No. 25-ICA-334

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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

PETITIONER'S REPLY BRIEF

FOUNTAIN PLACE, LLC

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Argument

I. The Development Agreement did not create an unconstitutional municipal indebtedness.

a. The "contingent liability" doctrine is misapplied by the City of Logan

The City Defendants argue that no indebtedness of "any kind" could be created, regardless of whether the payments were fixed or periodic. Respondents' Brief at 10. The City Defendants rely on *State ex rel. Council of Charleston v. Hall*, 190 W. Va. 665, 441 S.E.2d 386 (1994), to contend that contingent or long-term commitments should be scrutinized to avoid "opening a constitutional loophole for municipalities to escape Article X, § 8 by labeling obligations 'contingent.'" Respondents' Brief at 10. This quote from *Hall*, itself, indicates that contingency—in the sense of being dependent on external factors (such as payments being tethered to revenue)—indeed <u>does</u> allow contracts to avoid the Article X, sec. 8 bar; the concern is that contracting parties will misuse this as a "loophole." Thus, "contingent or long-term commitments should be scrutinized," but <u>not</u> "barred automatically." Such was the query addressed in *Hall*: what type of contingent or long-term commitment is being created by the contract in question? Or, phrased differently: is the contingent or long-term commitment an indebtedness, or something else?

Here, the contract—a Development Agreement tied to revenues raised by the City—is entirely self-supporting: it is a closed loop, it completely funds itself. The City is at virtually no financial risk at all by performing it, or by entering into it in the first place. There were no payments made by the City on the front-end. The Developer's entire compensation, tethered to the City acquiring the right to proceed with its annexation, was distilled into this one document: a document that was so valuable as to be included in the bankruptcy estate of Fountain Place's predecessor, the rights to which were then purchased by Fountain Place without objection by the City of Logan and its Development Authority, and which was considered a legitimate, valuable asset by a Federal

Bankruptcy Court, applying appropriate laws to make that determination. The Development Agreement is structured in such a way as to make sure that the City is never in a position of needing to pay obligations out of its general fund or revenues, and the payments the Developer (Fountain Place) receives are only ever made when the City is, itself, enriched from the operations performed at the property.

For this reason, while *Hall* contains important guidance, it is quite distinguishable from the matter at hand. It discusses "contingent contracts" falling under the "contingent liability doctrine" (which is a term of art), and there is no such contract in place here. Specifically, *Hall* involved an agreement where the City of Charleston contracted with a waste disposal service to operate a solid waste facility, that would be used by the City of Charleston for 25 years, in exchange for the payment of a certain rate for each ton of waste delivered by the City of Charleston. The contract also included a provision that if the agreement was prematurely terminated, the City of Charleston had the option to buy the improvements made to the facility by the waste management company.

In *Hall*, the Supreme Court of Appeals discussed the contingent liability doctrine in connection with the constitutional indebtedness bar, in relation to the buy-back provision of the agreement. The Court found that there was no constitutional bar to that provision, as the City of Charleston had the choice of whether it would buy back the facility.

The Respondent uses this decision to indicate that a "debt" cannot be incurred by a municipality even if the payment amount is "variable." Yet, *Hall* specifically discusses contingent contracts where a municipality agrees to make a payment if some condition occurs that requires the municipality to make such a payment—and not the sort of condition that involves the City making money out of a project-specific revenue source, such as B&O Taxes raised in connection with the contracted project.

There is no "contingent contract" provision here. The Development Agreement did not require the City Defendants potentially to pay a future debt, or potentially to assume an obligation, upon the occurrence of some event. There was no contingency: the obligation was immediate. The City Defendants agreed to pay a certain percentage of B&O Taxes for a set number of years in exchange for the annexation of the property. And indeed, the property <u>was</u> annexed, the shopping center <u>was</u> built, and the payments <u>were</u> made—until they suddenly stopped.

Moreover, the Supreme Court in *Hall* noted that:

> Merely incurring a contingent future liability does not create an indebtedness. Thus, a contract to pay a fixed price annually, where contingent on the supply furnished, does not create an indebtedness. But it is held in some jurisdictions that a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or delivery of property, is no less a debt, and therefore, within the constitutional prohibition.

