease or contract, which termination be by mutual agreement or may be by exercise of one party of one of his remedies due to the default of the other party." *Black's Law Dictionary* (5th ed. 1979). Further, when "termination" is coupled "without penalty" the phrase is plain to mean that the association may terminate a contract without remedy or recourse for the non-terminating party.

Second, the phrase "termination without penalty" in W. Va. Code § 36B-3-105 is unambiguous and does not require judicial construction. The lower court declined to interpret Section 3-105 to apply GSVPOA's statutory remedy only retrospectively. Rather, the lower court simply enforced its plain meaning that termination without penalty means that the Loan Agreement, after February 19, 2020, was "unenforceable and of no further effect". AP 3775.

Third, Petitioner states, without authority, that the "plain meaning of 'termination' is to end

a contract at a point in time, *preserving any right based on prior breach or performance.*" Petitioner's Brief at 17-18 (emphasis supplied). This is a *non sequitur*. The italicized second statement does not follow the first. Respondent agrees that "termination" of a contract is its end at that time (in this case, the Loan Agreement was terminated effective as of February 16, 2020). Because the Loan Agreement was terminated in all of its terms and existence, Petitioner was left without remedy or recourse after Respondent's termination; it can have no contract cause of action on the Loan Agreement. The prepositional *proviso* "without penalty" underscores that no cost can accrue against an association for invoking early termination. If this were not the plain meaning of "terminate without penalty" then Section 3-105 would become a toothless statutory right.

Fourth, the rationale for Section 3-105 to disincentivize the declarant from burdening the owners with bad or sweetheart deals, just like this one. The 1982 uniform law's drafters explained in Comment 1 that

> [t]his section deals with a common problem in the development of condominium, planned community and cooperative projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity. The Act deals with this problem in two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

§ 3-105 *Uniform Common Interest Ownership Act of 1982* (National Conference of Commissioners on Uniform State Laws with Prefatory Note and Comments).

It is hard to imagine a worse deal than the $15 million indebtedness that the declarant unilaterally burdened the Lot owners in this case in exchange for no value to them. GSVPOA's Lot owners had no say in the terms of the Loan Agreement, nor in the eight subsequent amendments to it (*e.g.* from $8 million to $15 million) and the imposition of interest where none had existed before. These

unilateral conditions lasted more than 18 years while the declarant wholly dominated and controlled GSVPOA's board of directors. AP 513-514. (West Virginia Code § 36B-3-105 is a non-judicial remedy. *See e.g. 2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247 (2d Cir. 1991) (affirming termination of a garage lease without penalty); s*ee also Energy Ctr., LLC v. Falls & Pinnacle Owners' Ass'n*, No. A11-1023, 2012 Minn. App. Unpub. LEXIS 90 (Jan. 30, 2012) (affirming a trial court's termination of a contract "binding the association": ". . . the application of this statute to only contracts to which the declarant continues to be a party when the termination occurs would eliminate the protection that the statute offers to unit-owner-controlled CIC associations from being bound to contracts that they were not able to negotiate." Unpub. LEXIS 90, at *8)).

Fifth, Petitioner while claiming "termination" is "commonly understood" also then incongruously asks this Court to look to the definition of "termination" in the Uniform Commercial Code in which it claims that "on 'termination' all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives." Petitioner's Brief at 18 (*citing* W. Va. Code § 46-2-106). If Section 3-105 is "commonly understood", then why does Petitioner look to the UCC for the meaning of "termination"? Further there is no analogue in the UCC for "termination without penalty". The two terms are incomparable for this reason alone.

The UCC actually is quite unlike UCIOA. The UCC is a commercial code whose principle purpose is to codify rights and duties in commercial transactions and relationships. One of UCIOA's main purposes is to protect consumers against unfair transactions and relationships crafted by the declarant while the association is under its domination and control. Developers can be clever, figuring out ways to disadvantage consumers. That is why the right to terminate without penalty is so effective. "Not to apply § 3607 [of the *Condominium and Cooperative Conversion*

Protection and Abuse Relief Act] merely because the developer has altered the form of its self-dealing transactions would provide an easy avenue for avoidance of that provision of the Act, the purpose of which was to 'alleviate developer abuses during the conversion process'." *2 Tudor City Place Assocs. v. 2 Tudor City Tenants Corp.*, 924 F.2d 1247, 1251 (2d Cir. 1991) (citing *West 14th Street Commercial Corp. v. 5 West 14th Owners Corp.*, 815 F.2d 188, 190 (2d Cir.), *cert. denied* 484 U.S. 850, 98 L. Ed. 2d 107, 108 S. Ct. 151 (1987)); *also see W.H.I., Inc. v. Courter*, 2018 R.I. Super. LEXIS 47* (May 1, 2019) (Rhode Island trial court declared association's exercise of right to terminate without penalty under § 34-36.1-3.05 thus 'voiding' a management agreement).

