No. 22-ICA-36

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

At Charleston

CHARLES WV MALL, LLC,

Petitioner,

v.

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

Respondents.

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

BRIEF OF RESPONDENT UMB BANK, N.A.

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I. INTRODUCTION

Charles West Virginia Mall, LLC ("CWVM") seeks reversal of the Circuit Court of Kanawha County's July 8, 2022 Order (J. Tabit) directing CWVM to turn over Charleston Town Center Mall tenant parking charges ("Tenant Parking Charges") to Boyd Real Estate Resources- the manager of the Charleston Town Center Parking Garages ("Parking Garages").[1] For the reasons which follow and based on various agreements and course of conduct spanning almost 40 years, Judge Tabit correctly found CWVM had no right to retain the Tenant Parking Charges, which are property of the entity which owns or leases the Parking Garages. CWVM has never been an owner or lessor of the Parking Garages, nor has it ever acquired or been assigned such rights by anyone who was then an owner or lessor of the Parking Garages.

A brief review of some of the relevant history of the Charleston Town Center Mall and Parking Garages supports the Circuit Court's Order. Beginning with the opening of the Parking Garages in 1984 and continuing unabated until CWVM purchased the Mall in May of 2021, all parking revenue, including Tenant Parking Charges, was always delivered to the entity which owned or leased the Parking Garages under the Parking Lease. This revenue was used for the operation, repair and maintenance of the Parking Garages and to redeem, as they came due, over $20 million in bonds sold by the Charleston Building Commission to finance the construction of the Parking Garages ("Parking Facility Bonds").[2] Various documents and agreements set forth

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[1]Boyd Real Estate Resources ("Boyd") was appointed by the Circuit Court of Kanawha County as the Parking Garage Receiver during the pendency of the original lawsuit. Following settlement, CURA and the Bond Trustee agreed to employ Boyd to manage the garages. Other capitalized terms in this Brief have the meanings assigned to them in the proceedings below.

[2] The Parking Garages serve as collateral for the bond holders to secure the redemption of their bonds. It is critically important for the bondholders that the Mall owner and/or Parking Garage Lessor to perform their obligations to operate, maintain, and repair the Parking Garages so the bondholder's collateral is not devalued or the bondholders left without adequate recourse in the event of default- which is what has now occurred.

these obligations and rights, including the Construction, Operation and Reciprocal Easement Agreement of April 20, 1982 ("COREA")- between the four (4) anchor tenants, Developer and Parking Garage entity, recorded in the Kanawha County Clerk's office; the Joint Development Agreement between CURA and the Developer; the Parking Lease, and Trust Indenture. CWVM has no legal basis to charge tenants a parking fee when it does not own or operate the Parking Garages, and the Trustee has not waived the Bondholders' right to these funds. While CWVM concedes it is subject to the COREA, which authorizes Tenant Parking Charges, CWVM ignores that the COREA and Parking Lease require CWVM, as "Developer" to pay parking revenue to and for the benefit of the Bond Trustee. From the beginning, all income from the Parking Garages was pledged to the Trustee to secure payment of the Parking Facility Bonds, and this Court should uphold the Circuit Court's finding that CWVM is obligated to do the same.

II. STATEMENT OF THE CASE[3]

In 1986, the Charleston Building Commission ("CBC") issued the Parking Facility Bonds to fund the construction of three parking structures to serve Charleston Town Center.[4] In 1996, this debt was refinanced by the issuance of approximately $20 million in new bonds. Respondent UMB Bank, N.A. ("UMB") is the current Bond Trustee under an Indenture of Trust dated as of November 1, 1996 ("the Indenture"). There are still over $10 million in Parking Facility Bonds in default and outstanding. The revenue from the Parking Garages, including Tenant Parking Charges, are supposed to be applied to maintain and repair the Parking Garages and to pay off the associated bond indebtedness, but CWVM has refused to turn over these Tenant Parking Charges-

[3] This Statement of Facts is limited to relevant information omitted or misstated in Appellant's Brief, in accordance with Rule of Appellate Procedure 10(d).

