
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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**NEW CHINA RESTAURANT, INC., and
PHILIP DY CHIN,
Plaintiffs Below, Petitioners,**

vs.) No. 24-403 (ICA No. 23-ICA-175)

**CITY OF CHARLESTON,
a West Virginia Municipal Corporation,
Defendant Below, Respondent**

RESPONDENT'S BRIEF

Appeal from the March 31, 2023, Final Order
Kanawha County Circuit Court
Civil Action No. 21-C-161

CITY OF CHARLESTON

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STATEMENT OF THE CASE

Respondent, City of Charleston (“Charleston,” “City,” or “Respondent”) responds to Petitioners’ Assignments of Error below and offers the following statement of the case as necessary to address inaccuracies and/or omissions provided by Petitioners. *See* W. Va. R. App. Proc. 10(d).

A. INTRODUCTION

Petitioners Philip Dy Chin and the New China Restaurant, Inc. own the property at 1599 Washington Street East in Charleston, West Virginia. Petitioners seek an appeal of an order, *Final Order Granting Defendant City of Charleston’s Motion for Summary Judgment* by the Kanawha County Circuit Court. The circuit court properly granted summary judgment in the Respondent’s favor and the Intermediate Court correctly upheld, finding that the Respondent provided Petitioners an opportunity to repair and rehabilitate the New China Restaurant Building—which Mr. Chin failed to do—and the Respondent had proper authority to demolish the Petitioners’ property and provided Petitioners with due process under the law. The circuit court also correctly found that Petitioners were not entitled to just compensation when Respondent took remedial action under West Virginia Code to abate a nuisance, that Respondent did not commit slander of title against Petitioners, that Respondent complied with the City of Charleston Municipal Code, and that there is no material dispute that Petitioners owe the City money for its demolition lien. Respondent, therefore, requests that this Honorable Court affirm the *Final Order Granting Defendant City of Charleston’s Motion for Summary Judgment*.

B. ERRORS AND OMISSIONS

First, Petitioners’ provided timeline in their “Facts” section is nearly identical to the timeline in their *Response to City’s Motion for Summary Judgment* filed with the circuit court in

February of 2023 and their Appeal Brief filed with the Intermediate Court in July of 2023.¹ (Sup. App. at 095-112).² As such, the circuit court considered the Petitioners' timeline of events when it granted summary judgment in favor of the Respondent and the Intermediate Court considered it when it upheld the circuit court's decision below. Nevertheless, the City feels compelled to correct several errors and omissions that Petitioners re-stated in their brief on appeal.

Petitioners state that on or about February 17, 2020, "some bricks fell from the veneer brick facade of the New China Restaurant." (Pt. Brief at 6). Petitioners attempt to mitigate the risk by stating "[n]o person nor property was injured." (*Id.*) However, an engineer retained by the City referred to "a significant number of brick[s]" numbering "[s]everal 100" that had fallen "approximately 25 feet from the . . . building to the sidewalk below." (Sup. App. at 40). A significant portion of the bricks fell from the southeast parapet of the building located at 1599 Washington Street East, posing a considerable threat to the community's safety in February of 2020. Petitioners are further incorrect that there was "no evidence of imminent harm," that the City "wrongfully destroyed" the building, or "made th[e] decision contrary to its regulations," as further explained below. (Pt. Brief at 6.)

After the bricks fell on or about February 17, 2020, Mr. Chin, the owner of the former New China Restaurant, was promptly notified of the hazard presented by the severely deteriorated building and its prolonged neglect. The City immediately secured the area to avoid damage to persons and nearby property. It is worth noting that the Petitioners state in their alleged timeline that on Tuesday, February 18, 2020, Mr. Chin's "access to the building was denied by [the] City."

¹ On October 21, 2024, Petitioners filed a "Brief of Petitioners" with the Supreme Court of Appeals via File&Servexpress, which Respondent received via efilng. Later, on November 3, 2024, the Petitioners filed a "Revised Brief" via File&Servexpress. It appears the Supreme Court of Appeals has only accepted and docketed Petitioners' November 3, 2024, Revised Brief as its Brief on Appeal. As such, Respondent will only reference Petitioners' November 3, 2024, Revised Brief.

² Petitioners uploaded the Supplemental Appendix as Document Title "Philip 10" on File&Servexpress.

(Pt. Brief at 7). Petitioners previously acknowledged this was because the City was “sealing off the structure from inspection pending removal of asbestos that may be contained therein.” (App. at 3; 52). Petitioners also state that the “City had already decided to destroy Mr. Chin’s building.” (Pt. Brief at 7). This information is incomplete at best. Petitioners acknowledged in their *Response to the City’s Motion for Summary Judgment* that the City “requested Mr. Chin’s consent” to demolish the building and that he “initially gave his consent” before he revoked it. (Sup. App. at 096-097).

Further, Petitioners concede they had access to the building for an inspection the next day, Wednesday, February 19, 2020, wherein Mr. Chin hired Mr. Brett Hodgdon, a Professional Engineer, to conduct a structural inspection visually. Mr. Hodgdon concluded that the building was “dilapidated” and that “[i]mmediate, extensive repairs” were necessary to ensure the general public’s safety in the surrounding areas and to prevent an “ongoing, progressive collapse of the interior structural systems.” (Sup. App. at 009). Mr. Hodgdon’s report stated that abrupt steps were required to ensure the public’s safety, including removal of all or a significant portion of the veneer brick, dismantling the damaged parapet walls, and further repairs of uncovered structural damage not visible at the time of inspection. (*Id.*) According to the Petitioners’ timeline, on February 20, 2020, Mr. Chin also “engaged a masonry contractor to finish cleaning up the fallen bricks and to remove all loose bricks from the building.” (Pt. Brief at 7). The Petitioners state the contractor estimated it would take ten days to perform this task. (*Id.*) While this may or may not be true, it is immaterial to the structural soundness of the remaining building, as per Mr. Hodgdon’s report.