In contrast, commercial parties do have that ability and are free to enter into contracts or not.[15] The UCC defines "termination" for its particular reason and to ensure that when one claimed defaulting commercial party terminates an agreement under the UCC that the remedies for breach for the defaulting party is unaffected by the termination. Further, the UCC's definition of "termination" obviously is not the equivalent of "termination without penalty".

Genoa Lakes Holds Water

Sixth, Petitioner oddly devotes 10 percent of its Brief to complain that a Nevada lower court case and ruling on UCIOA called "*Genoa Lakes* does not support the POA's argument or the Circuit Court's order". Petitioner's Brief at 18-21; AP 2530-2550. Respondent brought *Genoa Lakes* to the lower court's attention in detail because that order harmonizes with Respondent's position. AP 404. Yet, the Circuit Court no where mentions or cites to that case in its October 6, 2020 Order. AP 2530. *Genoa Lakes* nonetheless is persuasive that, as the Nevada court ruled, the term "terminate without penalty" should be given its plain meaning. AP 395-412.

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[15] The West Virginia Legislature enacted the 1982 version of UCIOA to succeed and replace the State's version of the Uniform Condominium Act. *See* W. Va. Code § 36B-1-101 *et seq.* [1981]. In UCA, the right to "terminate without penalty" W. Va. Code § 36B-3-105 was even broader that the current right, extending to "(2) any other contract or lease to which a declarant or an affiliate of a declarant is a party".

Nevada is a UCIOA State. *Genoa Lakes Resort Homeowners Ass'n v. Genoa Developer Assocs.*, 2015 Nev. Dist. LEXIS 598 (2015)[16] and this case share a fact pattern (and Respondent can find no other Section 3-105 case remotely similar to this one.) AP 0404-409. The Ninth Judicial Court of Nevada endorsed the association's invocation of Nev. Rev. Stat. Ann. § 116.3105[17] to terminate without penalty a $1 million promissory note and deed of trust that the declarant had coerced the association to make while the association was under the declarant's dominion and control. AP 528-540. Without the owners' consent, the declarant built a community fitness center and sued the association for $1 million and foreclosure. *Id.* After declarant surrendered control of the association, the association terminated the note and deed of trust under Section 3-105. *Id.*

Despite the declarant's protest that termination was inequitable, the *Genoa Lakes* trial court declared that the notice of termination was effective to void the note and deed of trust, leaving the declarant without a cause of action under them. The *Genoa Lakes* trial court explained its rationale:

> Perhaps out of necessity, the law allows declarants of common-interest communities to enter into contracts with their declarant-controlled associations. NRS 116.31187 (2) (b) The law also allows declarants of common-interest communities to encumber common elements of such communities. NRS 116.3112. Such is the case here where, in essence, Declarant shook hands with Declarant to the benefit of Declarant resulting in an encumbrance on the Fitness Center.

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[16] The Supreme Court of Nevada did not review after a stipulated dismissal. *See Genoa Developer Assocs., LLC v. Genoa Lakes Resort Homeowners Ass'n*, 2016 Nev. LEXIS 1097, 132 Nev. 971 (2016).

[17] The Nevada version of Section 3-105 provides "1. Within 2 years after the executive board elected by the units' owners pursuant to NRS 116.31034 takes office, the association may terminate without penalty, upon not less than 90 days' notice to the other party, any of the following if it was entered into before that executive board was elected: (a) Any management, maintenance, operations or employment contract, or lease of recreational or parking areas or facilities; or (b) Any other contract or lease between the association and a declarant or an affiliate of a declarant. 2. The association may terminate without penalty, at any time after the executive board elected by the units' owners pursuant to NRS 116.31034 takes office upon not less than 90 days' notice to the other party, any contract or lease that is not in good faith or was unconscionable to the units' owners at the time entered into. 3. This section does not apply to: (a) Any lease the termination of which would terminate the common-interest community or reduce its size, unless the real estate subject to that lease was included in the common-interest community for the purpose of avoiding the right of the association to terminate a lease under this section; or (b) A proprietary lease."