[4] The Parking Facility Bonds are formally known as "Series 1996C Subordinate Capital Appreciation Parking Facility Revenue Refunding Bonds (Charleston Town Center Limited Partnership Project)."

or to otherwise supply any funds to operate, maintain, or repair the Parking Garages, which are the collateral securing the bonds which are in default.

CWVM claims it was released from any such obligations under the Settlement Agreement negotiated between the former Developer, CURA and the Bond Trustee. CWVM is wrong. CWVM is neither a signatory nor a successor to a signatory party to the Settlement Agreement. Further, UMB, as Bond Trustee, did not release in the Settlement Agreement (or otherwise) any successors and assigns of the Former Mall Owner. See Settlement Agreement, ¶ H (3), at JA 652. In plain contradiction of the words in the Settlement Agreement, CWVM states wrongly that CURA *and* UMB released all claims against the Former Mall Owner and its successors. See Appellant's Brief at 25. UMB, as the Bond Trustee, released only "the CTC/Garage Entities," as set out more fully below. This does not include CWVM.

CWVM argues the Circuit Court in its January 14, 2019 Order Granting Joint Motion for Transfer of Mall Tenant Parking Charges from Mall Receiver to Garage Receiver ("Original Order"), committed error by relying almost exclusively on language in Attachment 4 to the JDA. See Appellant's Brief at 3. The Circuit Court's Order indicates otherwise. The Court found:

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

8. ... Section 10.9 of the COREA concerns the operation of the parking garages and refers to them as the "Parking Facility." Section 10.9(b)(ii) provides that occupants, such as tenants, may be required to pay parking charges pursuant to their respective leases or other separate agreements.

...

10. Beginning in 1984, there has been a uniform custom and practice regarding the handling of tenant parking charges. The Mall collected such charges and remitted them to the parking garage on a monthly basis. These charges were classified as a payable of the Mall and as a receivable of the parking garage.

...

18. There is a clear history of more than three decades of the Mall remitting the collected tenant parking charges to the parking garage on a monthly basis to support parking garage operations and maintenance.

January 14, 2019 Order, FOF ¶¶ 3, 4, 8, 10 & 18, JA 490, 493.

III. SUMMARY OF ARGUMENT

CWVM has no right to retain Tenant Parking Charges, which are the property of the Parking Garage manager who holds them for the benefit of the Bond Trustee and the Bondholders. CWVM has not been released from its obligations and responsibilities under the COREA and the related documents, which establish that all parking revenue, including Tenant Parking Charges, shall be dedicated to maintenance of the Parking Garages and payment of the Parking Garage Bond indebtedness. CWVM's acquisition of the mall from U.S. Bank does nothing to change these obligations of CWVM, as Mall owner. CWVM's five assignments of error lack merit, as set out below and its appeal should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

V. ARGUMENT

A. Standard of Review

The West Virginia Supreme Court of Appeals has set out a three-prong standard of review:

> In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl pt. 2, *Walker v. West Virginia Ethics Comm'n*, 31, 492 S.E.2d 167 (1997). CWVM cannot satisfy any of these standards. The Circuit Court did not abuse its discretion in requiring CWVM to pay over the Tenant Parking Charges under the Original Order. No facts found in the Order Granting Motion to Reopen Civil Action and Enforce Prior Orders of the Court are "clearly erroneous," and a *de novo* review of the law applied by the Circuit Court will produce the same result.

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

CWVM argues in its initial assignment of error that the Circuit Court's January 14, 2019, Order Granting the Motion for Transfer of Mall Tenant Parking Charges from Mall Receiver to Garage Receiver ("Original Order") is not enforceable against the CWVM because the Original Order was not recorded and CWVM was a bona fide purchaser for value. See Appellant's Brief at 9 *et seq*. These arguments fail because CWVM's notice or lack of notice of the January 14, 2019 Order is irrelevant. CWVM's obligations arise from the COREA, which, among other things, dedicates revenue from the Parking Garages to repayment of the bond indebtedness, as set out more fully

below. Both the COREA and JDA were recorded with the Circuit Clerk of Kanawha County.[5] CWVM is charged with knowledge of each of their contents. See W.Va. Code § 40-1-9. Thus, CWVM had notice of both and is bound by them.