Id. at 670 (quoting 15 Eugene McQuillin, *The Law of Municipal Corporations* § 41.23 (3d ed. 1935)). Thus, even if, *arguendo*, the future payments due to Fountain Place under the Development Agreement are considered contingent future liabilities, the Agreement does not automatically create an indebtedness. The City Defendants agreed to pay a certain percentage annually, resulting in a payment that was dependent upon the amount of B&O Taxes the City collects from the shopping center. <u>No future possibility of indebtedness was created</u>.

Further, the City Defendants, like the Circuit Court, rely primarily on cases that involve the issuance of bonds for the payment of a special project. *See Warden v. Grafton*, 115 W. Va. 438, 176 S.E. 706 (1934); *Brewer v. City of Point Pleasant*, 114 W. Va. 572, 172 S.E.2d 717 (1934); *Comm'n v. Cooke*, 197 W. Va. 391, 475 S.E.2d 482 (1996). As stated in Petitioner's Brief, however, no "bond" was issued to the City Defendants here. The City Defendants did not "borrow" money from Fountain Place in order to fund a special project. The City Defendants agreed to give Fountain

Place a percentage of the B&O taxes in exchange for the development of the shopping center and the annexation of the property.

b. The "special fund" doctrine absolutely applies to the Development Agreement

Even if, *arguendo*, a "debt" or a "bond" existed in this matter, the Development Agreement still does not create an unconstitutional indebtedness because the payment made from Fountain Place is from a "special fund." In its Response Brief, the City argues that the Development Agreement falls outside of the "special fund" exception to the constitutional definition of "indebtedness," suggesting that such doctrine applies only to self-liquidating, project-specific revenues, and not ordinary municipal taxes. Respondent's Brief at 10. The City relies on *Comm'n v. Cooke*, 197 W. Va. 391, 475 S.E.2d 482, insisting that the B&O Taxes are ordinary tax levies collected into the City's general revenue and cannot be a "special fund."

Yet, the City fails to acknowledge that the Development Agreement specifically requires that a "fund" be created, from which the payments to Fountain Place would be made, and that this fund was to be entirely and exclusively funded by the B&O Taxes that were collected from business operations occurring at the shopping center only. Those B&O Taxes are directly and exclusively derived from revenue and are not to be part of the City's general revenue fund. In *Cooke*, the Court was clear that "the special fund doctrine is based on the fact that a specific source of revenue is required to be identified and committed to the repayment of the bonds beyond mere annual appropriations from the general revenue fund." *Id.* at 398, 475 S.E.2d at 490 (quoting *Winkler v. State Sch. Bldg. Auth.*, 189 W. Va. 748, 758, 434 S.E.2d 420, 429 (1993)) (emphasis in original). Further, the Court defined a "special fund" as "a tax or a fee generated from the facility itself." *Id.* at 397, 475 S.E.2d at 489 (quoting *Winkler*, 189 W. Va. at 757; 434 S.E.2d at 429) (emphasis added).

In *State ex rel. Hall v. Taylor*, 154 W. Va. 659, 672, 178 S.E.2d 48, 56 (1970), the Supreme Court of Appeals stated that, while the "special fund doctrine" varies somewhat from state to state, it is nonetheless "applied uniformly in relation to projects or facilities which are self-liquidating . . . . Some courts hold that the doctrine applies in any case of a fund created by a special excise tax as distinguished from property taxes."

Upon quoting *Taylor*, the Court in *Winkler* then explained that:

> The special fund doctrine provided the basis for both our approval of the State Road Commission's special fund to generate revenues to construct the building for the Department of Highways in *State ex rel. Building Commission v. Moore*, *supra*, and the use of the Alcoholic Beverage Control Commission's profits in the same case to fund the construction of its warehouse. The same rationale supports our toll-bridge cases and our cases dealing with the construction of student dormitories at West Virginia University out of special student fees. The special fund doctrine is generally recognized in other jurisdictions as not being violative of constitutional debt limitations.