> For good reason, NRS 116 places stringent requirements on such deals. This was recently acknowledged by the Nevada Supreme Court. Writing for the majority, Chief Justice Hardesty articulated: When the Legislature codified NRS Chapter 116, it modeled the chapter on the Uniform Common Interest Ownership Act (UCIOA).[*Citations to Hearings omitted.*]...Testimony from one of the committee hearings . . . indicated that 'association management and consumer protection were the two most common threads throughout the bill.' [Citations to Hearings omitted.] Further, the UCIOA offered purchaser protections, including the 'power of an association to terminate 'sweetheart' contracts entered into by the developer.' [Citations to Hearings Exhibit omitted.]
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> *Double Diamond Ranch Master Ass' n v. Second Judicial District: Court,* 354 P.3d 641, 644, 131 Nev. Adv. Rep. 57 (2015).
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> Declarant invites the Court to ignore clear and unambiguous NRS Chapter 116 requirements in favor of Declarant's view of what is equitable. Declarant would also have the Court enforce the Note and Deed of Trust by relying upon the language placed by Declarant in Section 2.7 of the Declaration that is completely devoid of material terms.
>
> The Court does not accept Declarant's invitation. NRS Chapter 116 requirements 'may not be varied by agreement, and rights conferred by it may not be waived.' NRS 116.1104. A declarant 'may not act under power of attorney, or use any other device, to evade the limitations or prohibitions of this chapter or the declaration.' NRS 116.1104. Executive board members, even those controlled by a declarant, are fiduciaries who must act in good faith and in the best interest of the association and are subject to conflict of interest rules. NRS 116.3.103. Lastly, 'when a statute is facially clear, the court will give effect to the statute's plain meaning.' *Double Diamond Ranch Master,* 354 P.3d at 644 (2015); *See also, MGM Mirage v. Nevada Ins. Guaranty Ass'n,*.1.25 Nev. 223, 228-39 (2009).

Genoa Lakes Resort Homeowners Ass'n v. Genoa Developer Assocs., 2015 Nev. Dist. LEXIS 598, *14-16 (2015). AP 0528-0540.

The ruling in *Genoa Lakes* serves as persuasive authority especially under the mandate of W. Va. Code § 36B-1-110 by which the West Virginia Legislature requires that UCIOA "shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect

to the subject of this chapter among states enacting it."[18] But whether *Genoa Lakes* persuaded the Circuit Court is not disclosed in its October 6, 2020 Order. AP 2530. Nor need it be. GSVPOA exercised its statutory right to terminate without penalty "any other contract . . . between the association and the declarant".[19] In this case, the lower court similarly adjudicated what is the obvious legal result under UCIOA.

Second, Petitioner argues that in W. Va. Code § 36B-3-105 "[t]he plain meaning of "termination" is to end a contract at a point in time, preserving any right based on prior breach or performance." Petitioner's Brief at 16-17. Petitioner omits that Section 3-105 gives an association the statutory power and right to terminate "without penalty". This Court may not omit words or terms from a statute and is required to give every word and term meaning. This Court held in *State ex rel. AMFM, LLC v. King*:

> As such, our consideration of the governing statutes will be guided by our well-established rules of statutory construction whereby we defer to the intent of the Legislature in enacting its laws and give effect to every word and phrase thereof to ensure their true meaning is accomplished. *See* Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ('The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.'). *See also* Syl. pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) ('A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute.'); *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979) ('It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.'). Nevertheless, our interpretation of the applicable statutes is

[18] The United States and other UCIOA States give a unit owners association in a common interest ownership arrangement similar statutory rights to terminate contracts made or arranged by the declarant. *See e.g. Condominium and Cooperative Conversion Protection and Abuse Relief Act*, 15 U.S.C. § 3607 (1988); Conn. Gen. Stat. § 47-247 (1983); Alaska Stat. §34.08.360 (1985); Nev. Rev. Stat. Ann. § 116-3105 (1991); C.R.S. 38-33.3-105 (Colorado 1992); Minn. Stat. § 515B.3-105 (1992); 27A V.S.A. § 3-105 (Vermont 1997); 25 Del. C. § 81-305 (2008); Rev. Code Wash. (ARCW) § 64.90.40 (2018).

[19] GSVPOA also "hotly disputes the validity and enforceability of the Loan Agreement, an issue, irrespective of its Motion for Summary Judgment, that remains in controversy in" the civil action. AP 0412.

> foreclosed where their meaning is plain; at that juncture, this Court is obliged to construe, rather than interpret, the relevant legislative language. 'Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.' Syl. pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). *See also Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995) ('We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed.').

