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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

FOUNTAIN PLACE, LLC

Plaintiff Below, Petitioner,

v.

CITY OF LOGAN DEVELOPMENT AUTHORITY,
FOUNTAIN PLACE REALTY, LLC,
NAMDAR DG REALTY, LLC, and CITY OF LOGAN, WEST VIRGINIA

Petitioner Below, Respondent.

Logan County Circuit Court Civil Action No. CC-23-2023-C-106

AMENDED PETITIONER'S BRIEF

FOUNTAIN PLACE, LLC

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Assignments of Error

Now comes the Petitioner, Fountain Place, LLC ("Fountain Place") and, for its appeal of the underlying rulings in the Circuit Court of Logan County, West Virginia, submits this brief and, more particularly, the following assignments of error:

Assignment of Error Number 1: The Circuit Court erred in finding that Article X, Section 8 of the West Virginia Constitution applied to and disallowed the subject Development Agreement, and so erred because (i) said Development Agreement does not create or involve "indebtedness" of the municipality, and is thus not contemplated by that constitutional provision; and (ii) the existence and participation of the municipality's Development Authority made the Development Agreement constitutional in any event.

Assignment of Error Number 2: The Circuit Court erred in finding that the City of Logan was immune from its Development Authority's liabilities, and so erred because (i) such a holding deprives Fountain Place of constitutional due property rights that were not properly addressed by the Court; and (ii) the dissolution of any development authority without providing for the satisfaction of its continuing liabilities and obligations (such as what occurred in this case in 2013) is a violation of law and against public policy.

Assignment of Error Number 3: The Circuit Court erred in finding that the doctrine of estoppel did not apply in favor of Fountain Place, and so erred because the City's entrance into the Development Agreement was in its proprietary capacity and in the nature of an investment or venture, and thus the doctrine of estoppel should apply where Fountain Place has shown detrimental reliance in reasonable expectation of the City's performance under the Development Agreement.

Statement of the Case

This appeal seeks to challenge the Order of the Circuit Court of Logan County granting the Motion to Dismiss filed by the City of Logan, West Virginia (the "City") and the City of Logan Development Authority (the "Development Authority," and, collectively with the City, the "City Defendants"), which order essentially disposed of the case (the "Order").[1] *See* Supp. Appx. Vol. I at 422–453.

The Order denies a West Virginia business the benefit of its investment. It deprives that business of property rights that were created—and then unilaterally taken away—by the City that continues to be benefited by the business' investment. In doing so, it cites an inapplicable constitutional provision to find, shockingly, that a contract that had been ongoing (and fully performed) for 24 years was, in fact, void *ab initio*. *Id.* This decision was wrong, and should be overruled.

I. Factual History

The contract in question was a certain Development Agreement between the City Defendants and Fountain Place's predecessor-in-interest, Monterra Development Corp.

[1] While the Order does not contain language purporting that order to be propounded under Rule 54(b) of the West Virginia Rules of Civil Procedure, it nonetheless is an order of requisite finality for the Intermediate Court of Appeals to have jurisdiction to hear it on appeal. *Ottaviano v. Durst*, No. 16-0714, 2017 W. Va. LEXIS 652, *3 n.3 (W. Va. Sept. 5, 2017) (citing *Nat'l Union Fire Ins. Co. v. Miller*, 228 W. Va. 739, 746-47, 724 S.E.2d 343, 350-51 (2012) to hold that neither the existence of remaining claims nor the lack of Rule 54(b) language necessarily makes an order granting a motion to dismiss unappealable where the order essentially disposes the entirety of a claim). In this case, not only is Fountain Place's entire case now dismissed, but, more specifically, both its and the City Defendants' claims for declaratory judgment have been resolved, and the matter is also effectively entirely disposed as to two of the other defendants (Namdar DG Realty, LLC and Fountain Place Realty, LLC).

More particularly, this case involves the enforceability of a contract by which payments were collected by Fountain Place and/or its predecessor-in-interest from 1997 until 2021. The Circuit Court has ruled on the dispositive issue by saying that said contract is not enforceable because it is unconstitutional. While counterclaims remain to be litigated, these counterclaims are claims sounding in tort that are separable from the foundational issue of the constitutionality and enforceability of this contract for which declaratory judgment was sought. Furthermore, these counterclaims would have been potentially mooted had the Circuit Court ruled otherwise. Therefore, the Circuit Court's Order has conclusively determined the disposition of that matter and is thus appealable.

("Monterra"). *See id.* at 1–4, 72. Sometime prior to January 1, 1995, Monterra began work to develop a shopping center in Logan County. *Id.* The property on which Monterra was to develop the proposed shopping center was located within an unincorporated area of Logan County (the "Property").

As is no doubt known by this Court, developments of any kind in West Virginia are often very expensive and risk-intensive. For decades, a lack of "shovel-ready" sites throughout the State has frustrated commercial development. *See* Spencer, Tre*, West Virginia lags behind its neighbors in sites for new businesses*, MOUNTAIN STATE SPOTLIGHT (Aug. 22, 2025), located at mountainstatespotlight.org/2025/08/22/sites-business-ready-development-fund/ (last accessed Oct. 20, 2025). With the extreme unevenness of the terrain, the volatility and instability of the earth, the existence of undermined areas, and the unavailability of utility connections already posing very difficult excavation and construction challenges, the relatively depressed economic conditions throughout the region (when compared with the rest of the country) create a high-risk, potentially low-reward investment atmosphere for developers.

To incentivize and facilitate Monterra to complete the development of the shopping center, and, importantly, to improve its own position, the City established the Development Authority. The City and Development Authority then jointly entered into the aforementioned Development Agreement, dated July 22, 1997, with Monterra (the "Agreement"). *See* Supp. Appx. Vol. I at 3, 72.

By the Agreement, Monterra was to give the City the right to annex the Property. *Id.* In exchange for this right to annex the Property, the City and Development Authority were to remit to Monterra, or its assigns, an amount equal to 57% of the annual revenue raised by the City from business and occupancy taxes ("B&O Taxes") collected from businesses and occupants operating at the planned shopping center.[2] More particularly, the City Defendants were to create a "Special Allocation Fund" in which they would "pledge and supply" the moneys not yet paid (the "Fund"), and were to pay Fountain Place from that Fund. *Id.* at 73, 74, 77.

The agreement by the City and Development Authority to remit 57% of the B&O Taxes arising from the Property that Monterra was to develop was to be for an initial term of twenty years (the "Initial Term"), and could be extended by Monterra or its assigns at its or their sole option for an additional ten-year period, to begin at the conclusion of the Initial Term (the "Renewal Term"). *Id.* at 74, 81.

The payments due by the City and Development Authority to Monterra and/or its assigns over the Initial Term and, if elected, the Renewal Term, were in consideration of the right to annex the Property, and were to incentivize and facilitate the development of the Property into a shopping center; accordingly, Monterra was under no obligation to maintain the Property after development in order for the Agreement to remain in full effect and to collect the amounts due to it thereunder. *Id.* at 3, 72, 73, 78. In fact, as with virtually all shopping centers, it was expected that the developer would sell parcels of the Property, as developed, to future commercial occupants.

Upon execution of the Agreement, Monterra developed the Property into a shopping center, which still operates on the Property as the "Fountain Place shopping center," or "Fountain Place Mall." *Id.* at 3. This shopping center is now a well-known feature of southern West Virginia, as the only shopping center of its kind in the entire region. Its characteristic high-wall is a massive excavation achievement, and makes self-evident to even the layman the immense degree of effort, cost, and risk that was assumed by Monterra (and, as shown below, its successor, Fountain Place).

The Agreement provides that it "shall be binding upon and inure to the benefit of the

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[2] Monterra was also to be personally exempt from any B&O Tax obligations, though the claims at issue in this appeal regard the City Defendants refusal, as described below, to pay the described B&O Tax remittances.