On February 21, 2020, Mr. Tony Harmon, City Building Commissioner, provided Mr. Chin with a final written notice to take the actions required to alleviate the public threat. (App. at 163). The written notice required the actions, as suggested by the Petitioners’ engineer, Mr. Hodgdon,

to be completed by 6:00 p.m. Monday, February 24, 2020. (*Id.*) That same day, Mr. Hodgdon produced his report from his February 19, 2020, inspection. (App. at 16-42; 123-149; Sup. App. at 001-027). Although Petitioners assert that the engineer's report "showed the building to be in a rundown state but posed no immediate danger to the public," it is unclear how and where Petitioners drew this conclusion from the report. (Pt. Brief at 7). Indeed, Mr. Hodgdon's report makes repeated references to further portions of the veneer brick and parapet walls falling to the ground and "risking bodily injury, death, and property damage." (Sup. App. at 006).

After a failure to take necessary corrective actions, Kevin Baker, City Attorney for the City of Charleston, spoke with Mr. John Dorsey, Mr. Chin's previous attorney, regarding the City's intent to demolish the building due to the threat the building continued to pose to the public. Petitioners assert in their Statement of the Case that Mr. Baker "telephoned attorney Dorsey and essentially informed him that the Code Official . . . was being overridden and that the building would be demolished the next day." (Pt. Brief at 8). Petitioners also baselessly assert that "someone other than the Code Official [was] making the decision." (*Id.*) These statements are simply untrue, and Petitioners failed to assert or provide evidence below that another city official was overruling the code official, Mr. Harmon. Petitioners compound their misrepresentations by falsely claiming that "at no time did the Code official, the professional engineer and a licensed contractor express that the subject building was presently in danger of collapse or that the building otherwise posed an imminent threat or risk of harm to anyone." (*Id.*) This is belied by Petitioners' own engineer's report which stated that "[i]mmediate, extensive repairs to structural and nonstructural building components and systems are necessary to ensure the safety of the general public in the areas that surround the building, to allow reopening of the public passage ways, and to prevent ongoing, progressive collapse of the interior structural systems." (App. at 24; 131; Sup. App. at 009). As

noted, Mr. Hodgdon’s report makes multiple references to further portions of the veneer brick and parapet walls falling to the ground and “risking bodily injury, death, and property damage.” (Sup. App. at 006). A City Fire Captain and Lieutenant also concluded that the structure was “structurally unsound,” “uninhabitable,” “a hazard to the community” and a “threat to Life, Fire, and Health safety” during their reviews of the building. (App. at 174-175; Sup App. at 038-039).

On February 25, 2020, Mr. Chin filed a motion seeking a temporary restraining order and preliminary injunction. (App. at 2-7). After a hearing on the motion and considering the evidence, the circuit court found that “Respondent’s action of demolition [wa]s authorized by the City of Charleston’s Municipal Code § 14-253 and W. Va. Code § 8-12-16” and that the City had “obtained all proper inspections and determination to support the abatement of this dangerous structure.” (App. at 46). The court concluded that the Petitioners’ structure “because of dilapidation, deterioration, and decay, is likely to partially or completely collapse” and that the City “provided reasonable notice and opportunity for [Mr. Chin] to abate the unsafe and dangerous building.” (*Id.* at 46-47). As a result, the court concluded that the “comparative hardship is in favor” of the City’s interest, “as well as the community’s interest,” and denied the Petitioners’ motion for a temporary restraining order. (*Id.* at 48). Notably, Petitioners failed to appeal this adverse ruling.³

Nearly one year after demolition of the building, Petitioners filed the instant suit in February of 2021, alleging a variety of claims seeking relief, including that the City made “no showing that the structure required demolition,” that the City “effectively condemned the structure without due process of law,” “slandered the title of [] Plaintiffs’,” and that the City “did not comply

³ While appellate courts do not typically review interlocutory orders, the West Virginia Supreme Court has “appellate jurisdiction of civil cases in equity, includ[ing] a grant of jurisdiction to hear appeals from interlocutory orders by circuit courts relating to preliminary and temporary injunctive relief.” *Northeast Nat. Energy LLC v. Pachira Energy LLC*, 243 W. Va. 362, 366, 844 S.E.2d 133, 137 (2020) (internal citation omitted).

with . . . city code and ordinances.” (App. at 50-62). The City filed its Answer to the Complaint in June of 2021, asserting several defenses. (App. at 63-81). Further, the City filed a counterclaim noting that the Petitioners owed the City, collectively, the sum of one hundred and thirty-eight thousand four hundred and thirty-eight dollars and fifty-one cents (\$138,438.51) for an unpaid business and occupation tax assessment and demolition lien for the demolition of a substandard building located at 1599 Washington Street East, Charleston, West Virginia. (*Id.*) The City’s counterclaim included counts one (concerning Mr. Chin’s unpaid B&O taxes) and two (the demolition lien). (*Id.*) The parties submitted an agreed order of dismissal that they resolved their dispute relating to count one of the City’s counterclaims. (App. at 92). However, count two of the City’s counterclaim remained pending before the circuit court.

The City’s decision to demolish the building was authorized by the City of Charleston’s Municipal Code § 14-253 and W. Va. Code § 8-12-16. Under § 14-253, the code enforcement agency for the City may order the repair, alteration, improvement, closing, demolition, or removal of any structure, dwelling, or building that a code official determines to be unsafe, unsanitary, dangerous, or detrimental to the public safety or welfare. As a result of the City’s costs of demolition, it filed a lien for the demolition of 1599 Washington Street East for \$58,539.54. (App. at 80; 117; 162). As a matter of law, that lien is due and payable to the City by the Petitioners.