Winkler, 189 W. Va. at 757; 434 S.E.2d at 429. That is exactly the arrangement here. The B&O Taxes collected from the businesses operating at the shopping center are excise taxes on the privilege of doing business, not an "*ad valorem tax* . . . imposed on the basis of the value of the article or thing taxed." *See Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 172 W.Va. 505, 508–09, 308 S.E.2d 527, 531 (1983) ("An excise tax is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege." (quoting *Callaway v. City of Overland Park*, 211 Kan. 646, 508 P.2d 902, 907 (1973))). The percentage of these B&O Taxes that are owed to Fountain Place are a <u>specific source of revenue</u>, in the form of an excise tax, that is <u>not</u> derived from the City's general revenue fund. The B&O taxes are generated from the shopping center itself—revenues that never would have been created, and still would not be created, without the Development Agreement. The City does not have to dip into its general revenue to pay Fountain

Place. The B&O Taxes owed to Fountain Place are solely funded by the B&O Taxes collected directly from the shopping center.

Importantly, the B&O Taxes themselves are generated from the revenue of the business operations taking place at the shopping center. If every business in the shopping center had to close for a year, and no B&O taxes could be collected for that year, the City would not be obligated to pay Petitioner anything. The City is only obligated to pay Fountain Place a portion of the proceeds from the B&O Taxes derived from the shopping center. The "funding source" here has "built-in restraints" that make it constitutional—unlike the bonds in *Winkler*, in which "no such identifiable controls" existed "because their payment [was] directly from the general revenue fund." *Winkler*, 189 W. Va. at 758; 434 S.E.2d at 430.

The Court in *State ex rel. City of Charleston v. Hall*, 190 W. Va. 665, 441 S.E.2d 386, discussed *supra*, held that the provision of the agreement between the City of Charleston and the waste management business, namely that the business would operate the solid waste facility in exchange for the payment of a certain rate for each ton of solid waste, was not an unconstitutional indebtedness. The Court reasoned that the special fund doctrine applied, even though <u>the case did not involve revenue bonds</u>, because the payment to the waste management company was from a specific source of revenue, other than funds from the general revenue. *Hall*, 190 W. Va. at 669, 441 S.E.2d at 390.

> The City of Charleston has identified a specific source of revenue other than funds from the general revenue fund to pay for West Virginia Waste's services. As we noted earlier, West Virginia Waste's services will be paid from a fund "comprised of revenue derived by the City from charges for refuse disposal services[.]" Agreement P 5.02, in part. Furthermore, the money collected will limit the total amount that can be spent on the services provided by West Virginia Waste. Although there are no bonds which will be retired in the case before us, the situation where a special fund is used to retire a bond is strikingly similar to the situation where a special fund is used to pay for a long-term service.

Id. The same rationale applies to the case at hand. Although there are no bonds to be retired in the matter before this Court, there is a special fund in place to pay for the service rendered under the Development Agreement, specifically the annexation of the property by Monterra.

Persuasively, the Supreme Court of Appeals dealt with an analogous situation involving county commissions, and similar statutory and constitutional structures, in *State ex rel. Kanawha County Bldg. Comm'n v. Paterno*, 160 W. Va. 195, 233 S.E.2d 332 (1977). In that case, the Kanawha County Building Commission was contracted by the Kanawha County Commission to construct a judicial annex in exchange for the County Commission leasing space there and paying rent out of "monies theretofore and thereafter deposited in the County Coal Severance Tax Revenue Fund." *Id.* at 196, 233 S.E.2d at 334. When the constitutionality of that contract was challenged, the Supreme Court held that the agreement was constitutional, in part because the "County Commission in time may not be a recipient of coal severance tax revenues." *Id.* at 206, 233 S.E.2d at 338.