[p]arties [thereto] and their respective authorized successors and assigns." *Id.* at 3, 80. Due in part to the immense cost of the project, Monterra declared bankruptcy in 1999. *Id.* at 3, 84–94. By Order of the United States Bankruptcy Court for the Southern District of West Virginia, all rights and title to the Agreement (and the payments due to Monterra by the City and Development Authority thereunder) were assigned, without objection, to Fountain Place. Indeed, the City Defendants were both creditors, and thus parties to the bankruptcy proceeding—and both consented to the assignment of the Agreement. *Id.* at 92.

Fountain Place thus took over the construction of the shopping center, which, as stated above, continues to operate in what is now the City of Logan. As the rightful party under the Agreement, Fountain Place collected annual payments from the City Defendants in the amount of 57% of the total B&O Taxes collected annually from the Fountain Place Property, every year under the Initial Term. *Id.* at 4.

It is understood that sometime in or around 2013, the City discontinued and dissolved the Development Authority; however, the annual payments to Fountain Place continued to be made by the City. *Id.* at 23, 38; Supp. Appx. Vol. II at 209.

Thereafter, on June 28, 2016, George L. Partain, Esq., of the Partain Law Office, delivered to Logan City Mayor Serafino Nolletti a "Notice of Fountain Place LLC's Exercise of its Option Rights in the Development Agreement Dated July 22, 1997," by which Fountain Place informed the City and the Development Authority of its election to renew the Agreement for the Renewal Term, pursuant to the Agreement's terms. Accordingly, the City (and presumably not the Development Authority, since it is now understood that the Development Authority was dissolved at that point) was obligated to continue making the annual remittance payments described herein to Fountain Place until July 22, 2027. *See* Supp. Appx. Vol. I at 4; Supp. Appx. Vol. II at 180, 181.

In fact, the City not only raised no objection to Fountain Place's exercise of the Renewal Term, but actually continued to make payments to Fountain Place through May 2021—approximately four years into the Renewal Term.[3] *See* Supp. Appx. Vol. I at 4. However, despite observing the terms of the Agreement for a period of approximately 24 years, the City then unilaterally ceased making any payments to Fountain Place, and openly refused to make any further payments when asked or demanded, despite Fountain Place's contractual rights to these payments until 2027.[4] *Id.* at 5.

II. Procedural History

Fountain Place filed its Complaint for Declaratory and Other Relief on August 9, 2023. *Id.* at 1.[5] The City Defendants filed their Motion to Dismiss on October 11, 2023. *Id.* at 23. In their Motion, the City Defendants argued that Fountain Place had failed to state a claim on which relief could be granted because, they argued, the Agreement was unenforceable as a matter of law. The City Defendants argued that (i) the Renewal Term was a separate contract which was not supported by separate consideration; (ii) the Agreement was unconscionable; (iii) the Agreement was a violation of public policy; and (iv) the City was not a proper party in the case. *Id.*

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[3] This stream of income emanating from the Agreement is and always has been an important piece of Fountain Place's operations, and Fountain Place has used it both for cash flow and security for its business. Fountain Place has, over the course of the last approximately 26 years, sold parcels of the shopping center to various third parties, though Fountain Place does continue to own other parcels thereof. The Agreement, however, does not require Fountain Place to own the Property in whole or in part, nor does it (as stated above) require Fountain Place to continue to maintain the Property; the only obligations inuring to Monterra under the Agreement were to develop the Property into a shopping center and allow the City to annex that Property as its own, in consideration for the stream of income that was promised to it and its assigns over the Initial Term and Renewal Term.

[4] Around this time, it came to Fountain Place's attention that the other two defendants in the underlying case, Namdar DG Realty, LLC and Fountain Place Realty, LLC (collectively, the "Namdar Defendants"), had made representations to the City that they, or one of them, were entitled to the B&O Taxes-remittance payments under the Agreement; and the City claimed this as one reason, but not the only reason, why it would not make any further payments to Fountain Place. Such claims by the Namdar Defendants were patently false; and the Namdar Defendants, it is understood, have now rescinded and disclaimed any and all claims to rights under the Agreement. *See* Appx. Vol. I, at 44, 45.

[5] An Amended Complaint was filed two days later to correct a clerical error that was inputted during the electronic filing process. The Amended Complaint was identical in all respects to the original, and is thus not referenced further herein. *See id.* at 10.

After briefing on these issues, the Circuit Court heard the City Defendants' Motion on June 5, 2024. After argument on all the issues, the Circuit Court adjourned the hearing and ordered the parties to brief further the final point raised in the City Defendants' Motion (namely, whether the City was a proper party to the case due to the Development Authority being dissolved). The parties did so, and filed proposed orders, and the hearing on the Motion was reconvened on July 12, 2024.[6] *See* Supp. Appx. Vol. II at 283–314. It was just prior to the hearing that the City Defendants first mentioned Article X, sec. 8 of the West Virginia Constitution. *Id.* at 230.

At the hearing, the Circuit Court expressed consternation over the potential applicability of Art. X, sec. 8. Supp. Appx. Vol. III at 613, ¶ 8-18. Counsel for Fountain Place stated at the hearing that it was questionable whether the section applied, because the case did not involve an "indebtedness" at all. Supp. Appx. Vol. III at 577, ¶ 10-18; at 578, ¶ 20-23.[7] The Circuit Court refused to rule at the hearing as to what its decision in the case would be. Shortly after the hearing,

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[6] Fountain Place timely perfected its appeal by filing its Petitioner's Brief and Appendix on October 20, 2025. As of that date, Fountain Place had not yet received the transcripts for the motion to dismiss hearings from the Circuit Court of Logan County's reporter. Accordingly, Fountain Place, on even date therewith, filed a Motion for Leave to Submit Transcripts When Received from Lower Court. This Court granted that motion and entered an Amended Scheduling Order on October 24, 2025, giving Fountain Place until November 14, 2025, to submit the transcripts and any amended petitioner's brief deemed necessary. However, the transcripts were not received by Fountain Place's counsel until November 20, 2025. On that day, Fountain Place filed a Motion to Extend the Deadline to Submit Transcripts and Amended Petitioner's Brief. On November 25, 2025, this Court granted that motion and entered an Amended Scheduling Order, extending Fountain Place's deadline to file transcripts and any amended petitioner's brief deemed necessary to December 1, 2025—the date of filing of this Amended Petitioner's Brief and the Supplemental Appendix containing the hearing transcripts.

[7] During the hearing, the Court questioned counsel's indication that this matter did not involve an "indebtedness" at all, asking, "How is this not a debt? You're seeking money that the city owes you, you would say?" Supp. Appx. Vol. III at 585, ¶ 20-22. Counsel replied stating that Fountain Place is seeking money owed to it by the City, and "in that regard," this matter does involve an "indebtedness." *Id.* at 585, ¶ 24; at 586, ¶ 1-2. Thus, using the Court's simplified definition of the term "debt" as "money owed," counsel agreed that an "indebtedness" may exist. Counsel went on to explain that he was questioning whether an indebtedness existed here in regards to the applicability of Art. X. *Id.* at 586, ¶ 4-6. However, this argument was not further developed or resolved at the hearing, as the hearing was the first time the applicability of Art. X, sec. 8 was argued. Fountain Place also did not have the opportunity to expand or develop the argument this argument further after the hearing. In fact, after further research on the issue, Fountain Place filed a Motion for Leave to File Supplemental Briefing to further expand on its argument, but this motion was not considered by the circuit court. Supp. Appx. Vol. II at 256–266. Fountain Place argues that this matter does not involve an "indebtedness" under the legal definition of a "debt" herein, *infra* Section II.a.

Fountain Place filed a Motion for Leave to File Supplemental Briefing, and attached thereto its proposed supplemental briefing, on the issue of the applicability of Art. X, sec. 8 as a bar to the sort of obligations entered into in connection with the Agreement (the "Motion for Leave"). Supp. Appx. Vol. II at 256–266. The City Defendants filed an opposition to this Motion. *Id.* at 268–280. Upon further instruction from the Circuit Court, the parties filed new proposed orders in December 2024.[8] *Id.* at 315–368.