State ex rel. AMFM, LLC v. King, 230 W. Va. 471, 478, 740 S.E.2d 66, 73 (2013); *See Energy Ctr., LLC v. Falls & Pinnacle Owners' Ass'n*, No. A11-1023, 2012 Minn. App. Unpub. LEXIS 90 (Jan. 30, 2012) (in which the court affirmed the association's termination of a management agreement even though the association not a party to it but rather bound by it).

Last, Petitioner alleges that "[t]he 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[20] against the Utilities Loan balance, because any termination of the Utilities Loan was prospective, and the payments and credits were made prior to termination." Petitioner's Brief at 20. Petitioner's premise is fallacious. In its November 3, 2021 Order, the Circuit Court found that "Justice Holdings does not dispute that it is liable for assessments on the Justice Lots but claims that it was entitled to unilaterally offset assessments on the Justice Lots against the Loan Agreement." AP 3971-72 ¶ 57. The lower court further found that because the Loan Agreement was "subject to termination under W. Va. Code § 36B-3-105, and, in fact, was properly terminated, then Petitioner's "purported 'payment' of assessments by offsetting assessments under the Loan Agreement is likewise void and of no legal effect, and thus, improperly made. . . . Justice Holdings was charged with

[20] Justice Holdings acknowledges it owes assessments on a smaller number of Lots (referred to as "Justice Lots" or "Repurchased Lots" in the November 3, 2021 order) that it had re-acquired from third parties as opposed to the majority of Lots it owns that the declarant had never transferred to third parties. AP 3947.

knowledge that the UCIOA governed its relationship with GSVPOA . . and at the time it unilaterally gave itself credit against the assessments it owed to GSVPOA with regard to the Justice Lots". AP 3972 ¶¶ 58-59. Further, the lower court found "Justice Holdings' unilateral withholding of assessment payments constituted anticipatory self-help as to a contract claim that (a) had not been reduced to judgment and (b) that Justice Holdings was deemed to know, by operation of law, could become subject to the GSVPOA's right of termination. That unilateral action, if permitted to stand unredressed, would allow Justice Holdings to evade UCIOA's protections to GSVPOA. These circumstances support the award of judgment against Justice Holdings." *Id.* ¶ 61. The lower court rightly and correctly entered monetary judgment for Respondent.

Third Assignment of Error.

In the Third Assignment of Error, Petitioner identifies no reversible error nor cites any holding of this Court in support of its claim that "[t]he 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". Petitioner's Brief at 22. Petitioner alleges that GSVPOA was unjustly enriched upon the Section 3-105 termination of the Loan Agreement without penalty and makes conclusory claims that the lower court's orders refusing Petitioner motion to amend its complaint "are plainly wrong — legally and factually." *Id.* Petitioner essentially argues that its allegation of unjust enrichment alone is sufficient to entitle it to pursue that new claim "based on the POA's retention of the benefits of the Utilities Loan . . ." *Id.* Petitioner identifies not a single piece of evidence in the record that GSVPOA received any benefits under the Loan Agreement.

In its order denying Petitioner's motion to amend, the lower court explained that a

> review of the proposed amended complaint reveals that the purported equitable claims are premises on the Utility Infrastructure

> Loan. . . . [E]quity has no role in Justice Holdings' attempt to recoup amounts purportedly advance for utility infrastructure within Glade Springs Village. Under West Virginia Law, where there is a complete and adequate remedy in a court of common law, it is well settled that equity will not interpose a claim for equitable relief. *Shepherd v. Gross*, 34 W. Va. 123, 128 (1980).
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> ***
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> Justice Holdings [sic] invocation of West Virginia Code §36B-1-108 does not change this result. Specifically, West Virginia Code §36B-1-108 provides that: The principles of law and equity, . . . or other validating or invalidating cause supplement the provisions of this chapter, *except to the extent inconsistent with this chapter . . .*
>
> This Court is bound by the legislative command set forth in UCIOA, particularly W. Va. Code § 36B-3-105 and, as such will not interpose equity in this matter. As such it would be futile to permit Justice Holdings to amend its complaint to assert equitable claims against GSVPOA.
>
> *Permitting Justice Holdings to invoke equitable principles such as unjust enrichment, quantum meruit, promissory estoppel and quasi-contract to defeat GSVPOA's statutory right to terminate the Utility Loan Agreement would be 'inconsistent with' [UCIOA], particularly West Virginia Code §36B-3-105.*

AP 2717-2718 (emphasis supplied)

Petitioner is a Johnny One-Note. Justice Holdings claims that "it 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." Petitioner's Brief at 26-27. Again, the existence of a complete legal outcome, termination without penalty, forecloses equitable relief.