Indeed, it is important to reiterate that the Development Agreement, similar to the agreement addressed in *Paterno*, is a <u>self-supporting contract</u>. There is no scenario whereby Fountain Place is paid in which the City of Logan is not also enriched. And there "in time may not be" any B&O Taxes from which Fountain Place is to be paid. *See id*. Indeed, allusions and complaints by the City and its counsel about the amount of money Fountain Place is paid (or owed) have absolutely no persuasive potency, where, as an unassailable mathematical fact, the amounts due to Fountain Place have no bearing on the solvency or economic performance of the City.

c. The Development Agreement was <u>valid</u> ab initio

While the City Defendants concentrate on their contention that the Development Agreement is void *ab initio*, they fail to address Fountain Place's argument that, if it is void *ab* *initio*, the annexation of the property that comprised the consideration for the transaction was also void. Indeed, the Supreme Court of Appeals has noted, "A contract, void *ab initio*, is without legal effect. Such contract never had any legal existence . . . ." *Nationwide Mut. Ins. Co. v. Conley*, 156 W. Va. 391, 397, 194 S.E.2d 170, 173 (1972).

In fact, if the *amicus curiae* brief from the Attorney General demonstrates anything, it demonstrates that the contract was <u>not</u> *void ab initio*. The Attorney General does not argue that the contract was void from its inception, and instead operates on the assumption that the Development Authority actually had obligations under that contract prior to its dissolution in 2013. The Attorney General only argues that the City cannot be liable for those obligations.

Moreover, if the Development Agreement here is found to be void *ab initio*, not only would this implicate the annexation of the shopping center itself, but would implicate (and potentially harm) several other communities that have entered into similar arrangements in this State. In fact, several other municipalities have made similar deals involving major shopping centers throughout the State. This Court can take judicial notice of these contracts, including, but not necessarily limited to, contracts entered into by: (i) The City of Clarksburg, which entered into a contract in 1996 for development of the Newpointe shopping plaza, for which 50% of B&O Taxes were to be remitted [Development Agreement between the City of Clarksburg and THF Clarksburg Development One (May 17, 1996)];[1] (ii) The City of Nitro, which entered into a contract in 1997 for development of the Nitro Shopping Place, for which 80% of B&O Taxes were reportedly to be remitted [John O'Brien, *City of Nitro behind on payments, suit says*, Legal Newsline (Nov. 1, 2006), https://www.legalnewsline.com/west-virginia-record/city-of-nitro-behind-on-payments-

[1] Each of these agreements are public records, available pursuant to the West Virginia Freedom of Information Act, W.Va. Code § 29B-1-1 *et seq*.

suit-says/article_0bf54ca8-7fc7-544e-9b4e-53664a0eb4e5.html)]; (iii) The Town of Wayne, which entered into a contract in 1998 for development of the Pioneer Plaza Shopping Center, for which 70% of B&O Taxes were to be remitted [Development Agreement between the Town of Wayne, the Town of Wayne Development Authority, and Pioneer Plaza LLC (Dec. 1, 1998)]; (iv) The Town of Granville, which entered into a contract in 2003 for development of the University Town Center shopping plaza, for which 40% of B&O Taxes were to be remitted [Annexation and Development Agreement between The Town of Granville, West Virginia, Mountaineer Property Co., L.L.C., Mon-View, LLC, and Consolidation Coal Company (May 8, 2003)]; and (v) the City of Ravenswood, which entered into a contract in 2002 for development of its own shopping center, for which 40% of B&O Taxes were to be remitted [Development Agreement between City of Ravenswood, City of Ravenswood Development Authority, and Ridge Line, Inc. (Sept. 9, 2002)].

In truth, the contract was not void *ab initio*, because, in the first instance, it did not create an indebtedness under the West Virginia Constitution, and, in the second instance, because of the involvement of the Development Authority, which is specifically empowered to enter into transactions which the municipality itself may not otherwise be able.

II. The City is not immune from the obligations of its dissolved Development Authority.

Were one to rely solely on the second reason for the Development Agreement's constitutionality—the existence of the Development Authority as a party—the inquiry would then hinge on whether this obligation of the Development Authority essentially "dies with it" when it is dissolved (as it was in 2013). Of course, this is not the sole reason why the Development Agreement was constitutional at inception: it was constitutional *prima facie*, because it did not (and does not) involve a municipal indebtedness. *See supra* 1–7.

Indeed, because it did not involve a municipal indebtedness, and because the City was incontrovertibly a signatory and obligor thereunder, the Development Agreement on its own terms imputes upon the City the same obligations as it does the City's Development Authority. Thus, whether the Development Authority is dismantled or not, the City's obligations survive. It is not a matter, then, of whether the City has "inherited" or "assumed" the obligations of the contract at all—it is a matter of the City in fact becoming the only remaining municipal entity in a contract to which it is already a signatory.