In October of 2022, the City filed a thorough motion for summary judgment in the underlying matter, with several exhibits. (App. at 94-209). Petitioners wrongfully assert in their “Facts” section that the circuit court treated the Petitioner’s prior motion seeking a temporary restraining order and preliminary injunction as “being res judicata with respect” to the underlying lawsuit. (Pt. Brief at 9). Petitioners are correct that the matters are “inextricably intertwined” as they deal with the same building and demolition process. (*Id.*) Still, Petitioners put forth new

arguments in their February of 2021 lawsuit that the City addressed in its Answer and subsequent motion for summary judgment. The circuit court considered all these documents and arguments prior to its disposition of the case. While it is not the case on appeal, it is also inaccurate for Petitioners to rotely state that the circuit court “essentially treated [its] ruling” on Petitioners’ motion seeking a temporary restraining order and preliminary injunction “based solely on proffer of counsel.” (*Id.*). At the February 25, 2020, hearing, the circuit court “received and reviewed the petition for injunctive relief, as well as the City’s response, and . . . a copy of the structural inspection report” prepared by Petitioners’ retained engineer. (App. at 252). The circuit court relied on ample evidence and findings in its disposition of both cases. Finally, Petitioners’ belated attempts at removing the circuit court judge for “bias” were rejected by the Chief Justice of the Supreme Court of Appeals of West Virginia in accordance with Trial Court Rule 17.01(c). (Sup. App. at 113-132). Simply put, it is inaccurate to state that the circuit court judge was “biased” or should have recused herself.

As set forth below, the City respectfully requests that the Court uphold the circuit court’s proper grant of summary judgment in its favor with respect to all claims on appeal.

SUMMARY OF ARGUMENT

The Petitioners maintain that the building at 1599 Washington Street East was merely in a rundown state in February 2020 but was not an immediate danger to the public and should not have been demolished. They argue this even though their own retained engineer and several city experts, including the Code Enforcement Official, a Fire Captain, a Fire Lieutenant, and an outside engineer retained by the City, all stated that it was a matter of immediate public interest and safety to demolish the building. Despite these independent assessments after several hundred bricks fell from the building, Petitioners were granted a reasonable opportunity to repair and rehabilitate the

building—a significant opportunity given the structure’s continuing danger. Petitioners had a week from when the bricks fell until they lost their motion for a temporary restraining order and preliminary injunction to repair and rehabilitate the structure, which suffered from at least a decade of little to no repair. Petitioners failed to repair and rehabilitate the building at that time, forcing the City to act to abate the nuisance and threat to public safety.

Nearly a year after demolishing the structure, the Petitioners filed a lawsuit against the City, claiming—without evidence—that the City committed an ultra vires act, failed to provide due process of law, committed slander of title, and did not follow city code and ordinances. Critically, Petitioners provided no support for its varying claims and, on several occasions, made claims that were directly contradicted by the evidence in the record. This culminated in the City moving for summary judgment, which the circuit court correctly granted after considering Petitioners’ Response opposing the motion. After the court granted the dispositive motion but before the final order in the case, Petitioners filed an untimely motion to recuse the circuit court judge. The Petitioners bizarrely accused the circuit court of being “psychologically invested” in its previous decision to deny the Petitioners’ motion for a temporary restraining order and preliminary injunction three years prior. The Petitioners accused the circuit court of bias because it subsequently granted the City’s motion for summary judgment with the support of overwhelming evidence in the record. Within ten days, the Chief Justice of the Supreme Court of Appeals denied the Petitioners’ motion following the West Virginia Trial Court Rules.

Put simply, Petitioners have failed to carry their burden of proof to show that there are material facts in dispute and that the circuit court was incorrect in granting Respondent’s motion for summary judgment. For these reasons, the circuit court’s decision to grant judgment to the City of Charleston should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts of this case were well-presented in the proceedings below, as reflected in the Appendix, Supplemental Appendix, and as further discussed herein. In addition, well-established law governs the legal issues cited in this appeal. Because the law and facts are clear, the decisional process would not be significantly aided by oral argument, and the same is therefore unnecessary in this case pursuant to West Virginia Rule of Appellate Procedure 18(a). Respondent requests that the Court affirm the circuit court order by memorandum decision.

STANDARD OF REVIEW

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is required where the record demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” The West Virginia Supreme Court of Appeals has previously held that a “motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Finally, “[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.” *Johnson v. Killmer*, 219 W. Va. 320, 323, 633 S.E.2d 265, 268 (2006).

ARGUMENT

I. The circuit court correctly granted summary judgment in the matter because there were no genuine issues of material fact.

Petitioners are correct that the “core factual issue in this case was whether the City acted reasonably” in demolishing the building at 1599 Washington Street East. (Pt. Brief at 13).

However, Petitioners assert several false or misleading statements in support of their claim that the circuit court erred in granting summary judgment in this matter.

A. The City’s inspections and Petitioners’ Engineer Report confirm that the building was an immediate danger to the public.

First, Petitioners assert that it “is clear from the timetable and from the affidavits that Mr. Chin cleaned up the fallen bricks.” (Pt. Brief at 13.) While the City does not necessarily dispute that Mr. Chin—with the assistance of his prior counsel, Mr. John Dorsey, and a masonry contractor—may have eventually cleared the fallen brick, it is unclear from the record if they could have accomplished this task in a timely manner. In Mr. Dorsey’s affidavit, he states that on Thursday, February 20, 2020, “Phillip Chin advised me that he had made arrangements with a masonry contractor whose name is Jason Pauley, to remove the brick and debris from the sidewalk and remove the brick veneer of the exterior walls beginning from the top on Elizabeth Street until all loose brick were removed[.]” (App. at 245). Petitioners state in their provided affidavits and their brief on appeal that the task would take “about ten (10) days to accomplish.” (App. at 240; 245; Pt. Brief at 7). Even to the extent Petitioners could have successfully cleared the loose brick from the sidewalk and removed the brick veneer of the exterior walls, Petitioners point to this as evidence that the building was somehow still not an immediate danger to the public. Yet critical structural issues with the building continued to endanger the public.