The Circuit Court never ruled on the Motion for Leave, and never considered Fountain Place's arguments raised therein. In fact, the Circuit Court made no substantive action in the case for another seven months, when it issued its Order adopting in full, and without alteration, the City Defendants' second proposed order granting their Motion to Dismiss, ruling that (i) the Agreement was void *ab initio* because unconstitutional, (ii) the City was immune from the liabilities of the now-defunct Development Authority, and (iii) the City Defendants were not estopped from arguing that there was no contract between them and Fountain Place. *Id.* at 422–53 (said Appendix pages being hereinafter referred to as the "Order"). Fountain Place timely filed its Notice of Appeal thirty days later, and the matter was subsequently stayed under W.Va. R. Civ. P. 28(a). *Id.* at 454–467.

Statement Regarding Oral Argument and Decision

Fountain Place asserts under West Virginia Rule of Appellate Procedure 20 that the issues in this case are of significant-enough materiality and novelty that oral argument is appropriate in this case. Should this Honorable Court find likewise, counsel for Fountain Place is prepared to present oral argument.

Summary of Argument

The Agreement was constitutional at its inception, because it did not create a debt of the

[8] Fountain Place's second proposed order addressed the applicability (or lack thereof) of Art. X, sec. 8, including important arguments raised in the Motion for Leave and proposed supplemental briefing on that issue. *Id.* at 353–357.

municipality. In fact, it did not create a debt at all. The Agreement created a revenue-sharing arrangement between the parties. The City had no debt to Fountain Place under the Agreement. Indeed, the City never once reflected these obligations as "debts"—and it should not have. Not only was it not a debt, but the obligations created by the Agreement were obligations of the Development Authority, which was created for the purpose of making deals such as this happen. It is thus incontrovertible that the Agreement was constitutional at its inception.

The obligations to continue payment could not simply be disappeared by the unilateral dissolution of the Development Authority in 2013. It is inherently inequitable and unjust to posit that a Development Authority can accrue liabilities, of any kind, to third parties, and then simply dissolve without addressing those liabilities, and thus absolve the municipality that has benefited from those third parties of any future liabilities. That is an unconstitutional reading of the statute, which does not comport with the interpretation of similar statutes in other jurisdictions—and one that would lead to gross violations of public policy that would further mire the State in a reputation of being an undesirable investment area.

In fact, the argument that the City is immune due to its unilateral decision to dissolve the Development Authority also violates the plain reading of the contract and principles of estoppel. The City, both by the written Agreement and by its course of conduct, affirmatively assumed the payment obligations to Fountain Place—payment obligations which the City actually satisfied for approximately eight years after its dissolution of the Development Authority. Indeed, because the Agreement represented a multi-decade joint venture whereby the City's tax base and geographic area would increase, the act of entering into that Agreement was of a proprietary nature, and thus the City cannot now argue there was no contract between it and Fountain Place.

For these reasons, all of which are more fully enumerated and argued below, the Order granting the City Defendants' Motion to Dismiss was in error, and should be overruled by this honorable Court.

ARGUMENT

I. Standard of Review

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Likewise, "[c]onstitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review." *Morris v. Crown Equip. Corp.*, 219 W. Va. 347, 352, 633 S.E.2d 292, 297 (2006).

Accordingly, in reviewing a trial court's decision to dismiss a case for failure to state a claim under Rule 12(b)(6), the reviewing court must look at the question of law without deference to the trial court's findings, and itself ask the question as to whether "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Ewing v. Board of Educ. of County of Summers,* 202 W. Va. 228, 235, 503 S.E.2d 541, 548 (1998) (quoting *Murphy v. Smallridge,* 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996) (internal citations omitted)).

II. The Circuit Court erred in finding that Art. X, sec. 8 of the W. Va. Constitution applied to and disallowed the Development Agreement

a. The Development Agreement did not create or involve an "indebtedness"

Article X, sec. 8 of the West Virginia Constitution states as follows:

> No county, city, school district, or municipal corporation, except in cases where such corporations have already authorized their bonds to be issued, shall hereafter be allowed to become <u>indebted</u>, in any manner, or for any purpose, to an amount, including existing <u>indebtedness</u>, in the aggregate, exceeding five per centum on the value of the taxable property therein to be ascertained by the last assessment for state and county taxes, previous

> to the incurring of such indebtedness; nor without, at the same time, providing for the collection of a direct annual tax on all taxable property therein, in the ratio, as between the several classes or types of such taxable property, specified in section one of this article, separate and apart from and in addition to all other taxes for all other purposes, sufficient to pay, annually, the interest on such debt, and the principal thereof, within, and not exceeding thirty-four years. Such tax, in an amount sufficient to pay the interest and principal on bonds issued by any school district not exceeding in the aggregate three per centum of such assessed value, may be levied outside the limits fixed by section one of this article: Provided, That no debt shall be contracted under this section, unless all questions connected with the same, shall have been first submitted to a vote of the people, and have received three fifths of all the votes cast for and against the same.

(Emphasis added). While in any case, much can be spent litigating the question of whether an indebtedness does not exceed the prescribed aggregate, or whether it is provided for by a tax of the proper type, or whether any other of the requirements of Art. X, sec. 8 have been met, the key first inquiry is whether there is, in fact, an "indebtedness."[9]

> In the first place, the word "indebtedness" implies a liquidated amount, something quantified. Strictly construed, the word indicates a sum of money due by certain and express agreement; a claim for which an action of debt will presently lie. *City of Perry v. Johnson*, 106 Okl. 32, 33, 233 P. 679, 680 (1925). The essence of a cause of action for debt is that the defendant be obligated to pay the obligee a then knowable sum of money. *Foshee v. General Telephone Company of the Southeast*, 295 Ala. 70, 322 So. 2d 715 (1975). "Indebtedness," then, means a particular sum presently owed. It is not a contingent liability. *See McCrea v. First National Bank of Austin*, 162 Minn. 455, 203 N.W. 220 (1925); and *West Florida Grocery Co. v. Teutonia Fire Insurance Co*., 74 Fla. 220, 77 So. 209 (1918).

Connors v. Mulvehill, 679 F. Supp. 1071, 1078 (N.D. Ala. 1988) (emphasis in original). In *Perry*, the Oklahoma Court was addressing a constitutional provision remarkably similar, though not identical, to the West Virginia provision cited above. While that case involved a suit by a taxpayer, the Court in that case nonetheless relied on 31 C.J. 412 to provide that "indebtedness" generally

[9] Indeed, Fountain Place attempted to do just this, when it first was faced with and responded to the newly-raised constitutional question in the few days leading up to the July 12 hearing—which hearing, for context, was called to address the sole question of the applicability of W.Va. Code § 7-12-8. Further research thereafter revealed that the threshold "indebtedness" inquiry exempted the Agreement from the prohibitions of Art. X, sec. 8. *See* Supp. Appx. Vol. II at 242–43.

requires a "sum of money due," and, in any event, "The word 'indebtedness,' as used in the limitation placed upon municipal power, is given a meaning much less broad and comprehensive than it bears in general usage." 106 Okl. 34. In *McCrea*, the Minnesota Court held, in interpreting the language of an assignment, that the "term 'indebtedness' as used must be and is construed as meaning direct and not contingent indebtedness." 162 Minn. 457. In *West Florida Grocery*, the Florida Court held, in interpreting the requirements for a writ of garnishment, that "indebtedness" must exclude "indebtedness that may never become due according to circumstances yet to occur, or which is not determinable by a fixed and certain method of calculation. If there is anything contingent or to be done by a person before the liability of another becomes fixed, there is not such an 'indebtedness[.]'" 74 Fla. 226.