To be clear: the Attorney General's *amicus curiae* brief regards whether it is a constitutional due process violation to dissolve a Development Authority and thus get the City out of its obligations to contractors. In the process, the brief of *amicus* did not address the constitutional question of "indebtedness" under Article X, sec. 8, but rather the constitutional question of whether there is a "reasonable expectation" or "enforceable expectation" in a stream of income from a municipality after its Development Authority has been dismantled. In fact, in addressing the definition of "indebtedness" in W.Va. Code § 7-12-8, *amicus* specifically distinguishes that definition from the one used in the Constitution, never challenging the Development Authority's assumption of the Development Agreement's obligations in the first instance, and thus seems to acquiesce to the argument that the contract was <u>valid</u> *ab initio*. *See* Brief of *Amicus* at 9, and *supra* p. 8.

The question implicated by the *amicus* addressed only whether the <u>statutory</u> immunity afforded to the City from the "indebtedness" of its Development Authority is definitionally broad enough to cover the obligations created by the Development Agreement. If it does, then W.Va. Code § 7-12-8 would prohibit Fountain Place from seeking to enforce that contract against the City. In making that very argument, *amicus* expressly states that the "Constitution's and statute's definitions are plainly distinct anyway." *Id.*

In doing so, *amicus* criticizes Fountain Place for failing "to address the statute's 'indebtedness' definition." *Id.* Respectfully, *amicus* is retroactively projecting its views into a dispute in which those views have never been considered (*i.e.* that the Constitutional definition of "indebtedness" is somehow different from the statutory one)—and, respectfully, Fountain Place is under no obligation to accept the Attorney General's framing of the issue. To the contrary, Fountain Place rejects the proposition that the word "indebtedness" needs to be read differently between the Constitution and the statute. The Attorney General seems to attribute great significance to the statute's use of the qualifier "of any nature," yet disregards the Constitution's use of a similar qualifier: "in any manner." *Id.* at 7, *compare with* W. Va. Const. Art. X, sec. 8. Both phrases necessarily impute a sense of generality, but only to the extent that that generality still falls within the actual definition of "indebtedness." Indeed, if the obligations of the Development Agreement do not constitute "indebtedness" under the one, they cannot constitute "indebtedness" under the other.

The analysis, then, follows the following logical framework:

1. Does the Development Agreement create an indebtedness at all?
    a. If <u>no</u>, then there is no constitutional prohibition on the contract. There is also no immunity under W.Va. Code § 7-12-8.
    b. If <u>yes</u>, then the contract was still constitutionally valid, because it involved a Development Authority, which was statutorily permitted to assume "indebtedness of any kind" that would otherwise not be a municipality's to assume.
2. Assuming (a) is the case, the inquiry ends, and the contract must be enforced. Assuming (b) is the case, the line of inquiry continues:
    a. Does the statute allow the City to dismantle its Development Authority at any time, and thus relieve itself entirely of that "indebtedness of any kind"?
        i. If <u>yes</u>, then the inquiry ends, and while the contract is technically enforceable, there is substantively nothing Fountain Place can do about it.
        ii. If <u>no</u>, then the City either:

1. impermissibly dismantled its Development Authority, and thus must be held liable to Fountain Place for damages arising under this breach, or
2. permissibly dismantled its Development Authority, but must be responsible for the Development Authority's obligations under the Development Agreement.

The *amicus* brief skips straight to the end of this analysis, presumably because Fountain Place invoked a constitutional justification for why it would be inappropriate to interpret the statute in such a way as to grant municipalities the right to absolve themselves entirely of all liabilities arising from their use of development authorities. In particular, Fountain Place argued that it had an enforceable and reasonable expectation in the stream of income, which it not only purchased in the Monterra bankruptcy, but also for which it worked, as consideration, after the Monterra bankruptcy by further developing the Fountain Place Shopping Center. Fountain Place then argued that, accordingly, it had a right to this stream of income that was protected by the due process safeguards of the Constitution. To interpret W.Va. Code § 7-12-8 to permit this stream of income simply to vanish by the stroke of a ministerial pen would be, therefore, to interpret the statute to further—among other things—an unconstitutional end.