Just as they did below, Petitioners falsely assert that “the building, although in a rundown state, did not present any danger to the public.” (Pt. Brief at 13). It is undisputed that the property at 1599 Washington Street East was brought to the City’s attention because bricks began falling to the ground from the building on or about February 17, 2020. Petitioners acknowledge that “brick from the upper level [of] the southeast corner of the structure . . . came dislodged and fell to the

sidewalk below.” (App. at 3; 51). Thereafter, the City’s code enforcement officer inspected the building and concluded that the building was likely to collapse partially or wholly, or some portion of the foundation or underpinning of the building or structure was likely to fail or give way. (App. at 11-12). Similarly, a Fire Captain and Lieutenant also concluded that the building was “structurally unsound,” “uninhabitable,” “a hazard to the community,” and a “threat to Life, Fire, and Health safety” during two separate reviews on February 18 and February 24, 2020, respectively. (App. at 174-175). The latter of these two reviews took place even though “[o]ver the course of the past few days more bricks have come down by [the] owner.” (*Id.*) Indeed, Petitioners acknowledge that the City’s concern for public safety led it—just one day after bricks first fell from the structure—to “erect[] barriers . . . to impede the traffic . . . which the structure faces and . . . to preclude entry within that area by vehicles or pedestrians *so as to minimize any risk of injury or damage to persons or property.*” (Emphasis added). (App. at 5; 52).

Further, after these preliminary inspections by the City, Mr. Chin obtained an independent structural review and report. The report concluded that the building was dilapidated and that immediate and extensive repairs to structural components were necessary to ensure the safety and wellbeing of the public in the areas surrounding the building—a concession that the Petitioners acknowledged in their Complaint. (App. at 24; Sup. App. at 009). The Petitioners’ expert “reported that he could not determine that the structure was completely safe, and that further bricks could possibly fall from the structure.” (App. at 52). Indeed, the Petitioners’ Report stated that the building was “in a state of disrepair due to long-term deferred maintenance.”⁴ (App. at 18).

⁴ Among its many findings, the Petitioners’ Expert Report concluded that “it is expected the cost of repair will exceed the value of the property.” (App. at 24; 261; Sup. App. at 009). Petitioners also did not dispute that the “building ha[d] sat vacant for quite some time.” (App. at 257). Although the City did not seek corrective action on these grounds, Municipal Code § 14-255(b)(2) allows the City to take corrective action where “the structure, dwelling, or building is vacant, abandoned, or has been lawfully declared unfit for human habitation; and the reasonable estimated cost of repair, rehabilitation, or corrective action exceeds the reasonable estimate of the fair market value of the structure, dwelling, or building.” This includes a “structure, dwelling, or building, or any portion, [that] is clearly unsafe for its

Based on the preliminary investigations and the structural report, the City considered the building unsafe, dangerous, and detrimental to public safety. On the same day as the Petitioners' expert issued his report—February 21, 2020, five days after bricks first fell from the upper level of the structure onto the public sidewalk below—the City provided the Petitioners, in writing and by personal service, a final notice to take action to abate the dangerous and unsafe conditions “by 6:00 p.m. on Monday, February 24, 2020.” (App. at 163). The written notice clearly stated that Petitioners needed to “complete the removal of all portions of the veneer brick, dismantling of damaged parapet walls, and begin repairs to any hidden damage in order to ensure public safety of those nearby.” (*Id.*) Mr. Harmon's notice further provided that if the work was “not completed in that time period and an immediate threat to public safety remains, the City will be forced to demolish the building at your ultimate expense.” (*Id.*). Therefore, it is undisputed that the City provided the Petitioners an opportunity to repair and rehabilitate the building.⁵ Petitioners acknowledge that necessary repairs or testing “could not be accomplished” prior to the date set forth by the City's Code Enforcement Official, Mr. Harmon. (Pt. Brief at 8; App. at 163).

use.” Municipal Code § 14-252(6). Although Petitioners argued the building was not in danger of imminent collapse or an ongoing threat to public safety—in contravention of several expert reports and evaluations—it was clearly unsafe for its use. Put simply, even if the City *had* failed to meet the standard for correction of unsafe conditions under Sec. 14-255(b)(1), it met additional definitions under Sec. 14-255(b)(2) to take corrective action against Petitioners.

⁵ While Petitioners argue that they were only given “approximately 72 hours” to fulfill the repairs outlined in the City's final notice to take action, which they characterized as “an unreasonable time period,” this misstates the record and misses critical context. (Pt. Brief at 7). First, Petitioners were on notice of the need for immediate repairs from the moment bricks fell from the building on or about February 17, 2020. The City required actions delivered in a written notice on February 21, 2020, to be completed by February 24, 2020—an entire week after the bricks fell. These were also the same set of recommended actions Petitioners' engineer Brett Hodgdon concluded as a result of his inspection on February 19, 2020, providing Petitioners with several additional days to make the necessary repairs. Further, the circuit court below correctly concluded that Mr. Chin had a “duty incumbent upon a property owner to maintain and keep the premises in a safe” manner that “doesn't imperil the public safety.” (App. at 255). When asked what “maintenance of th[e] building” Mr. Chin had conducted “over the last years when it's been unoccupied,” Petitioners' longtime prior counsel, Mr. Dorsey, stated: “I don't know[.]” (*Id.* at 256). Finally, as the City informed the court below, Mr. Chin failed to obtain any building permits from 2009 until 2019 “for any building or renovations of that [building], and that building has sat vacant for quite some time now.” (*Id.* at 257).

B. The City Building Commissioner provided Petitioners with a clear written notice of Code violations and a requirement to take action to abate the nuisance.