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

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

Appellant's first objection is to Paragraph 7 of the Order, JA 731, in which the Court found that the parties to this lawsuit engaged in a prolonged mediation of issues relating to the Parking Garages and entered into a Settlement Agreement to which U.S. Bank was not a party. See JA 734. These facts are objectively true and supported by the Settlement Agreement, JA 641. Appellant's objection based on CURA's release in paragraph H.1 of the Settlement Agreement is similarly misplaced. CWVM is the successor to U.S. Bank; U.S. Bank was not a party to the Settlement Agreement. See JA 641-42 and 662-65. The Circuit Court's finding of fact in paragraph 7 of the Final Order is correct and supported by evidence of record.[6] This issue is also addressed in section E below.

Equally baseless is CWVM's claim that UMB released CWVM in a subsequent paragraph of the Settlement Agreement," *id.* This argument fails because UMB did *not* release "successors and assigns." UMB, by the Bond Trustee, released only the "CTC/Garage Entities." See Settlement Agreement, ¶ H.3, at JA 652. CWVM does not qualify as either CTC, or a Garage Entity.

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[5]Both the COREA and the JDA were recorded in the Office of the Circuit Clerk of Kanawha County on May 10, 1982. The JDA was recorded in Deed Book 2002, page 1, and the COREA at Book 2002, page 122. See JA 00242 and 000360, respectively.

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

Therefore, the Bond Trustee never released CWVM and it cannot claim any such relief under the Settlement Agreement.

Second, CWVM objects to the Circuit Court's finding in paragraph 8 of the Order that "CWVM incorrectly relies on Section 4.2 of the [Restated] JDA as a release of obligations under the COREA, which continue to run with the land." Appellant's Brief at 14. This objection is a restatement of CWVM's assertion that: 1) the COREA does not impose an obligation on the Mall Owner to pay over tenant parking fees, (rebutted in section F below); and 2) the Restated JDA executed by CURA and U.S. Bank eliminated any obligation based on the original JDA, (rebutted in section D below.) The COREA states that its covenants run with the land,[7] and makes clear that a purchaser at a foreclosure sale, and its successors and assigns, is bound by the agreement. See COREA § 16.2(f), JA 858-59.

Third, CWVM objects to the Court's finding in paragraph 10 of the Order that "Upon information and belief, CWV knew and was made aware of the obligations relating to the Mall including, but not limited to, the JDA and COREA as the same run with the land and are of record." See Appellant's Brief at 15-16.[8] This objection is meritless as CWVM concedes it is "legally charged with knowing the obligations contained in the Former JDA ... the COREA, and the Restated JDA as those documents were recorded and available in the property records at the time

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[7] Section 25.11, JA 886-87, provides:

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

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

that CWVM purchased the Developer Parcel in May of 2021," Appellant's Brief at 15. Thus, the COREA provides sufficient basis for the Circuit Court's Order, as discussed *infra* and *supra*.

CWVM next objects to the Circuit Court's finding in paragraph 13 of the Order that "CWV falsely claims that it is a beneficiary of the releases in the Settlement Agreement by way of successorship to the prior Mall Entities even though it did not purchase the Mall from the prior Mall Entities nor is it a corporate successor to the prior Mall Entities." Again, the Circuit Court's finding is accurate. In paragraph H. (1) of the Settlement Agreement, CURA and others release "the Former Mall Owner, Developer and the Parking Garage Entity" and their successors and assigns. See JA 650-51. These are defined terms in the Settlement Agreement, "Former Mall Owner" means Charleston Town Center SPE, LLC. Settlement Agreement ("SAR") ¶ A(6), JA 642. "Developer" means Charleston Town Center Company, Limited Partnership. SAR ¶ A(7), *id.* "Parking Garage Entity" means Charleston Town Center Parking Limited Partnership. SAR ¶ A(8), *id.* CWVM is not a successor to any of these three parties. At best, it is a successor to U.S. Bank, which was not a party to the Settlement Agreement, nor a beneficiary of any of the releasees therein.