"When the constitutionality of a statute is challenged, every reasonable construction must be resorted to by the courts to sustain its validity and any reasonable doubt must be resolved in favor of the constitutionality of the legislative act in question." *Paterno*, 160 W. Va. at 204, 233 S.E.2d at 337. Here, Fountain Place does not even challenge the constitutionality of W.Va. Code § 7-12-8; it rather challenges the constitutionality <u>of an interpretation thereof</u> that would permit the municipality unilaterally to destroy a contractor's right to receive compensation for the contracts into which it enters with that municipality.

Not only does the presumption against unconstitutionality apply here, but so, too, does the disfavoring of "absurd results." Indeed, "[t]he absurd results doctrine merely permits a court to favor an otherwise reasonable construction of the statutory text over a more literal interpretation where the latter would produce a result demonstrably at odds with any conceivable legislative purpose." *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 788, 551 S.E.2d 702, 710 (2001).

Fountain Place's argument here is simple. Whether through an appeal to protection of its actionable due process rights, to the statutory interpretations used in other jurisdictions, to estoppel arising from decades' worth of detrimental reliance, or to the simple bar against "absurd results," it is fundamentally unfair that municipalities are entitled to enjoy the benefit of their bargain in perpetuity, while those by whose labors these municipalities were enriched by are "left holding the bag." Frankly, the Attorney General's response to this is as callous as it is absurd: "Fountain Place knowingly assumed the risk that the Authority would close." *Amicus* Brief, 13. Surely, there is no other context in which such an argument would be countenanced.

In the first place, should the Court here rule in agreement with that proposition, then not only would every county and municipality be emboldened to dissolve their development authorities, but it would make nearly impossible the ability of existing development authorities to do business with contracting parties in this State. It is indisputable that these authorities are created for the distinct purpose of vitalizing local economies, by entering into contracts that are more uniquely structured, and often longer-termed, than those into which their municipal counterparts otherwise could. W.Va. Code § 7-12-7(a)(3). No self-respecting businessperson would be willing to enter into such contracts knowing that the entity that was going to pay him or her could shutter-up the next day without recourse.

This Court does not need to feel itself compelled to condone such an absurd conclusion on the basis that the statute gives it no other option. That is not the case. W. Va. Code § 7-12-8 states that “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” (emphasis added).

Firstly, Fountain Place is only a “creditor” to the extent that it has a right to payments that are already due and owing—which is clearly the case here. To the extent, however, that “creditor” is construed to mean that the Development Agreement creates a “indebtedness” between it and the municipal defendants, however, Fountain Place is not a “creditor.” Fountain Place is better considered an obligee, entitled to share in payments derived from revenues that it helped create through a contract.

Should Fountain Place be considered a “creditor” in the strict sense that it is owed money that has not been paid, however, it is important to address the rest of the language of the statute, particularly the term “corporate capacity.” From the Latin *corporare*, meaning “formed into a body,” “corporate” is an adjective defined as “Formed into an association and endowed by law with the rights and liabilities of an individual.” MERRIAM-WEBSTER ONLINE, “corporate,” located at https://www.merriam-webster.com/dictionary/ corporate (last accessed January 26, 2026). “Corporate capacity” is thus the capacity, or power, of the entity that is formed into a body under the law. Once an entity is dissolved, it no longer has any “corporate capacity.” Thus, this code section presupposes that a given development authority actually exists as a corporate entity.