In *Deputy v. DuPont*, 308 U.S. 488 (1940), the United States Supreme Court, in interpreting the Internal Revenue Act, stated that "although an indebtedness in an obligation, an obligation is not necessarily an 'indebtedness.'" *Id.* at 497. The Eight Circuit Court of Appeals cited this favorably in determining that an "inchoate or contingent debt" cannot be interpreted to mean "indebtedness," and also in affirming that granting the term "indebtedness" any "definition more flexible [than an unconditional obligation to pay] would only encourage subterfuge and deception." *C.L. Downey Co. v. Commissioner*, 172 F.2d 810, 812 (8th Cir. 1949).

Indeed, in West Virginia, the Supreme Court of Appeals has held (again in a taxation context) that "indebtedness" must be "existing": *i.e.* indebtedness that can be particularly listed and identified "to show when payable and the amount thereof, including interest[.]" It cannot include "possible indebtedness," which may be dependent on the occurrence of "contingencies." *Wheeling Fire Ins. Co. v. Board of Equalization & Review*, 111 W.Va. 161, 170, 161, S.E. 427, 431 (1931).

This is reinforced by Black's, which defines "Debt" as "as a specified sum of money owing" and "a fixed and certain obligation." Black's Law Dictionary, 5th ed. ("Debt"). Cornell Law School's Legal Information Institute further explains that:

> Debt is mainly composed of two elements: principal and interest. While debt can take many forms, the main variables by which debt differ are: (1) the amount of principal; (2) the maturity, or the amount of time until the debt is due; (3) the interest rate; and (4) the frequency by which interest is accrued, i.e. how frequently it is calculated. For example, an individual could borrow $1,000 to be repaid in ten years, with 2% interest accruing semi-annually. Or, alternatively, an individual could borrow $1,000 to be repaid in five years with 5% interest accruing annually.
>
> The party taking on the debt may be referred to as the borrower or debtor. Individuals, corporations, and government bodies may hold debt. For example, corporations often issue corporate bonds to investors, becoming indebted to the investors, to fund new projects. Government bodies at the local, state, and federal level also issue bonds to investors, becoming indebted to them, to fund new projects or to cover budget deficits. Debt issued by local governments to fund projects such as infrastructure or schools is referred to as municipal bonds . . .
>
> Debt may take the following forms: loans, bonds, promissory notes, debenture, mortgages, and amounts owed on a credit card, among others.[10]

The question then, is whether the financial obligations created by Agreement *sub judice* constitute "indebtedness," which, if so, would invoke the limitations of Art. X, sec. 8 of the State Constitution. It is clear on its face that they are not.

Here, the Agreement does not create a bond, a note, a loan, a debenture, a mortgage, a line of credit, or any other form of "debt instrument" that falls under the category of "debt." It does not create any "principal" or "interest," and it does not establish a traditional "maturity" date or accrual schedule. Indeed, it creates only a contingent obligation of the City, in which the City only pays money when it receives money; and, by definition, every payment is less than the total amount

[10] Located at https://www.law.cornell.edu/wex/debt (last accessed October 19, 2025).

collected by City, meaning the City is realizing a net revenue gain every time it makes a payment.[11] If the City reduces its B&O Taxes (perhaps offsetting it with a home-rule sales tax or other assessment),[12] it reduces the amount it owes Fountain Place. If the tenants of the Fountain Place Mall (for example, Wal-Mart or Lowe's) abandon their business there, the amount the City owes Fountain Place also diminishes.

While Fountain Place can proffer to this honorable Court that it is confident that the City has not treated this obligation as a "debt" on its books, that fact was not a matter of record in the underlying case (and the Court dismissed the case before any factual record could be developed).[13] The payment obligation created by the Agreement is nonetheless, and undoubtedly, not an "indebtedness" for a strict and certain sum, that must be paid off over time. Indeed, the Agreement more closely resembles a corporate venture: both the City and the developer made investments into the Fountain Place Mall, from which they would share the revenue for a period of thirty years. This is not an indebtedness, but the sharing of an income stream. The fact that the City collects the money first and then remits it does not transform it into an indebtedness of the City resembling a bond, or a loan, or some other debt instrument as commonly understood.

The fact that the City has now failed to make those payments for a period of three years, and going forward, does not transform those payments into "indebtedness" because the amount owed is now "certain," and thus somehow absolve the City from these arrearage liabilities. Such an interpretation would be constitutionally (and equitably) unpalatable. Truly, the City is constitutionally <u>prohibited</u> from missing these payments—first, because such would be a

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[11] This further undermines any argument that the Agreement damages the City, because the very act of paying the money means that the City is making more money than it otherwise would have made.

[12] *See* Supp. Appx. Vol. I, at 166.

[13] This is yet another reason why the Court erred.

substantive denial of Fountain Place's due process and property rights (as described *infra* p. 22–24), and second, because, assuming *arguendo* that these back payments are transformed into "debts" by the fact of being unpaid, the City is not allowed to let that happen.

In short, the Agreement was entered into by the City, the Development Authority, and Monterra (who assigned the Agreement to Fountain Place in a federally-approved bankruptcy transfer to which the City Defendants made no objection), and included as part of the consideration a ten-year renewal term that made the total length of the venture thirty years. Neither the City nor the Authority assumed any debt obligations, but rather a contingent revenue-sharing obligation. The Constitution did not prohibit this transaction in 1997, and it does not prohibit it now.

Furthermore, the City and the Development Authority both warranted that they had "full power and authority to execute and deliver this Agreement and to perform all of its agreement, obligations and undertakings hereunder." *See* Supp. Appx. Vol. I at 75. They further warranted that:

> The execution, delivery and performance of this Agreement have been duly and validly authorized by all necessary action on the part of the City and Development Authority. This Agreement is a legal, valid and binding obligation of the City and the Development Authority in accordance with its terms, except as enforcement hereof may be limited by applicable bankruptcy, reorganization, insolvency or similar laws affecting creditor's rights as may from time to time be in effect.

Id..[14] As stated above, the City Defendants had the opportunity to object to this warranty and representation not only at the outset of the deal, but also years later, during the Monterra

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[14] They additionally warranted that:

> Neither the execution nor the delivery of this Agreement nor the performance of the City's or the Development Authority's agreements, obligations and undertakings hereunder will conflict with, violate or result in a breach of any of the terms, conditions, or provisions of any agreement, rule, regulation, statute, ordinance, judgment, decree, or other law by which the City may be bound.

Supp. Appx. Vol. I at 75.

bankruptcy, at which time they did not raise any challenge to the Agreement. Not only is this evidence that the City Defendants were, in fact, operating legally and constitutionally at the time, but it also tends to prove that, if they were in fact not acting legally and constitutionally, the City Defendants were acting fraudulently in inducing the development of the project by Monterra (and, later, Fountain Place) by making these false warranties.

The cases cited by the Circuit Court in its Order holding that Art. X, sec. 8 prohibited entry into the Agreement, and thus made it void *ab initio*, are not persuasive, nor even on point.