Next, Petitioners baselessly state, “Although the Code official is the person charged by the [City] ordinance with making the decision regarding destruction of property, in this case that decision came from outside of the Code enforcement agency.” (Pt. Brief at 13). Petitioners provide no evidence for this claim in their argument section. It appears Petitioners are referencing assertions put forth in their “Facts” section wherein they alleged that the “Code official, the person charged with the sole responsibility of enforcing the code, was being overridden.” (Pt. Brief at 8). It is unclear who Petitioners contend overrode Mr. Harmon’s decision-making authority.⁶ Indeed, the decision to demolish the building on Tuesday, February 25, 2020, is wholly in line with Mr. Harmon’s final written notice requiring Petitioners to take action. The final written notice was issued on City of Charleston Building Department letterhead and bears the Building Commissioner’s name, “William A Harmon” on February 21, 2020. (App. at 163). Mr. Chin also signed and dated the letter, indicating that he received it. (*Id.*). The note clearly stated to Petitioners that if “the work is not completed in th[e] time period and an immediate threat to public safety remains, the City will be forced to demolish the building at your ultimate expense.” (*Id.*)

Finally, Petitioners state in their “Facts” section that the City’s decision to demolish the building “raises the obvious issue of estoppel and of someone other than the Code official making the decision” to demolish the building. (Pt. Brief at 8). As discussed above, Petitioners have no

⁶ In their *Response to City’s Motion for Summary Judgment* below, Petitioners incredulously assert that the decision to demolish the building was “political and had nothing to do with the condition of Mr. Chin’s building.” (Sup. App. at 104; App. at 240-242). While Petitioners frame this as merely a “question” of some material fact that defeats summary judgment, they provide no evidence to support their baseless assertions. As previously noted, the Supreme Court of Appeals has held that “summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.” *Johnson v. Killmer*, 219 W. Va. 320, 323, 633 S.E.2d 265, 268 (2006). The Respondent wholeheartedly denies that the demolition of the building was based on anything other than public safety and the imminent risk the building posed to the public, as demonstrated throughout the Record and proceedings below.

evidence that anyone other than Mr. Harmon authorized the demolition of the building. Further, it is unclear what Petitioners are referencing by citing “estoppel” as they do not elaborate on this claim in their Argument section. To the extent that Petitioners are claiming equitable estoppel applies, their arguments are unfounded and do not satisfy the basic requirements for equitable estoppel. This Court has previously held that petitioners must explain how they relied on or were prejudiced by the alleged actions of the City as required by equitable estoppel under West Virginia law. *See Butler v. Sigley*, No. 22-ICA-176, 2023 W. Va. App. LEXIS 74, 2023 WL 2364913 (W. Va. March 6, 2023) (citing Syl. Pt. 6, *Stuart v. Lake Washington Realty Corp.*, 141 W. Va. 627, 92 S.E.2d 891 (1956)) (stating the general elements of equitable estoppel, including that the person who asserts it must have been prejudiced). Contrary to Petitioners’ claims, they cannot prove how they were prejudiced. They failed to remedy all the conditions set forth to salvage the building by the date set forth in Mr. Harmon’s final written notice, and Mr. Harmon—as the Building Commissioner and Code Official—made the decision to demolish the building as it remained an imminent threat to public safety.

C. The City provided Petitioners with due process under the law.

Next, Petitioners state that the demolition of the building “was, by the words of the City’s ordinance, an *ultra vires* act.” (Pt. Brief at 14). Petitioners concede that “the building was in need of repairs” and claim that the City “could have and should have ordered [repairs] to be made under the [City] ordinance.” (*Id.*) Finally, Petitioners argue that the City “did not choose the least restrictive alternative, which it is bound by law to do.” (*Id.*).

Generally, procedural due process requires “a formal written notice of charges; sufficient opportunity to prepare to rebut the charges; opportunity to have retained counsel at any hearings on the charges, to confront his accusers, and to present evidence on his own behalf; an unbiased

hearing tribunal; and an adequate record of the proceedings.” *Jordan v. Roberts*, 246 S.E.2d 259, 262, 161 W. Va. 750, 755-56 (1978). Further, the West Virginia Supreme Court has previously stated, “[t]he term ‘ultra vires’ means beyond the power. It, generally, refers to an act that is beyond the scope of power allowed or granted by a corporate charter, articles of incorporation, bylaw, or law.” *John A. Sheppard Mem. Ecological Reservation, Inc. v. Fanning*, 836 S.E.2d 426, 429, 242 W. Va. 459, 462 (2019) (quoting 18B Am. Jur. 2d *Corporations* § 1712 (2019)).

West Virginia Code § 8-12-16(f) provides that:

[t]he governing body of every municipality has plenary power and authority . . . providing for the vacating, closing, removal, or demolition of any dwelling, structure or building by the municipality in the absence of owner agreement or court: Provided, That the ordinance requires the code enforcement agency to provide lawful notice to and undertake reasonable efforts to seek agreement from the owner before taking any action.⁷

⁷ In its *Response to City’s Motion for Summary Judgment* below, Petitioners argue that the City was incorrect to rely “upon West Virginia Code §8-12-16” in support of its action, “particularly the word ‘plenary.’” (Sup. App. at 104). The Petitioners claimed that “[n]o one and no City has plenary authority. Plenary means absolute. To the extent the Legislature purports to grant plenary power to the City to destroy private property, such grant is unconstitutional as violative of due process.” (*Id.*) Here, Petitioners misunderstand and misapply the word plenary as it relates to the statute. The statute provides “[p]lenary power and authority . . . [to] adopt ordinances regulating the repair, alteration, or improvement, or the vacating and closing or removal or demolition, or any combination, of any structure, dwelling, or building, whether used for human habitation or not, that is unsafe, unsanitary, dangerous, or detrimental to the public safety or welfare.” W. Va. Code § 8-12-16(b). The Legislature has not conferred upon Respondent a broad, limitless power to destroy *any* private property. Rather, municipal powers are carefully defined and circumscribed in the statute. The West Virginia Supreme Court has also referenced the application of this statute in several decisions without any question toward its constitutionality. See *Witteried v. City of Charles Town*, No. 17-0310, 2018 WL 2175820, 2018 W.Va. LEXIS 352, *27 (W. Va. May 11, 2018) (memorandum decision) (“[West Virginia Code § 8-12-16] clearly provides that the City has the authority to institute a civil action in order to take corrective action, including the possible demolition of any structure or dwelling that fits within the statute. [] The statute further provides extensive remedies available to the circuit for the benefit of the City, including demolition of the structure, dwelling, or building.”); *City of Parkersburg v. Carpenter*, 203 W. Va. 242, 243 n.4, 507 S.E.2d 120, 121 n.4 (1998) (“The City had determined that the structure had deteriorated to the extent that it presented a hazard to the public’s health, safety and welfare. . . . The City’s authority to demolish structures is located in W.Va. Code, 8-12-16(d) [1996].”); *Bittinger v. Corporation of Bolivar*, 183 W. Va. 310, 395 S.E.2d 554 (1990) (holding the same).