Here, however, that is not the case. In fact, there is no remedy for the “creditors” of the Development Authority other than from the Development Authority itself, while it exists (*i.e.* has corporate capacity), or from the municipality that created it, after it no longer exists (*i.e.* no longer has corporate capacity of any kind). This is reinforced by W. Va. Code § 7-12-13, which states that “upon dissolution of the authority, all of its assets and property shall revert to and become the property of the county or municipality for which said authority was created.” In other words, if the remedy is to collect against the Development Authority's property while it exists, the remedy must be to collect against the Development Authority's property after it no longer exists; and, at that point, that property is the municipality's. As stated in the Petitioner's Brief, this is supported by similar statutory schemes in other jurisdictions. *See* Petitioner's Brief at 28.[2]

Thus, there is no reason to implicate the constitutional analysis at all: while the statute may be silent on the question of what happens when an authority dissolves, it in fact does not bar creditors or other obligees from a remedy in the event that it dissolves. This is a fair reading of the statute's plain language, which does not create an absurdity. Should the City have desired to insulate itself from collection, it would have been better served leaving its Development Authority corporate and intact.

In fact, considering the Attorney General's suggestion that this case presents a wholly contractual problem, and not a constitutional one, Fountain Place posits that the Development Agreement itself—valid *ab initio*—requires the City to take steps not to frustrate the Agreement's performance. In fact, if it is true that the Development Authority's dissolution could terminate all Fountain Place's hard-earned and paid-for rights under the Agreement, leaving Fountain Place without any remedy, then the City as a matter of contract was not permitted to dissolve that Development Authority. Taking all the *amicus'* arguments as true, then, the parties are back where they started: the City has breached its contract with Fountain Place, and is liable for damages.

Indeed, the fact that the City is a party to the contract, and bound to make sure the contract happens and is performed creates two counterpoints to the Attorney General's argument. First, assuming *arguendo* that the Attorney General is correct, and there is no constitutional due process argument here (but rather a contractual question alone), then it is abundantly clear that the City

[2] The *amicus*, as well, invoked other jurisdictions' statutory structures.

has indeed breached that contract, to which it is a party, by intentionally frustrating its performance. Secondly, this fact reinforces the reasonable expectation Fountain Place had of continual performance of the Development Agreement—because the City was party, and the City was contractually required to make sure the Agreement was performed.

Indeed, the entirety of the *amicus'* argument (and the Respondents' argument regarding immunity) ultimately hinges on whether there was such a reasonable and enforceable expectation under the law created by the entrance into and performance of this Development Agreement. If there is such an expectation, then interpreting the statute to absolve the City of its dissolved Authority's obligations is an unconstitutional one. That inquiry lies at the core of these arguments.

The Respondents and the *amicus* have argued that Fountain Place cannot have a "reasonable" or "enforceable" expectation in something that is contrary to a statute, thus, taking the Court on a tautological journey: the Court is first encouraged to find that there is no constitutional violation because there is no "reasonable expectation," and there is no "reasonable expectation" because the statute forecloses one, and the statute forecloses one because any interpretation otherwise would result in the City committing a constitutional violation. This turns the interpretative maxims on its head: the presumption in favor of constitutionality involves whether the <u>statute</u> is constitutional, not the <u>action complained of</u>.

Contra this Court's *amicus*, Fountain Place absolutely had a reasonable and enforceable expectation in a benefit. As said above, the reasonable expectation here is not foreclosed by the statute. In fact, it is reinforced by the contract itself, which requires the City to take measures to ensure that the contract is performed. After 23 years' worth of payments and performance, affirmative recitals and representations of legality, and the complete review and approval of this contract and its validity in a contested bankruptcy proceeding, it is reasonable for Fountain Place to expect these payments to continue; indeed, it is eminently reasonable for any entity in Fountain Place's position to read the statute in the way this Court is hereby urged to read it.

It is not disputed that Fountain Place detrimentally relied on the City's promises and continued performance—even after the dismantling of the Development Authority in 2013. It is disputed, however, whether this reliance estops the City from arguing that there was no enforceable contract, which turns on whether this performance was "proprietary" or "governmental" in nature. If the latter, then estoppel is not available to Fountain Place as an argument. If the former, then the City is bound. *See Cawley v. Board of Trustees*, 138 W. Va. 571, 583–84, 76 S.E.2d 683, 690 (1953) ("Municipalities sometimes act in a governmental capacity, and sometimes in a proprietary capacity. When the action relates to a proprietary function, equitable estoppel may be invoked against municipalities.")