For example, the Circuit Court quotes Syl. Pt. 1, *Warden v. Grafton*, 115 W. Va. 438, 176 S.E. 706 (1943), stating, "Any attempt of a municipality to obligate itself to pay a debt from indirect taxes to be collected in future years is in violation of Constitution, Article X, section 8." Order, p. 427, ¶ 2. That case involved the proposal by the City of Grafton to issue bonds and use the proceeds thereof for the construction of a municipal hospital. The West Virginia Supreme Court of Appeals held that a city could not incur any indebtedness unless it laid a direct levy to fund that debt. The Circuit Court further relied on *State ex rel. Cty. Comm'n v. Cooke*, 197 W. Va. 391, 475 S.E.2d 483 (1996), which involved the constitutionality of the issuance of bonds to finance a county water project. There, the Supreme Court of Appeals noted that there are three categories of bonds which do not implicate constitutional restrictions on debt: "those issued pursuant to W. Va. Const. art. XIV, §2, relating to constitutional amendments"; "those which are payable from lease rental payments or similar contract arrangements for a necessary service on the part of the public agency"; and "those which are liquidated out of a special fund." Order, p. 428–29, ¶ 6. On this basis, the Circuit Court below held that the contractual payments asserted by Fountain Place "do not fall within these three categories of bond repayment obligations that do not implicate constitutional restrictions on debt." *Id.*

However, these cases are distinguishable from the case at hand because they only address situations where bonds are used to fund a project.[15] Here, the City Defendants have not issued a "bond" or created a repayment obligation. The revenue created by the B&O Taxes is not used to pay off money borrowed by the City Defendants or needed by them to work on a specific municipal project. Instead, the City Defendants simply agreed that the developer (Fountain Place) may share in the tax revenues, which, but for the Agreement, would never have been raised. The Circuit Court even noted in its Order that "[u]nlike a public improvement project, no bonds were issued or are involved regarding the payment obligations alleged." Order, p. 430, ¶ 8. Therefore, *Warden* and *Cooke* are not applicable to the case at hand.

The Circuit Court further relied upon West Virginia Attorney General Opinion, 060618, 2018 W. Va. AG LEXIS 6 (June 6, 2018). Order, p. 430–431, ¶ 10. There, the Attorney General addressed the enforceability of sponsorship, operation, and maintenance agreements concerning dams and channels across West Virginia. The State had agreed to be a "sponsoring organization," requiring it to contribute to the construction costs for 170 small-watershed dams and 22 flood control channels across the state.

In its opinion, the Attorney General relied upon the definition of "debt" provided in *Allison v. City of Chester*, 69 W. Va. 533, 536, 72 S.E. 472, 473 (1911), as created wherever "payment [is] postponed to future dates" for "services performed[] or to be performed," including for projects such as "the building of water works[] or any other municipal improvement." The Circuit Court in the matter at hand also relied on this definition to find that any agreement involving ongoing obligations with a municipality is a debt in violation of Art. X, sec. 8. Order, p. 431, ¶ 10. (It should

[15] It is worth noting that, here, there was, in fact, a special fund created. *See supra* p. 4 (regarding creation of the Fund). This is discussed further *infra* p. 17.

be noted, as stated above, that the Circuit Court never considered Fountain Place's arguments that the Agreement did not create an "indebtedness.")

However, as stated above, the City Defendants' obligation to Fountain Place under the Agreement is not for "services performed or to be performed" such as building of a municipal building. The City Defendants' remitting of the B&O revenue was promised in consideration of the annexation Fountain Place's property. In other words, the City Defendants did not pay Fountain Place or Monterra to build anything. The City Defendants offered this revenue-sharing in exchange for the right to annex—and that revenue-sharing induced the annexation. Therefore, the payment of a percentage of B&O Taxes to Fountain Place is not considered a debt by the Supreme Court's definition.

Further, even if the City of Logan's payment obligation could be considered a bond or debt—which is unlikely—such would fall into the category of liabilities that are "liquidated out of a special fund." The Circuit Court held that the increase in B&O tax revenue generated by taxable business activities at Fountain Place after annexation "does not mean that B&O tax revenue is a 'special fund' or somehow exempts the City's general revenue tax dollars from the Constitutional requirements and limitations appliable to all municipalities designed to protect the public." *See* Order, p. 429, ¶ 7. This is completely wrong. The Agreement did create a Fund, which was to be called a "Special Allocation Fund," and which was to be funded entirely by an increase in the B&O Taxes collected as an absolute, direct result of the annexation of the Fountain Place Mall Property. It was from that Fund that payments to Fountain Place were to be made.

This is entirely distinguishable from the case *Cooke*, in which it was wrongly argued that the fact that property taxes would increase due to development of new water facilities could be construed to mean there was a new "fund." That is not the case here, where a literal Fund was established and funded from specifically designated municipal revenue: the B&O tax payments gleaned from the Fountain Place Mall Property only.

In *Cooke*, the Supreme Court cited several cases in which it found that the constitutional indebtedness restrictions were not implicated because of the existence of a "special fund."

> In the cases noted above, various financing schemes passed constitutional muster because a new tax source was utilized, the amount to be paid on an existing tax account was increased, or an existing special revenue source was used which had not been placed into the general revenue funds, thus "the financial integrity of the State's existing tax structure . . ." had not been impaired. Clearly, the special fund concept has been held not to violate constitutional restrictions on incurring debt only when the general tax revenue of the State or county has not been affected.

Cooke, 197 W. Va. at 399 (citing *State ex rel. Marockie v. Wagoner*, 190 W.Va. 467, 472, 438 S.E. 2d 810, 815 (1993) (citation omitted)). Here, a new tax source (Fountain Place Mall) was implemented and utilized exclusively. Payment to Fountain Place came directly, or was supposed to come, from the Fund established thereby.

In 1979, the Attorney General made its opinion clear that a municipality can enter into a multi-year contract if the obligation created by that contract can be met solely through funds generated by virtue of that contract. Attorney General Opinion, 58 Op. Atty. Gen. W. Va. 95, 1979 W. Va. AG LEXIS 35 (Sept. 17, 1979). There, the question addressed was "whether the City of St. Albans can legally enter into" a multi-year contract for garbage collection and solid waste management services "if the obligation created thereby is to be met solely through funds generated from fees collected from each residence for garbage pickup." *Id.* at *1. The Attorney General found that the City of St. Albans could enter into such a contract, reasoning that "if an obligation is payable out of a special fund only, and the municipality is not otherwise liable, it is generally held that there is no indebtedness." *Id.* at *4 (quoting 15 McQuillin Mun. Corp. § 41.31 (3rd Ed. 1970)). Indeed, the question of whether the obligation creates further municipal liabilities appears to be a key factor in determining whether there is an "indebtedness."

Further, "The West Virginia Supreme Court of Appeals has embraced this principle in the area of self-liquidating bonds, basing its conclusion on the fact that the obligation created by such bonds would not require the payment of monies out of general funds or levying taxes." *Id.* (citing *County Court v. Demus*, 148 W.Va. 398, 135 S.E.2d 352 (1964)). The Attorney General did warn, however, that the terms of a contract cannot be framed in a manner "that could be construed to provide for general liability upon the part of the municipality." *Id.* at *5.

In the case at hand, there is no payment of monies out of general funds or levying taxes. The percentage of B&O Taxes paid to Fountain Place is directly correlated with the amount of B&O Taxes paid at the Fountain Place Mall. Again, if Fountain Place Mall were to bring in $0.00 for a year, the City Defendants would not be obligated to pay Fountain Place <u>anything</u> out of its general B&O tax revenue or other funds. The payment is only out of this special Fund of revenue collected by the City for the business operations taking place at Fountain Place Mall—and, importantly, the City Defendants are not "otherwise liable" to Petitioner.

Lastly, the Circuit Court again quoted *Cooke*: "[t]he underlying purpose of constitutional debt restrictions is to protect the fiscal integrity of our governmental entities." Order, p. 428–429, ¶ 6 (quoting *Cooke*, 197 W. Va. at 396). But, the B&O Taxes revenue paid to Fountain Place does not affect the fiscal integrity of the City, as there is no debt incurred by the City—in fact, it improves it. The City did not borrow money for the purposes of securing payment of a project, which it may not be able to pay back in the future—thus, the City has not had the burden of unpaid debts on its books for these nearly three decades in connection with the expensive construction of the Fountain Place Mall. As stated above, under the Agreement, the City only pays money when it makes money: the payment to Fountain Place is entirely dependent on the amount of money brought in by the development itself. If the Fountain Place Mall were to bring in $0.00 for a year, the City would not have to find some other source of money to pay Fountain Place; instead, Fountain Place simply would not receive payment from the City under the Agreement for that year. Thus, the Agreement did not, and does not, put the City at any sort of financial risk at all.