Finally, CWVM objects to the Circuit Court's use of the phrase, "based on information and belief" and its finding in paragraph 14 of the Order that "CWV states that it is not bound by the COREA." CWVM argued in its Response to the Motion to Reopen that the Settlement Agreement and Restated JDA superseded the COREA and JDA. See JA 635. Counsel for CWVM also stated at the June 13, 2022 hearing that the Restated JDA "changes the obligation under the COREA." Transcript at 24:1-3.[9] As with the Court's finding in paragraph 10, any error based on this finding

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

is meaningless, as CWVM acknowledges it is bound by the COREA, which was the basis of the Circuit Court's legal conclusions.

D. CWVM is obligated under the COREA and JDA to pay over parking fees collected under tenant leases to the manager of the parking garage, and the Circuit Court did not abuse its discretion in so finding.

The Circuit Court concluded as a matter of law that its Original Order directing the Mall Receiver to remit Tenant Parking Charges to the Parking Receiver (now Parking Garage manager), remains enforceable against CWVM by virtue of CWVM's purchase of the Mall from U.S. Bank. It further found that CWVM was "not released from any continuing obligations arising from the COREA or JDA", and that the Restated JDA "did not release any obligations due and owing from CWV, as those obligations arise under the COREA." See Appellant's Brief at 18; Order, ¶¶ 2-3, JA 736. CWVM urges this Court to find that these conclusions were reversible error because these terms are not contained in the COREA, and because the Circuit Court's reliance on the parties' course of conduct was improper absent a finding of ambiguity. Appellant's Brief at 19.[10] This argument is specious.

CWVM has no basis to charge and retain a parking fee- including any Tenant Parking Charge. CWVM does not own, lease, or operate the Parking Garages. CWVM is paid Tenant Parking Charges only because those charges are included under leases the Former Mall Owner negotiated with Mall Tenants- with the express understanding that the COREA and Parking Lease required those charges to be remitted and applied to the Developer's broader obligation to "perform or cause the performance of the Parking Lease." See COREA § 10.10(b), JA 840.

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

The Parking Lease obligated the Developer or its parking entity to make payments equal to the total amount due on the Garage Bond indebtedness.[11] The expectation that all revenue from the Parking Garages is intended to fund payments under the Parking Lease is further reflected in the COREA's statement in section 10(d)(iii) that "if the Revenues from the Parking Facility are not sufficient to pay the [Parking Facility] Operator's fees and the rents to be paid under the Parking Lease," the Developer would remain responsible for the payment of any deficiency.[12] JA 838-39. These COREA provisions support the Circuit Court's finding that CWVM's obligation to pay over the Tenant Parking Charges arises under the COREA, which remains in place.[13]

The 1982 COREA, which has not been amended, authorized collection of Tenant Parking Charges and required the Developer to pay parking revenue to the Bond Trustee by reference to the Parking Lease. From the beginning, all income from the Parking Garages was pledged to the

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[11] The Second Amended and Restated Lease Agreement, for example, states in paragraph 4.2: "Amounts Payable. The Company agrees to pay to Trustee as rent ... payments in an amount sufficient to pay in full the principal of, premium, if any, and interest on the Bonds from time to time Outstanding." This document is recorded in Kanawha County, at Book 242, p. 618.

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

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

COREA, § 10(d)(iii), JA 838-39.

[13] These COREA provisions impose an unambiguous obligation on the Developer to devote all parking charges to payment of Parking Garage maintenance and the Parking Garage Bonds. The passage of forty (40) years and the course of conduct have consistently reinforced this fundamental truth and obligation. The release of the former Developer under the Settlement Agreement did not introduce any ambiguity into the interdependent obligations of CURA, the Mall owner, the Parking Entity and the bondholders under the COREA. CWVM became obligated to perform these obligations when it acquired the mall. Nothing in the Settlement Agreement provides otherwise.

Trustee to secure payment of the Parking Facility Bonds, and this Court should uphold the Circuit Court's finding that CWVM is obligated to do the same.[14]

E. CWVM is neither a beneficiary of the Settlement Agreement nor a legal successor to any party to the Settlement Agreement, and in addition the Trustee did not release any successors or assigns in the Settlement Agreement.