Further, the City of Charleston’s Municipal Code provides that the City “may order the repair, alteration, improvement, closing, demolition, or removal of any structure, dwelling, or building that is determined by a code official to be unsafe, unsanitary, dangerous or detrimental to the public safety or welfare.” § 14-253(a).

Just as the circuit court found below, the Petitioners cannot prove that the City failed to provide them with due process under the law. First, the Petitioners conceded that the City notified them of its intent to take action against and to secure the safety of the building and premises. (“Phillip Chin was informed by William A. Harmon, Building Commissioner . . . that the City would be demolishing the structure and sought the consent of the Petitioner to do so.”) (App. at 3). This act—the City Building Commissioner seeking consent from Petitioners to demolish the structure—fits squarely within the law’s requirement that the City must “undertake reasonable efforts to seek agreement from the owner before taking any action.” W. Va. Code § 8-12-16(f). After the Petitioners failed to consent to the demolition or take prompt action to make the required repairs noted by the Petitioners’ engineer, the City began taking other measures to secure the premises.

While Petitioners contend that the City’s subsequent actions demonstrate that it always intended to demolish the structure, this is undercut by their further admissions that the City’s conduct was in furtherance of public safety and community interest. Specifically, Petitioners conceded that after informing them of the structure’s dilapidated state, the City began “sealing off the structure . . . pending removal of asbestos,” “erect[ing] barriers . . . to impede the traffic on Washington Street where the structure faces . . . [and] to preclude entry within that area by vehicles or pedestrians so as to minimize any risk of injury or damage to persons or property.” (App. at 52). Indeed, even after taking these immediate actions to ensure the public’s safety, the City provided

the Petitioners an opportunity to obtain an independent inspection of the structure. Petitioners also secured legal counsel to represent them during this process. (“Mr. Harmon communicated to the legal counsel for Plaintiffs.”) (*Id.* at 53). As previously noted, the independent structural inspection and report concluded that the building was dilapidated and that immediate and extensive repairs to structural components were necessary to ensure the safety and wellbeing of the public in the areas surrounding the building.

In short, Petitioners have failed to point to specific evidence that the City did not provide due process or committed an ultra vires act. The court below correctly held that “[p]ursuant to the State Building Code and W. Va. Code § 8-12-16, the [City] has plenary power to abate any structure that is dangerous and unsafe and detrimental to the public safety and welfare” when it denied Petitioners’ motion for a temporary restraining order and preliminary injunction. (App. at 47). The circuit court also held that the City “obtained all proper inspections and determination to support the abatement of this dangerous structure.” (*Id.* at 46). Petitioners have produced no new information to contradict the City’s evidence that it followed the law and due process when taking action. Accordingly, the circuit court correctly concluded that the City provided the Petitioners with due process of law under the facts of this case.

II. The circuit court did not treat its denial of the Petitioners’ motion seeking a temporary restraining order and preliminary injunction as res judicata in the current matter.

The West Virginia Supreme Court has held that a preliminary injunction is “a harsh remedial process,” and should be “used only in cases of great necessity and not looked upon with favor by the courts.” *Jefferson Cnty. Bd. of Educ. v. Jefferson Cnty. Educ. Ass’n*, 183 W. Va. 15, 24, 393 S.E.2d 653, 662 (1990). Petitioners are correct that the West Virginia Supreme Court has

identified “the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff’s likelihood of success on the merits; and (4) the public interest.” *Justice v. W. Va. AFL-CIO*, 246 W. Va. 205, 212, 866 S.E.2d 613, 620 (2021) (citing *Jefferson Cnty. Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662).

A. The circuit court properly issued findings of fact and conclusions of law when it denied the Petitioners’ motion for a preliminary injunction and temporary restraining order in February of 2020.

After correctly identifying the factors the circuit court considered in denying Petitioners’ motion for a preliminary injunction, Petitioners doubled down on an easily disproven misstatement. Petitioners claim that the circuit court’s “ruling denying the temporary restraining order [and preliminary injunction was] decided only on proffers of counsel.” (Pt. Brief at 15). As a result, Petitioners conclude that the court’s “denial of the petition for such an order has no effect on subsequent litigation.” (*Id.*) As previously stated, at the February 25, 2020, hearing on Petitioners’ motion seeking a temporary restraining order and preliminary injunction, the circuit court “received and reviewed the petition for injunctive relief, as well as the City’s response, and . . . a copy of the structural inspection report” prepared by Petitioners’ retained engineer. (App. at 252). The circuit court relied on ample evidence in its disposition of the Petitioners’ motion.