Under the Third Assignment of Error, Petitioner claims broadly and vaguely that "the Declaration is a contract between the Developer and the POA". Petitioner's Brief at 28-29 (citing AP 3768-3774). This Court need not address whether a declaration is a contract. This Court should focus on the lower court's foremost conclusions in that Order: That "First Amended Complaint

does not identify any portion of the [GSV] Declaration that constitutes a contract or the expression of a contractual commitment." AP 3770. "The theory stated in the first amended complaint and argued in Plaintiff's response to the motion to dismiss is that the Declaration by which the Defendant is committed to fund from assessments certain infrastructure improvements associated with the development of Glade Springs Village." AP 3771. The lower court concluded that " while the Declaration gives the Defendant Association the authority to arrange for designated elements of infrastructure, neither the Declaration as a whole nor any part thereof constitutes a contract by which the Defendant incurred or committed to an immediate obligation or duty of performance owed to the Plaintiff." AP 3772.

On this point, Respondent notified Petitioner that it disputed that the GSV Declaration contains within it a contract by which GSVPOA agreed to pay the declarant for the cost of infrastructure. In the same notice, Respondent elected to terminate without penalty such a contract to the extent that it existed under W. Va. Code § 36B-3-105. AP 3779-3880. In sum, whether the termination in this instance was effective under UCIOA was moot because the lower court adjudged there is no such contract embedded in the GSV Declaration. AP 3772.

In the Fourth Assignment of Error, Petitioner claims that "[t]he 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." Petitioner's Brief at 29-34. Petitioner gives two reasons, again both based on equity, and not in law, for seeking reversal of the claimed assignment of error. For its first reason, Petitioner argues that the "Developer was justified in relying on the exemption stated in the Declaration and could have constructed the addition of lots differently to avoid assessments on undeveloped land, if the Developer has reason to know the exemption was

not valid." Petitioner's Brief 30. Petitioner identifies no place in the record in which Petitioner specifically asked the lower court to give equitable relief from its legal conclusion that the offending provision the GSV Declaration was "void, invalid and enforceable" under UCIOA. AP 2510, 2521-2522 ¶¶ 39, 42 and A-D. Petitioner made no such request seeking relief in equity. Petitioner does not cite to any objection made or fact in the record in support of its first reason. Moreover, Petitioner gives no rationale why a court should give it equitable relief from a clear legal conclusion.

For its second reason, Petitioner claims that, despite that UCIOA demands it, the "[i]mposition of assessments on Developer Lots is barred by equitable doctrines of laches and estoppel, and the Circuit Court's order results in unjust enrichment." Petitioner's Brief at 32-33. Petitioner claims that Respondent's *contractual* claim "is barred by the equitable doctrines of laches, estoppel and unjust enrichment." This second argument fails completely. The obligation to pay assessments under Article X of the GSV Declaration is based on contract; Respondent sought and recovered 10 years' worth of assessments under Article X of the GSV Declaration, none foreclosed by West Virginia's 10-year statute of limitations on contract causes of action.[21]

> Where legal title is involved in a case, the statute of limitations applicable thereto governs ordinarily even if the legal title be involved in an equitable proceeding and if such statute does not bar the right to the land, laches can not bar such right. Laches applies to equitable demands where the statute of limitation does not. The mere delay in asserting a right, short of the limitation fixed by statute, does not bar the right in equity.

Syl. Pt. 2, *Condry v. Pope*, 152 W. Va. 714, 715, 166 S.E.2d 167, 168 (1969).

Fifth Assignment of Error.

Petitioner claims, in reality, six sub-assignments of error under the general Fifth

[21] The 10-year contract statute of limitations is codified in W. Va. Code § 55-2-6.

Assignment of Error that "[i]f all of UCIOA applies to GSV, the Circuit Court committed reversable [sic] error by incorrectly applying UCIOA, or enforcing its requirements". Petitioner's Brief at 34-39. These six substantively are unrelated to each other.

1. Petitioner complains that "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". Petitioner's Brief at 35. This Court need not address this argument because the issue is moot. The lower court concluded that the GSV Declaration does not include any contract or obligation to which GSVPOA was or is bound to pay for the costs of utilities so that Cooper Land could market and sell Lots. Petitioner has not claimed this as an assignment of error.