CWVM is not a successor to any party to the Settlement Agreement. CWVM is the successor to U.S. Bank, which purchased the Mall in foreclosure. U.S. Bank was not a party to the Settlement Agreement, and the Settlement Agreement clearly states that CURA, the Parking Garage Receiver and the Bond Trustee expressly reserve rights as to any contract obligations related to the Mall. See SAR ¶ E, JA 645. The Circuit Court's finding of fact in paragraph 7 of the Final Order is correct and supported by evidence of record.[15]

In addition, CWVM claims repeatedly that CURA **and** the Bond Trustee released the Former Mall Owner and CTC/Garage Entities and their successors. *See, e.g.,* Appellant's Brief at 6, 13, 24, 25. This is true as to CURA, but not as to the Bond Trustee. Paragraph H. (3) of the Settlement Agreement provides:

> The Current Parking Garage Bond Trustee, Former Parking Garage bond Trustee, and Majority Parking Garage Bondholder Representatives each, on behalf of itself and its respective owners, officers, directors, shareholders, employees, principals, agents, partners, members, managers, representatives, parent companies, subsidiary companies, affiliates, predecessors, successors, and assigns hereby **releases, discharges and covenants not to sue the CTC/Garage Entities** from and with respect to any and all claims, liabilities, obligations, damages, causes of action, suits, rights, demands, costs, taxes, expenses, losses and interest ....

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[14]The Circuit Court reviewed thoroughly on several occasions the multiple, interrelated legal documents that set out mutual obligations forming the basis for construction, finance and operation of the Mall and the Garages over the five-years since this case was filed. These include the JDA, the COREA, the Parking Parcel Ground Lease, the 1982 Parking Facility Operating Agreement, the 1982 Lease Agreement, the 1996 Second Amended and Restated Lease Agreement, the Indenture of Trust, and the Leasehold Deed of Trust, among others. These documents are part of the record below, available to the Court on its own motion under R. App. Pro. 6(b).

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

Settlement Agreement, ¶ H.3, at JA 652 (emphasis added). Paragraph H. (3) is a broad release of the CTC/Garage Entities, but it extends no farther and makes **no reference to successors and assigns**. CWVM has no basis to claim any release of its obligations to the Bond Trustee based on the Settlement Agreement.

F. Section 4.2 of the Restated JDA replaced the prior payment arrangement for the "Annual Additional Payment" to CURA and the ground lease between CURA and the Developer, but it did not confer upon CWVM a legal right to collect and retain tenant parking charges.

In 2020, CURA and U.S. Bank executed an Amended and Restated Joint Development Agreement ("Restated JDA"), JA 666. CWVM claims exoneration from any obligation to pay over Tenant Parking Charges based on the language of section 4.2 of this document and its statement that Attachment 4 to the JDA is void and superseded. See Appellant's Brief at 30. CWVM is wrong, as demonstrated by any fair and accurate reading of section 4.2 of the Restated JDA, including its defined terms. Section 4.2 restates the "Annual Additional Payment" to CURA. The Annual Additional Payment was part of the purchase price for the "Retail Parcel." See JDA Attachment 4, Part I, JA 298-300. The "Retail Parcel" is the land under the Mall. See JDA §107, JA 249. The "Parking Parcel" is the land under the Parking Garages, which is still owned by CURA. *See id.* Section 4.2 states:

> **Annual Additional Payment.** The Mall Owner, its successors, and assigns, in accordance with the Chart set forth below, shall pay the Authority an annual additional payment ("Annual Additional Payment ") based on rents received by the Mall Owner from tenants for space in the Town Center Parcel, and in lieu of any other payments due from Mall Owner on account of rents collected from Town Center Parcel Tenants and/or on account of Mall Owner's maintenance obligations associated with the Parking Parcel as follows: ....

JA 670. This language does not reference or implicate Tenant Parking Charges. It addresses only rents charged for space in the Mall and any maintenance obligations associated with the land upon which the Parking Garages are built ("Parking Parcel").