Further, contrary to Petitioners’ claims, the circuit court made findings of fact and conclusions of law when it denied their motion for a temporary restraining order and preliminary injunction in February of 2020. Indeed, Petitioners have included as much in their Appendix. (App. at 46-48). This is, of course, in compliance with Rule 52(a) of the West Virginia Rules of Civil Procedure, which states:

Effect. — In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing preliminary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

Therefore, Petitioners are incorrect to state that the circuit court “mistakenly believed that the earlier hearing on the temporary restraining order established certain facts.” (Pt. Brief at 15). Indeed, the circuit court did make findings of fact and conclusions of law, as outlined in its Order. (App. at 46-48). Petitioners also erroneously state that the circuit court acknowledged “on the record at the time she made the ruling that no facts were established. See, Transcript page 15, page 250 of the Appendix.” (Pt. Brief at 15). Yet nowhere in the cited page of the Transcript does the circuit court state that no facts were established.⁸ Again, critically, the circuit court issued an order with proper findings of fact and conclusions of law.

To the extent there is any daylight or differences between the circuit court’s statements at the hearing and its written order—which Petitioners later strangely argue “set forth Findings of Fact and Conclusions of law which the Court never made”—the West Virginia Supreme Court has long been clear that “[a] court of record speaks only through its orders[.]” *State ex rel. Erlewine v.*

⁸ The circuit court acknowledged at the hearing on Petitioners’ motion for a preliminary injunction and temporary restraining order it was “hearing proffers of counsel.” It did not “have witnesses here testifying,” including “the City engineer” or the Petitioners’ expert. The court, however, still “reviewed the petition for injunctive relief, as well as the City’s response, and . . . a copy of the structural inspection report that [] was prepared by Mr. Hodgdon.” (App. at 252; 264). While the circuit court did consider the proffer and arguments of counsel, it is disingenuous for Petitioners to repeatedly state and imply that the circuit court *only* considered the arguments of counsel when making its findings of fact and conclusions of law.

Thompson, 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973). Indeed, the Court has further held that “where a circuit court’s written order conflicts with its oral statement, the written order controls.” *State v. Keefer*, 247 W. Va. 384, 388 n.4, 880 S.E.2d 106, 110 n.4 (2022) (citing *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 107 n.5, 459 S.E.2d 374, 384 n.5 (1995)). Accordingly, although it is immaterial to the case on appeal, the circuit court did issue proper findings of fact and conclusions of law when denying Petitioners’ motion for a temporary restraining order and preliminary injunction in February of 2020.

B. The circuit court previously considered and correctly rejected Petitioners’ arguments before issuing its final order granting summary judgment.

Next, Petitioners take issue with several findings of fact and conclusions of law that the circuit court outlined in granting Respondent’s motion for summary judgment in the current matter via an email to the parties on March 8, 2023. (App. at 237-38).⁹ Petitioners falsely state “there were no facts established at the hearing for the temporary restraining order.” (Pt. Brief at 16). As noted above, this is incorrect per the circuit court’s order. (App. at 46-48). Petitioners then state, “any notice and opportunity for Mr. Chin to repair the building must be reasonable to satisfy due process. The concept of reasonableness is notably absent in the email except maybe by passing reference.” (Pt. Brief at 16). First, the circuit court’s email to the parties on March 8, 2023, was *not* the final order granting summary judgment. This is clear when reading the email’s closing paragraphs:

Based upon the foregoing, it is ORDERED that the City’s Motion for Summary Judgment as to all Plaintiff’s claims is GRANTED. Further, it is ORDERED that the City’s Motion for Summary Judgment on its Counterclaim is GRANTED, and judgment is awarded to the City in the amount of \$58,539.54, plus interest.

⁹ Petitioners state to “See, Appendix page 240 for the full text of the email.” (Pt. Brief at 16). This appears to be an error. The entire referenced email is found in the Appendix on pages 237-38.

Counsel for the City is directed to prepare a Final Order reflecting these findings and conclusions and noting the Plaintiff's objections by MARCH 15TH. Counsel should, of course, include appropriate legal authority set forth in the City's legal memorandum. Please circulate the Order and obtain agreement to form prior to submitting to the Court. Please submit the Order in WORD form by email to me and copy Judge Tabit, and her judicial assistant, Sarah Weaver, both of whom are copied on this email.

(App. at 238). While it is true that the circuit court made some initial findings and conclusions to support and explain its ruling in the March 8, 2023, email, its *Final Order Granting Defendant City of Charleston's Motion for Summary Judgment* was entered on March 31, 2023, and is the circuit court's valid final order setting forth an exhaustive set of findings of fact and conclusions of law. (App. at 217-233; Sup. App. at 80-94).

With this in mind, the City provided Mr. Chin an opportunity to repair and rehabilitate the building. The Respondent has exhaustively documented this above. Further, Petitioners are incorrect to state that "the City did not give Mr. Chin notice of what repairs it wanted." (Pt. Brief at 16). As noted, the City provided Mr. Chin with a written notice of required actions on February 21, 2020. (App. at 163). Further, these actions were outlined in Petitioners' expert report. (App. at 24).

Next, Petitioners misconstrue their facts to fit their ends when they state that "the code official and Mr. Chin's engineer had agreed the building was not a threat or danger to the public and based on this, the code official instructed Mr. Chin that no more work on the building was required." (Pt. Brief at 16). Although this assertion has no citation to the Record, it appears that Petitioners are referencing a conversation and phone call they allege occurred on the morning of Monday, February 24, 2020. (Pt. Brief at 8). Petitioners allege that their retained engineer, Mr. Hodgdon, called Petitioners' former counsel, Mr. Dorsey, "and informed him that he had met with the Code Official at the subject building and the Code Official stated that a sufficient number of

bricks had been removed pending further testing.” (*Id.*) Petitioners suggest a false correlation between loose brick removal pending further testing and an unwarranted conclusion that the building was not still in a state of disrepair and at risk of imminent collapse. Indeed, the City’s written notice to take action still controlled for the City’s assessment of the building. (App. at 163).