2. Petitioner complains that "[t]he Circuit Court wrongly refused to enforce UCIOA requirements for addition or withdrawal of property subject to the GSV Declaration". Petitioner's Brief at 35-36. Astonishingly, Petitioner has claimed that Glade Springs Village does not exist and seeks to invalidate title to thousands of Lots, including its own, to defeat GSVPOA's right and duty to collect assessments on them. AP 3110-3112. Truth is that the declarant had the reserved right in the GSV Declaration to add new Lots (AP 7, GSV Declaration, Art. II) and that the GSV Declaration contains no reserved declarant right to withdraw Lots. AP 455-498, GSV Declaration pages generally.

3. In a scant six lines on page 37 of its Brief, Petitioner claims that "[t]he 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). Petitioner fails to show it presented this issue to the lower court as W. Va. R. App. P. 10(c) requires. Petitioner does not refer to the record in support of this sub-assignment of error and literally confesses that it as the declarant controlling

GSVPOA did not follow "UCIOA's requirements for budgeting and assessment in W.Va. Code §§ 36B-3-103(c) and 36B-3-115(a)-(b)". Petitioner omits that the GSV Declaration imposed no obligation to budget and rather imposed and collected assessments under an express contract obligation to do so under Article X(6). AP 469-471.

4. Petitioner claims that GSVPOA failed to follow "UCIOA requirements for allocation of common expenses under W.Va. Code § 36B-3-115(b)". Petitioner's Brief at 38; AP 2510-2525. Petitioner alleges that the GSV Declaration "does not provide a formula for allocation of common expenses". *Id.* The GSV Declaration, while omitting a named "formula" for allocating a "fraction or percentage of the common expenses" and "the votes" nonetheless includes provisions on which an allocation formula has been based since 2001. Article III(2), *Voting Rights*, of the GSV Declaration states that all Class A Members "shall jointly be entitled to one (1) vote for such Lot . . . as specified in this Declaration or the Bylaws". AP 465. In addition, each Lot is subject to the same Annual Assessment under Article X(3) of the GSV Declaration. AP 477-478. GSVPOA through the Affidavit of David B. McClure showed that GSVPOA since 2001 has allocated one share of the common expenses and one vote to each Lot. AP 0323. The lower court ruled:

> Nonetheless, it is undisputed, based on the Affidavit of David B. McClure as GSVPOA's current president . . . , that GSVPOA in practice uses a formula to establish allocation of interest in which the numerator is one and the denominator is the total number of Lots subject to assessment. In other words, each Lot and its owner bear one share of the common expense liability expressed through GSVPOA assessments equal to the other shares and assessments for the other Lots and owners.

AP 2520-2521.

5. Petitioner alleges that 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." Petitioner fails to show it adequately presented this issue to the lower court as W. Va. R. App. P. 10(c) requires. The GSV Declaration in Article X imposes on each Lot the express covenant to pay an Annual Assessment. AP 476. While under the complete dominion and control of Justice Holdings, the GSVPOA board of directors ratified or voted each fiscal year beginning July 1, 2010 and ending June 30, 2019, with no Class A Member input or vote, to assess a specific amount from each Lot. These are recapitulated in the Affidavit of David B. McClure. AP 840-844. Consequently, each Annual Assessment became a contract obligation on each Lot and each Lot owner, including Justice Holdings. Petitioner's Brief at 38.

6. Petitioner last claims, of a piece with the foregoing, the sixth sub-assignment of error, that "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." Petitioner claims GSVPOA surpluses where there are none and Petitioner has failed to show they exist.

CONCLUSION

Based on the foregoing, Respondent, Glade Springs Village Property Owners Association, Inc., asks this Court to reject each and every of Petitioner's Assignments of Error and to affirm each and every Order of the Raleigh County Circuit Court in this appeal and to grant Respondent such other and further relief as the Court deems appropriate.

GLADE SPRINGS VILLAGE
PROPERTY OWNERS ASSOCIATION, INC.

By its counsel

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No. 22-0002

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

at Charleston

Justice Holdings, LLC,

Plaintiff below/Petitioner,

v.

Glade Springs Village
Property Owners Association, Inc.,

Defendant below/Respondent.

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

CERTIFICATE OF SERVICE

The undersigned, does hereby certify that on this 19h day of May, 2021, he served a copy of the foregoing "*Response of Glade Springs Village Property Owners Association, Inc.*" by depositing the same to them in the U. S. Mail, postage prepaid and sealed in an envelope upon:

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