Respondents and *amicus* argue, of course, that annexation of land and collection of excise taxes are governmental in nature, and thus argue that estoppel is not available here as an argument against the City. However, this argument is an exercise in self-interested selectivity. In truth, the Development Agreement reflects the establishment of a special fund, under the auspices of a separate entity—the Development Authority—which cannot be comingled with the general fund (not unlike, for example, a municipal utility). Indeed, development authorities are designed to engage frequently in proprietary, business-like functions, such as investments, financing, and other arrangements designed to spur economic growth. Here, the nature of the Development Agreement was a revenue-sharing investment arrangement to spur economic activity by paying—in a retrospective structure—for the development of a shopping center. The payments made here were not payments to pave City roads or light City property: they were payments reflecting a business-like investment into the construction of a privately-owned shopping center that the City intended to leverage in order to gain municipal wealth. The City assuming performance of this activity from 2013 until it stopped paying in 2021 was definitionally proprietary, in that it was continuing to perform the proprietary functions of its Development Authority during that timeframe. This sort of proprietary activity estops the City from arguing that there was no enforceable contract here.[3]

More frustrating is the claim made by both Respondents and *amicus* that true unfairness arises from enforcing the Development Agreement. This is, mathematically speaking, utter nonsense. Again: the Development Agreement is entirely self-supporting. It was consideration for a massively expensive and risk-intensive endeavor (which in fact bankrupted the first developer, Monterra)—consideration that could theoretically have resulted in the City paying nothing at all to Fountain Place, or paying many millions, or anything in between, all determined by how much the City actually made from the annexed property. The City continues to benefit from the development <u>every single day</u>, in the form of increased economic activity, access to retail and other services, B&O Taxes, and "home-rule" sales taxes. To claim that it is "West Virginia taxpayers

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[3] In discussing the principle of estoppel, the Supreme Court of West Virginia addressed several out-of-jurisdiction cases which are persuasive here: *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); *Filipo v. Chang*, 62 Hawaii 626, 618 P.2d 295 (1980); *New-Mark Builders, Inc. v. City of Aurora*, 90 Ill. App. 2d 98, 233 N.E.2d 44 (1967); *Department of Culture, Recreation & Tourism v. Fort Macomb Dev. Corp.*, 385 So.2d 1233 (La. App. 1980); *State v. O'Connell*, 83 Wash. 2d 797, 523 P.2d 872 (1974).

The Court's own synopsis of these cases was as follows:

> In *City of Long Beach*, the city had acquiesced over a period of many years in the substantial private development of tideland property. It then sought to litigate title to this area and was held to be estopped. *Filipo* involved the welfare department's <u>sudden cancellation</u> of a <u>twenty-three-year-old policy</u> regarding welfare assistance on the ground that there was a technical flaw in its original promulgation. In *New-Mark Builders*, the city had annexed two areas developed by the builder, but refused a contiguous third area asserting the failure to meet a new condition which had not been made applicable to the first two. *O'Connell* involved municipalities acting in their proprietary rather than governmental capacity seeking to reclaim attorney's fees paid to the attorney general and they were held estopped. We have recognized the possibility of estoppel where the government is acting in a proprietary function.

Freeman v. Poling, 175 W.Va. 814, 820 n.4, 338 S.E.2d 415, 422 n.4 (1985) (other citations removed) (emphasis added).

who would ultimately bear the cost" demonstrates a fundamental misunderstanding of how this development project—like the ones in Clarksburg, Nitro, Ravenswood, Granville, and Wayne listed above—actually works. No amount of tirades about "charg[ing] West Virginia taxpayers" can side-step the reality that not a single dollar collected by Fountain Place under this Agreement has been collected without "West Virginia taxpayers" gaining tax revenues, too.

It is fair to pay others for work performed. It is unfair not to do so.

WHEREFORE, the appellant Fountain Place, LLC respectfully asks that this Court find in its favor, overrule the findings below, remand, and order the case be reinstated on the active docket of the Circuit Court of Logan County, as well as provide any and all other relief that this Court deems necessary and appropriate.

CERTIFICATE OF SERVICE

I, Jonathon C. Stanley, do hereby certify that the foregoing Petitioner's Reply Brief was electronically filed with the Court on January 27, 2026, 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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