Indeed, reneging on the Agreement puts the City at a far greater risk. Not only does it reflect poorly on the City's reputation as a business-friendly government, and not only could it effect the City's creditworthiness as a municipality, but the reneging by the City constitutes an outright breach of the Agreement whereby the Fountain Place Mall Property was annexed in the first place. Indeed, the Circuit Court—apparently throwing caution to the wind by declaring the Agreement void *ab initio*—has created a scenario where the <u>annexation itself</u> was void *ab initio*, and thus should be reversed as a matter of law. The logic of the Order would further void other transactions of similar character that were created elsewhere in the State—transactions that also were not discussed in the underlying case and made part of the record, because the Circuit Court dismissed the case as a matter of law before any discovery could occur.[16] The consequences of the Circuit Court's erroneous finding must be reversed, lest a frightful legal fiasco unleash itself.

b. The Existence of the Development Authority made the Development Agreement constitutional in any event

> The purposes for which [the Development Authority] is created are to promote, develop and advance the business prosperity and economic welfare of the municipality or county for which it is created, its citizens and its industrial complex; to encourage and assist through loans, investments or other business transactions in the locating of new business and industry within the municipality or county and to rehabilitate and assist existing businesses and industries therein; to stimulate and promote the expansion of all kinds of business and industrial activity which will tend to advance business and industrial development and maintain the economic stability of the municipality or county, provide maximum opportunities for

[16] *See* n. 12, *supra*, and accompanying text.

> employment, encourage thrift, and improve the standard of living of the citizens of the county; to cooperate and act in conjunction with other organizations, federal, state or local, in the promotion and advancement of industrial, commercial, agricultural, and recreational developments within the municipality or county; and to furnish money and credit, land and industrial sites, technical assistance and such other aid as may be deemed requisite to approved and deserving applicants for the promotion, development and conduct of all kinds of business activity within the municipality or county.

W.Va. Code § 7-12-2. Indeed, the purpose of development authorities created under W.Va. Code § 7-12-1, *et seq.* is to enter into transactions that municipal governments otherwise would not be able to perform, due to statutory or constitutional limitations.

Here, the Development Authority was created prior to the City's entrance into the Agreement for the purposes of facilitating the transaction. Neither any party nor the Circuit Court has claimed that the Development Authority lacked the statutory or constitutional authority to enter into the Agreement and perform thereunder. Yet, the Circuit Court did not give that incontrovertible fact any shrift when it completely declared the entire Agreement void *ab initio*. Even if, *arguendo*, the Constitution barred the City from entering into the transaction in a vacuum (which it did not), the City did <u>not</u> enter into the transaction in a vacuum; it entered into the transaction with a fully authorized and empowered Development Authority in tow. The Agreement was thus constitutional in any event—regardless of the applicability of Art. X, sec. 8.

III. <u>The Circuit Court erred in finding that the City of Logan is immune from the Development Authority's liabilities</u>

a. The Circuit Court's holding deprives Fountain Place of constitutional due process and property rights

W.Va. Code § 7-12-8 states:

> No statutory limitation with respect to the nature, or amount, interest rate or duration of indebtedness which may be incurred by municipalities or other

> public bodies shall apply to indebtedness of the authority. No indebtedness of any nature of the authority shall constitute an indebtedness of the governing body of the municipality or county commission of the municipality or county in which the commission is intended to operate or any municipality situated therein, or a charge against any property of said county commission, municipalities, or other appointing agencies. The rights of creditors of the authority shall be solely against the authority as a corporate body and shall be satisfied only out of property held by it in its corporate capacity.

In their Motion to Dismiss, the City Defendants relied on this section to argue that the City could not be held responsible for the liabilities of the Development Authority, and, because the Development Authority had been dissolved since 2013, there was thus no party available from which Fountain Place could make a claim under the Agreement. The Circuit Court agreed; and, for that reason, it erred.

Indeed, the very notion of a municipality being able, unilaterally, to dissolve its development authority and thus skirt obligations to third parties, leaving those third parties with absolutely no recourse, is fundamentally intolerable in any system that would prioritize fairness and the protection of the public.

The Due Process Clause of the West Virginia Constitution, Art. III, sec. 10, prohibits the government from taking an action where, in its retroactive application, "would impair a 'vested' or 'substantive' property right." *Wampler Foods, Inc. v. Workers' Comp. Div.*, 216 W.Va. 129, 145, 602 S.E.2d 805, 821 (2004) (citing syl. pt. 6 *State ex rel. Blankenship v. Richardson*, 196 W.Va. 726, 474 S.E.2d 906 (1996)). The standard applied by the Courts has been to determine whether the property right being impaired is "one [in] which the individual has a legitimate claim of entitlement under existing rules or understandings." *Id.* Importantly:

> Due Process of law under our *Constitution* 'is ultimately measured by the concept of fundamental fairness.' *Blankenship*, 196 W.Va. at 739, 474 S.E.2d at 919; *accord*, *State v. Osakalumi*, 194 W.Va. 758, 764-66, 461

> S.E.2d 504, 510-12 (1995); *Committee on Legal Ethics v. Printz*, 187 W.Va. 182, 188, 416 S.E.2d 720, 726 (1992) ("fundamental fairness … is the heart of due process"); *State ex rel. Peck v. Goshorn*, 162 W.Va. 420, 422, 249 S.E.2d 765, 766 (1978) ("due process of law is synonymous with fundamental fairness").

Id. Here, it is clear (or, at the very least, a factual issue) that the Plaintiff had every reasonable and legitimate expectation that it was entitled to this stream of income. As argued below, it was a contractual right that was sealed by the signatures of the parties. It was a right that had been ongoing for nearly a quarter-century, and was the consideration for the development of what has become a value-adding business enterprise in Logan and its surrounding communities. The City had continued to make payments for eight years after the Development Authority ceased to exist (*i.e.*, from 2013 until 2021). Before the Development Authority was dissolved, Fountain Place had been receiving this stream of income, as a matter of right granted to it by the City, since it was assigned the Development Agreement in 1999. Fountain Place had relied on this stream of income during all those years.

To argue that it is in any way legitimate for a municipality simply to disband its development authority in order to eliminate the rights of those individuals and entities with whom the development authority did business is to say that a city can indeed reach backward and essentially dismantle contracts it entered into with private citizens. It is to argue, against all concepts of fundamental fairness, that a city can retroactively impair a vested and substantive property right, at its own whim. Such *ex post facto* manipulations, designed for no other purpose than to deny a private citizen its rights and entitlements, are a gross constitutional violation.

This is another reason why the reading of the statute proposed above is proper, and, indeed, necessary. Indeed, a major canon of statutory interpretation is the canon of "constitutional voidance," which requires a court to uphold the interpretation of a statute that would make that statute constitutionally valid. *See generally* 16A Am. Jur. 2d *Constitutional Law* § 173. To construe

W.Va. Code § 7-12-1, *et seq.* as did the Circuit Court would be to interpret it in a matter that challenges its constitutional credulity—which is not necessary or appropriate in this instance, where another reasonable interpretation (namely, that creditors shall satisfy their rights out of the property of the dissolved Development Authority, which was reverted and now owned by the City), is proffered.

Thus, it is abundantly clear that the City's efforts to avoid paying Fountain Place for rights duly inuring to it under the negotiated, agreed-upon, and acted-on Development Agreement were unconstitutional on their face, and there is no constitutional argument justifying the Circuit Court's interpretation of W.Va. Code § 7-12-1, *et seq.*

b. The Circuit Court was incorrect that the Agreement was statutorily barred

The cases and opinions relied upon by the Circuit Court do not support the argument that the West Virginia Code bars Fountain Place from enforcing its rights under the Agreement against the City Defendants. As persuasive authority, the circuit court cites Attorney General Opinion 073118, 2018 W. Va. AG LEXIS 8 (July 31, 2018), regarding the Attorney General's conclusion that "the critical inquiry of whether an expenditure by a development authority is lawfully permitted is whether the relevant program advances a development authority's purposes *within the relevant jurisdiction*." Order, p. 432, ¶ 2. Using this analysis, the Circuit Court found that Fountain Place did not use the money paid by the City Defendants from the B&O Taxes to develop property within the City, and therefore such payment was restricted because the Development Authority is not authorized to pay Fountain Place public money for Fountain Place's use outside of the City.