As for Attachment 4, it is true the Restated JDA declares it void and superseded. See Restated JDA § 1.1, JA 668. This statement cannot be read to eliminate the obligation of the Developer to pay over all parking charges, which arises under other documents. The JDA and the Restated JDA are agreements between CURA and the Developer. CURA has never been entitled to Tenant Parking Charges, which are for the benefit of the Bond Trustee and the bondholders.[16] Further, the Developer's obligation to devote all parking-related income to the operation and maintenance of the Parking Garages arises from the COREA and the Parking Lease, as set out in **Attachment 2** of the JDA. Moreover, neither U.S. Bank nor its successor has any legal basis for claiming a right to revenue from the Parking Facility in any form, as the Developer does not own the garages and is obligated to provide parking under the operative documents.

The JDA is a real estate agreement between CURA and the Developer, which obligates CURA to sell the "Developer Parcel" to the Developer for construction of the Mall, and to lease the "Parking Parcel" to the Developer for development of the Parking Garages. See JDA §§ 201, 316, JA 250-51, 257. It leaves to the COREA and Parking Lease how the Parking Garages will be operated, maintained and the bonds paid off, as detailed below. Specifically, financing and paying for the Parking Garages, as opposed to the underlying real estate, was set out in the Parking Lease between the CBC, which owns the Parking Garages, and Charleston Town Center Parking Limited Partnership ("the Parking Entity"). The Parking Lease incorporated certain obligations set out in

[16] CURA owns the Parking Parcel underneath the garages, and was entitled to rent under the Parking Facility Ground Lease. The Restated JDA states that the Mall Owner and its successors have no continuing obligation for the Parking Facility Ground Lease. See JA 666. This does not affect the tenant parking charges included in the leases purchased by CWVM.

the COREA by requiring the Parking Entity to make payments equal to the bond service on the Parking Garage Bonds.[17]

The JDA refers to Attachments 2 and 4 for the specifics of operating and funding the Parking Garages:

> The Developer shall develop, or cause to be developed, the Parking Parcel in accordance with and within the limitations established therefor in the Scope of Development (Attachment No. 2). Funding of the development of the Parking Parcel shall be obtained through parking revenue bonds in accordance with the Schedule of Funding and Payment (Attachment No. 4).

JDA § 316, JA 257. Attachment 2 in turn refers to the COREA and the Parking Lease:

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

JDA Attachment No. 2, ¶ G, JA 293 (emphasis added). The COREA requires the Developer to perform the requirements of the Parking Lease, and the Parking Lease made the Developer liable for the full amount of payments to Trustee under the Trust Indenture. See COREA § 10.10(b), JA 840, and discussion in section D above.

Attachment 4 sets out the payments due from the Developer to CURA, which are the purchase price of the Developer/Retail Parcel (Part I) and the lease of the Parking Parcel (Part II). Section II.B conditions construction of the Parking Facility on the issuance of Parking Revenue Bonds by the CBC. JDA 300. Section II.C sets out the formula for determining annual rental payable to CURA for the Parking Parcel. *Id.* Section D (mis-labelled "B") is the provision quoted by the Circuit Court in its Original Order:

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[17] See note _ *supra*. The parties to the Settlement Agreement agreed to release and terminate the Parking Lease- See SAR ¶¶ B.2, F.1, JA 642, 645, but its payment provisions remain relevant to understanding the COREA.

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

JDA § 2.D [mis-labelled "B"], JA 301-02. Its elimination does not affect the rights of the CBC, or the Bond Trustee, to all income from the Parking Facility. The Restated JDA replaced the prior payment arrangement between CURA and the Developer, but it did not confer upon CWVM a legal right to collect and retain Tenant Parking Charges. The ruling of the Circuit Court should be upheld.

VI. CONCLUSION

For these reasons and others apparent of record, the Court should uphold the Order of the Circuit Court.

UMB Bank, N.A.
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CHARLES WV MALL, LLC,

Petitioner,

v.

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

Respondents.

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

CERTIFICATE OF SERVICE

I, Shawn P. George, do hereby certify that I served Brief of Respondent UMB BANK, N.A. was electronically served via File & Serve upon all counsel of record this 27th day of December, 2022.

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