Further still, a City Fire Lieutenant observed the building on February 24, 2020, after Petitioners had spent the previous days removing loose brick from the structure. He found that “the structure is still structurally unsound and a hazard to the community.” (App. at 175). The Lieutenant concluded that the Building Commissioner’s Office should “take appropriate measures to ensure this structure is scheduled for immediate emergency demolition and removal of the debris.” (*Id.*) Accordingly, Petitioners are incorrect in suggesting that removing the loose brick from the veneer of the structure negated the overall assessment of the building as structurally unsound and a hazard to the community. Ample evidence from the record supports the circuit court’s conclusion that the building was an ongoing threat at the time of its demolition.

C. Petitioners’ attempts to return the case to circuit court based on bias are belated and unwarranted, as previously affirmed on appeal.

Finally, it is unclear what the Petitioners mean when they state that “Mr. Chin did not receive an impartial hearing during his subsequent suit for damages.” (Pt. Brief at 16). The Petitioners further state that the circuit court failed to be “impartial,” engaged in “prejudgment,” and “predetermined the outcome” of the matter below. (Pt. Brief at 16-18). Further still, in its “Relief Sought,” Petitioners seek “to reverse the decision of the ICA and remand the case to the Kanawha Circuit Court for a trial on the merits.” (*Id.* at 19).

Petitioners first raised various bias arguments regarding impartiality and prejudgment in a *Motion to Recuse* filed with the circuit court on March 20, 2023. (Sup. App. at 115-119). As Judge

Tabit noted in her letter to Chief Justice Elizabeth Walker addressing the motion, Petitioners’ motion for recusal “was untimely presented *after* [she] granted a dispositive motion in favor of defendant City of Charleston.” (*Id.* at 113). As Judge Tabit recounted in her letter, the Petitioners “filed the underlying lawsuit” on February 23, 2021. (*Id.*) After discussion with the initially assigned judge, the case was then reassigned to Judge Tabit on June 16, 2021, “in the interests of judicial efficiency.”¹⁰ (*Id.* at 113-14). When the case was assigned to Judge Tabit, the Petitioners were “obviously aware that [she] had presided over the previous litigation, a fact [Petitioners] concede[.]” (*Id.*) As noted, the case subsequently proceeded for nearly two more years. Yet it was not until March 20, 2023—nearly two weeks after being advised that the court had granted the Respondent’s motion for summary judgment—that Petitioners filed a Motion to Recuse. (Sup. App. at 115). The circuit court aptly noted that Petitioners and their counsel “were aware as early as June 16, 2021, when this case was assigned to [Judge Tabit], of issues regarding their perception of bias. However, plaintiff[s] neglected to raise these issues until two years later, *after* [Judge Tabit] had ruled adversely against the plaintiff[s].” (*Id.* at 114).

Rule 17.01(a) of the West Virginia Trial Court Rules states that: “In any proceeding, any party may file a written motion for disqualification of a judge within thirty (30) days after discovering the ground for disqualification.” Judge Tabit was correct that the motion to recuse was untimely and that Petitioners “‘lied in wait’ until there was an adverse ruling before challenging the undersigned’s ability to preside fairly in this matter.” (Sup. App. at 114). Further, the Chief Justice of the West Virginia Supreme Court reviewed the motion and “determined that the

¹⁰ Contrary to the nefarious notions put forth by Petitioners, the West Virginia Supreme Court has never “found that a judge’s knowledge of the facts in related cases is a bar to a judge presiding over related cases.” *State v. James K.*, No. 18-0990, 2020 WL 1911453, 2020 W. Va. LEXIS 250, *20-21 (April 20, 2020)(memorandum decision). Indeed, “[t]hat judges frequently preside over cases with related facts or related litigants is a common practice and necessary for judicial efficiency.” *Id.*

evidence set out in support of the disqualification motion is insufficient to warrant such disqualification.” (*Id.* at 132).

Finally, because the Petitioners have already unsuccessfully moved for judicial recusal through the process outlined in West Virginia Trial Court Rule 17.01, they are not entitled to do so again, nor simply seek review of a different circuit court judge now. The West Virginia Supreme Court has previously held that: “The matter of judicial recusal and disqualification is a matter of discretion reposed solely in the presiding judge and the Chief Justice of this Court.” *Patton v. Cnty. Of Berkeley*, 242 W. Va. 315, 319, 835 S.E.2d 559, 563 (2019) (citing *State of West Virginia ex rel. Pritt v. Vickers*, 214 W. Va. 221, 222 n.1, 588 S.E.2d 210, 211 n.1 (2003)). Like in *Patton*, Petitioners here “reiterate[] the same argument, fail[ing] to offer any new evidence or argument . . . that the proceedings below were not fair.” *Patton*, 242 W. Va. at 319, 835 S.E.2d at 563. Accordingly, this Court should find no error below.

CONCLUSION

The City of Charleston correctly followed Municipal and State Code in demolishing Petitioners’ building. The City obtained all proper instructions and determination to support the abatement of the dangerous structure, which posed an immediate threat to public safety. The questions and arguments presented within Petitioners’ appeal have already been considered and answered by the circuit court below and rejected upon further review by the Intermediate Court of Appeals. The circuit court’s holdings are consistent with the application of the State Building Code and statutory authority upon which municipalities have relied for decades to abate unsafe and dangerous buildings and structures.

For these reasons, Respondent requests that this Court deny Petitioners' Appeal on all grounds; uphold the grant of summary judgment entered by the circuit court and grant such other relief as the Court deems appropriate.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**NEW CHINA RESTAURANT, INC., and
PHILIP DY CHIN,
Plaintiffs Below, Petitioners,**

vs.) No. 24-403 (ICA No. 23-ICA-175)

**CITY OF CHARLESTON,
a West Virginia Municipal Corporation,
Defendant Below, Respondent**

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December 2024, I filed the foregoing “**Respondent’s Brief**” with the Clerk of the Court by using the File & ServeXpress system. In addition, I certify that the following parties or their counsel of record are registered as File & ServeXpress Filers and that they will be served by the File & ServeXpress system:

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