The Circuit Court's opinion misses the mark. The Attorney General Opinion was whether the <u>development authority's expenditure</u> was within the relevant jurisdiction, not the way that expenditure within the relevant jurisdiction would eventually make its way further into the stream of commerce. It is impossible, once tax funds are spent (or, in this case, remitted) by a governmental entity for that entity then to place a limitation on the future use of those funds in the stream of commerce going forward. It is one thing to say that a governmental entity must spend its tax dollars on projects within its jurisdiction; it is another thing to say that the contractor that the governmental entity pays for a project within its jurisdiction cannot then use those well-earned dollars somewhere else.

The Opinion cited by the Circuit Court is distinguishable in any event. In it, the Attorney General concluded that West Virginia Code § 7-12-1 *et seq.* did not prevent the Berkeley County Development Authority from "issuing matching funds to an educational institution or other entity to support educational or recreational activities, as long as the programs are connected to advancing business and economic interests within Berkeley County." *Id.* at *2. Unlike the case at hand, there, the Attorney General mainly addressed the issue of whether development authorities are allowed to fund educational programs in accordance with W. Va. Code § 7-12-2, which states that an overall goal of a development authority is to "promote, develop and advance the business prosperity and economic welfare of the municipality or county." In deciding that educational programs do fall within this purview, the Attorney General reasoned that:

> development authorities also have statutory authorization "generally to do *any and all things necessary or convenient*" toward the end of "promoting, developing and advancing the business prosperity and economic welfare of the county." W. Va. Code § 7-12-7(a)(3) (emphasis added). The statute similarly provides that "this article shall be *liberally construed* as giving to the authority full and complete power reasonably required to give effect to the purposes hereof." W. Va. Code § 7-12-15 (emphasis added).

Id. at *4. Further, the Attorney General noted that the statutory text gives broad power to developmental authorities, and that

> the Supreme Court of Appeals has made clear that commercial development generally—not industrial development alone—serves the same statutory ends. *See, e.g., State ex rel. Ohio Cty. Comm'n v. Samol*, 165 W. Va. 714, 718, 275 S.E.2d 2, 4

> (1980) ("It does not require any lengthy discussion to realize that the renovation, expansion or creation of existing or new commercial projects gives much the same economic benefit to a community as would comparable activities in the industrial area. Each serves to create or maintain employment and enhance tax revenues, and thereby operates to benefit the community and public in general." (footnote omitted)).

Id. at *5.

Here, the Circuit Court found that the payment of a percentage of the B&O Taxes to Petitioner were unenforceable because the funds are not or are no longer used to promote, develop, or advance the economic welfare of the City. Order, p. 431–433, ¶¶ 1-3. The Circuit Court further found that the City Defendants may not exercise powers in excess of those granted by the Legislature, citing *State ex rel. Plymale v. Huntington*, 147 W. Va. 728, 131 S.E.2d 160 (1963). Order, p. 433–434, ¶ 4.

However, the key point of the Opinion 073118 was that the statute gives development authorities broad power to do <u>any and all things</u> to promote the business prosperity and economic welfare of the municipality. In the case at hand, the very act of the City Defendants entering into the contract with Monterra in the first instance was to promote, develop, and advance the business propensity and economic welfare of the county through the annexation of Fountain Place—with payment over time being the negotiated consideration for the annexation. At the contract's inception, the annexation and commercial development of Fountain Place brought an enormous economic benefit to the City. Thus, the City Defendants operated completely within their powers to enter into that agreement in order to reach its goal of annexing the Property.

c. The Circuit Court's findings were improper on other grounds

In addition to the fact that the Circuit Court's interpretation of the statute created an unconstitutional result, the Circuit Court's interpretation of W.Va. Code § 7-12-1, *et seq.* was wrong on statutory, contractual, equitable, and public policy grounds.

In the first instance, the language cited above clearly regards "indebtedness." Here, as well-argued *supra* p. 10–21, there is no "indebtedness" created by the Agreement. The City is realizing the revenue gains from the B&O Taxes that it collects, from Property it annexed through its own inducing promises. It is simply obligated under the Agreement that it entered into to share those revenues. The statute does not speak to such "obligations" as these.

Furthermore, Article 7 of the West Virginia Code is silent on what happens to the obligations of a development authority once that development authority dissolves—whether those obligations are in the form "debts" or something else. In fact, the statute does speak to what happens with the assets and property of the dissolved authority; it says that such assets are to revert back to the municipality that created it. W.Va. Code § 7-12-13 ("all of its assets and property shall revert to and become the property of the . . . municipality for which [it] was created.").

Silence should not be taken here as prohibition. Indeed, the statute also states that creditors "shall satisfy" their rights "out of property held by the authority in its corporate capacity." When that authority ceases to exist (and no longer has a "corporate capacity"), its property, as prescribed by the statute, reverts to the municipality—thus leaving the municipality itself as only option for creditors or obligees to collect from.

This is supported by similar statutory schemes in other jurisdictions (including jurisdictions which have utilized development authorities to a far greater extent than West Virginia). A good example is New Jersey, which declares all assets, funds, and property of a development authority to revert to the municipality that created the authority, after the authority is dissolved—but the authority cannot dissolve until it "has no debts or obligations outstanding or [until] provision has been made for the payment or retirement of such debts or obligations." N.J. Stat. § 52:18A-237(j). California, as another example, dissolved a statewide "redevelopment authority" scheme, and, in its place, instituted agencies that would assume all assets, property, and liabilities. These agencies were contemplated to be the cities or counties under which the "redevelopment authorities" operated. *See Indep. Living Ctr. of S. Cal. v. City of Los Angeles*, 205 F.Supp.3d 1105 (2016). In every instance, there was a successor-in-interest to the dissolved authorities, <u>as must logically and fairly be the case</u> in any equitable system that values due process and legal rights.

There are contractual reasons, as well as statutory ones, why the Circuit Court's interpretation of the statute was erroneous. The Development Agreement is an enforceable contract, to which the City is the first-listed party, and under which the City has affirmative obligations, including the annexation of the property where the Fountain Place Shopping Center sits, the imposition and collection of B&O Taxes, the establishment of a fund to ensure the collectability of that portion of the B&O Taxes due to Fountain Place, and the remittance of those funds to the Development Authority that it created (and has since disbanded).

The City is also the entity benefiting most from the Development Agreement itself. In exchange for a 30-year 43%/57% split between it and Fountain Place of the B&O Taxes, the City assumed virtually no monetary or capital risk, and instead shifted all capital risk to the developer, expanded its borders and population, introduced dozens of business and jobs into its community, and was promised 100% of all B&O Taxes in perpetuity after the conclusion of the 30-year period (not to mention was enabled in recent years to implement a "Home Rule" sales-tax program that is making it, no doubt, millions of dollars, none of which needs to be shared with Fountain Place or any other entity).[17] The recital clauses of the Development Agreement reinforce this fact:

> WHEREAS, <u>City</u> has determined that it is essential to the economic and social welfare of <u>City</u> that <u>City</u> promote the economic vitality of the community by assuring opportunities for development and sound and stable commercial growth; and
> WHEREAS, <u>City</u> believes a retail shopping complex and other

[17] *See* n. 11, *supra*.

> improvements on the Property will help to improve the social and economic welfare of City; and,
> WHEREAS, the proposed Development contemplated in this Agreement will enhance the tax base of City and will increase the commerce in the City to the benefit of City and other government entities; and,
> WHEREAS, the powers exercised hereunder are found to be in furtherance of a public use and essential to the public interest; and
> WHEREAS, Development Authority desires to assist in the improvement of the economic conditions and opportunities for the citizens of the City of Logan[.]

See Supp. Appx. Vol I. at 72. Emphasis added. It is important to note that these recitals clearly and unambiguously contradict the City's claims in the trial court for unconscionability. The City signed this document, endorsing these incorporated recitals, which function as an admission that the City entered into the Development Agreement because it was "essential to the economic and social welfare," "promote[d] the economic vitality of the community," "assur[ed] opportunities for development and sound and stable commercial growth," would "help to improve the social and economic welfare," would "enhance the tax base," "increase commerce," "benefit" the City, and further "public use" and "public interest." Indeed, the City was the entity that offered the incentives to induce the Developer into developing the subject property. *See id.* at 75. The Development Agreement itself states that it "is a legal, valid and binding obligation of the City and the Development Authority." *Id.* (emphasis added).

The fact is that the City assumed the obligations of the Development Agreement, and agreed to them. The City was a necessary party, and must be included as a party against whom a judgment can be collected. It would be untenably unjust and fundamentally inequitable for the City to claim immunity for contractual obligations it affirmatively agreed to and assumed, especially where the development that resulted was induced by and from the City's own incentives and promises.

IV. The Circuit Court erred in finding that the doctrine of estoppel did not apply in favor of Fountain Place

Indeed, principles of equity dictate that the City not be found to be "immune" from liability on the basis that the Development Authority was dissolved in 2013. This is because, since the dissolution of the Development Authority in 2013, the City affirmatively assumed the obligations of the Development Authority to remit the payments to Fountain Place annually. As undisputed among the parties *sub judice*, the City remitted 57% of the B&O Taxes collected from the Fountain Place Mall to Fountain Place until 2021, a full eight years after the Development Authority was apparently dissolved.

During that eight-year period, the City performed all obligations under the Development Agreement as if it assumed entirely the obligations of the Development Authority. As argued above, this was the proper course of conduct from a statutory, constitutional, and contractual perspective. The City assumed all the property and obligations of the Development Authority under the statute, it could not disband the Development Authority so as to impair Fountain Place's rights under the Constitution, and it could not allow the contract that it had entered into to be breached. In addition to these actions, the City also created a situation of detrimental reliance through its eight-year course of conduct, by which it was estopped from arguing that it was not subject to a contractual obligation to continue paying until the termination of the Renewal Term in 2027.

"In general promissory estoppel is an equitable doctrine which, under certain circumstances, will nullify the defense of lack of consideration in a contract action." *Cochran v. Ollis Creek Coal Co.*, 157 W.Va. 931, 936–37, 205 S.E.2d 410, 414 (1974) (citing 7A M.J. *Estoppel* § 14). Michie's Jurisprudence, cited by the Court in *Cochran*, states:

> The general rule of equitable estoppel, or, as it is frequently called, estoppel in pais, is that when one person, by his statements, conduct, action,

> behavior, concealment, or even silence, has induced another who has a right to rely upon those statements, or the like, and who does rely upon them in good faith to believe in the existence of the state of facts with which they are compatible and act upon that belief, the former will not be allowed to assert, as against the latter, the existence of a different state of facts from that indicated by his statements or conduct, if the latter had so far changed his position that he would be injured thereby.

7A M.J. *Estoppel* § 14. Here, the City—by its statements, conduct, action, and behavior—induced the Plaintiff to rely upon the City for the stream of income, even after the dissolution of the Development Authority. For eight years, the City paid the tax remittances to Fountain Place, and Fountain Place made business decisions during that period of time in good faith and reasonable reliance upon that income. The City affirmatively induced Fountain Place's detrimental reliance by taking actions indicating that it had assumed the obligations of the Development Authority that it dissolved. Accordingly, the City cannot argue that there was no contract binding it to continuing to make these payments.

The Circuit Court, however, rejected Fountain Place's argument that it is entitled to receive a percentage of the B&O Tax revenue based on the doctrine of estoppel. To support this rejection, it cited *Martin v. Pugh*, 175 W. Va. 495, 33 S.E. 2d 633 (1985) and *Burgess v. City of Cameron*, 113 W. Va. 127, 166 S.E. 113, 115 (1932), to demonstrate that municipalities are not subject to the law of equitable estoppel.

However, the West Virginia Supreme Court of Appeals has held that "the general rule that equitable estoppel does not apply against a governmental agency is not without exceptions." *Hudkins v. State Consol. Pub. Ret. Bd*, 220 W. Va. 275, 280, 647 S.E.2d 711, 716 (2007). Moreover, a governmental entity may be subject to the doctrine of estoppel "[w]hen equity clearly requires that it be done." *McFillan v. Berkeley County Planning Comm'n*, 190 W. Va. 458, 465, 438 S.E.2d 801, 808 (1993).

As noted by the Circuit Court, when a municipality is acting in a proprietary capacity, rather than a governmental capacity, the law of equitable estoppel can apply.

> The basic test in determining whether a public corporation, in its operations, is engaged in a discharge of a governmental function or is acting in a proprietary capacity is whether the act performed is for the common benefit of the public or is for the special benefit or profit of the corporation.

Shaffer v. Monongalia General Hospital, 135 W. Va. 163, 169–70, 62 S.E.2d 795, 798 (1950).

In the cases cited by the Circuit Court, the governments involved were clearly acting in a governmental capacity. In *Martin*, the issue of estoppel was discussed in the context of a police officer's employment. *Burgess* addressed the issue of estoppel in the context of street resurfacing. Both of these involve core matters of governmental function.

A governmental entity acts in a governmental capacity when the act performed is for the common benefit of the public (for example, the enforcement of ordinances); it acts in a proprietary capacity when it acts for its own special benefit (for example, the acquisition of land or revenue). *McFillan*, 190 W. Va. at 465, 438 S.E.2d at 808.

Here, the City's performance was not in the enforcement of some general rule, law, or policy, but rather in connection with a contractual arrangement designed to increase the municipality's territory and tax base. This is the government acting as a propriety entity, and thus the doctrine of equitable estoppel can, and does, apply.

The Circuit Court, however, found that the City was not acting in a proprietary capacity because it was "acting for the good of its public, its citizens, in annexing property and collecting B&O Taxes," and thus "was not acting for its own good. Annexation and levying taxes are unquestionably government functions." *See* Order, p. 437, ¶ 5. However, in continuing to perform under the Agreement after the dissolution of the Development Authority in 2013, and after Fountain Place's election of the Renewal Term in 2016, the City was ensuring that Fountain Place

Mall remained annexed so that it (the City) could directly receive tax revenue from the business activities taking place there.

The City entered into the Agreement in the first place so that both parties could receive, and share, the financial benefits from the annexation of a large business development at the Property. But for that, Fountain Place would not have agreed to keep the property annexed, and the City would not have collected any taxes off of the business operations at the Property. Accordingly, entering into such an Agreement was not in the City's governmental capacity, but in its proprietary, revenue-generating capacity, and the doctrine of estoppel can, and must, apply in this circumstance.

Conclusion

WHEREFORE, for the reasons set forth above, the Petitioner Fountain Place, LLC hereby respectfully requests that this Honorable Court find the herein-enumerated assignments of error to be meritorious, namely, to find that the Circuit Court of Logan County was erred in dismissing the underlying case as a matter of law, to order said dismissal reversed, to order further that the case be remanded for further proceedings in accordance with the law as set forth in this Court's reversal, and to award such other award or relief as this Court deems necessary or appropriate.

CERTIFICATE OF SERVICE

I, Jonathon C. Stanley, do hereby certify that the foregoing Amended Petitioner's Brief was electronically filed with the Court on December 1, 2025, using the File & ServeXpress system, which will send notification and access to a copy of the same to the following counsel of record:

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