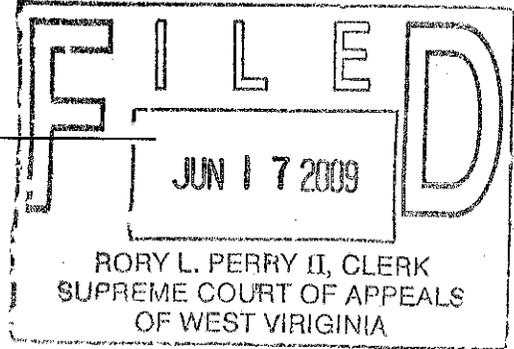


No. 090857

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON



STATE OF WEST VIRGINIA ex rel.,
CORPORATION OF CHARLES TOWN,
a Municipal Corporation,

PETITIONER,

v.

IN PROHIBITION UPON
ORIGINAL JURISDICTION

HONORABLE DAVID H. SANDERS,
Judge of the Circuit Court of Jefferson County;
ROBERT W. FURR and JACKON-PERKS
POST NO. 71, INC.

RESPONDENTS.

PLAINTIFF'S RESPONSE TO PETITION
FOR WRIT OF PROHIBITION

Dale A. Buck, Esquire
W. Va. Bar Id. No. 4914
LAW OFFICE OF DALE BUCK, P.L.L.C.
306 West Burke Street
Martinsburg, WV 25401
Telephone No.: (304) 260-0225
Counsel for Respondent
Robert W. Furr

PLAINTIFF'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Prohibition is an extraordinary writ. It cannot be substituted for ordinary legal remedies but is of strictly limited availability. The Supreme Court of Appeals will issue a Writ of Prohibition only when a circuit court usurps and abuses its legitimate powers. West Virginia Code §§51-2-2, 53-1-1, 51-1-2; Constitution Article 8, Sections 6 and 12. *State ex. rel. King v. McQueen*, 386 S.E. 2d 819, 182 W.Va. 162 (1986). Prohibition arises only to restrain inferior Courts from proceeding in causes of which they have no jurisdiction, or, in which having jurisdiction, they exceed their legitimate powers. Prohibition may not be used as a substitute for the petition for appeal or certiorari. *State ex. rel. Allstate Insurance Company v. Gaughan*, 640 S.E. 2d 176 (WV 2006). See also *State ex. rel. Brooks v. Zakaib*, 609 S.E. 2d 861, 216 W. Va. 600 (2004).

In this case the Corporation of Charles Town ("the City") has filed a Motion to Dismiss three (3) times and three (3) times has been denied by the Circuit Court of Jefferson County. The Petition for Writ of Prohibition arises from the third order denying the motion to dismiss. Thus, the truncated nature of the Order of May 28, 2009 is understandable. (see Exhibits 1, 2 and 3).

The Second Amended Complaint states a claim that dangerous conditions existed on the leased parking lot as a result of the City's failure to maintain the lot in a reasonable state of repair (see paragraph number 8, Second Amended Complaint). It alleges a failure to keep the macadam in good repair, a violation of the lease with the lodge that caused a lodge members' injury. Plaintiff Furr is the lodge member. Plaintiff Furr is an intended beneficiary of the contract. Furr's injuries are the result of breach of contract as well as negligence.

The City acquired use of the parking lot by operation of a lease agreement with the Lodge. The City acquired the benefits of a parking area in the center of Charles Town's commercial district without making the capital outlay to purchase or condemn land. It gained the benefit of that lease and, as part of the obligations set forth in the lease, the City

"covenants and agrees that it shall maintain the leased premises as a public parking lot only and will keep the macadam, or blacktop, in a reasonable state of repair and shall keep the premises policed and free from trash, debris, weeds, snow and ice." (see Exhibit 4).

The City, through counsel retained by its insurance company, now argues it should be allowed to renege on its contractual obligations. If allowed, a huge disincentive is created for the Lodge, or any other entity, to engage in contracts with the City, depriving the City of the downtown parking lot for which it had bargained.

The gist of the Defendant's Petition is that the immunity provisions of West Virginia Code §29-12A-5(a)(6) prohibit a successful prosecution of the causes of action against the City of Charles Town. West Virginia Code §29-12A-5(a)(6) provides that:

a political subdivision is immune from liability if a loss or claim results from:

(6) snow or ice conditions or temporary or natural conditions on any public way or any other public place due to weather conditions, unless the condition is affirmatively caused by the negligent act of a political subdivision.

The Code explicitly provides an exception to the immunity when the snow or icy condition "is affirmatively caused by the negligent act of a political subdivision." Defendant argues that the Complaint, as written, does not contend that there is an affirmative act by the City which caused the condition of black ice. However, Defendant fails to take into account paragraph 8 of the Second Amended Complaint (see attached

Exhibit 5). Defendant fails to take into account the agreement made the 1st day of April, 2003 by and between the Jackson-Perks Post Number 71 Inc. the American Legion and the City of Charles Town, by which the Corporation of Charles Town affirmatively and contractually agreed to “keep the premises policed and free from trash, debris, weeds, snow and ice.”

Simply put, the City can not enter into a contractual agreement by which it covenants to keep the premises free from snow and ice and, after an injury has occurred, deny liability on the grounds that it is immune under the statute.

The Complaint clearly states that the City contracted with the American Legion Post to keep the property free from snow and ice (see paragraph 5, Lease Agreement, Exhibit 5). Plaintiff herein is a dues paying member of the Jackson-Perks Post Number 71 Inc., The American Legion. As such Mr. Furr is an intended beneficiary of the contractual obligations set forth in the agreement of April 1, 2003.

Further the operation of the metered parking lot for revenue constitutes a proprietary function of the Corporation of Charles Town, as opposed to a governmental function of the City. The government’s statutory immunity from tort liability under the Governmental Tort Claims and Insurance Reform Act depends upon nature of the function being performed at the time in question. *Walker v. Meadows*, 206 WVa 78, 521 S.E. 2d 801 (1999). West Virginia Code §29-12A-4 explicitly states that a “political subdivision is liable in damages in a civil action for injury, death, or loss to persons... allegedly caused by an act or omission of the political subdivision... in connections with a governmental or proprietary function...[including] negligent failure to keep public roads,...sidewalks,...in repair.”

As a general rule, the liability-creating provisions of the Governmental Tort Claims and Insurance Reform Act are to be broadly construed and the Act's immunity created provisions are to be narrowly construed. *Calabrese v. City of Charleston*, 515 S.E. 2d 814 (WV 1999).

Further under West Virginia law, a parking lot or sidewalk which is "out of repair" may render the city liable for resulting injury if it is unsafe for ordinary modes of travel. *Simpson v. City of Charles Town*, 22 F. Supp. 2d 550 (1998); *Calabrese v. City of Charleston*, 515 S.E. 2d 814 (WV 1999).

In short, the City's insurance counsel is arguing that, as a matter of law, the City is immune from suits arising from the City's failure to honor duties it expressly assumed by contract and for which the Act clearly holds municipalities responsible in tort. The City argues that it may create an affirmative duty to keep a lot in good repair and then claim immunity when it fails to keep the premises in good repair.

The Circuit Court has not abused its legitimate powers by thrice ordering that dismissal is premature and this time and that this matter should proceed to discovery.

Respectfully Submitted,



Dale A. Buck, Esquire
WV Bar No. 4914
LAW OFFICE OF DALE BUCK, P.L.L.C.
306 West Burke Street
Martinsburg, WV 25401
(304) 260-0225

Counsel for Plaintiff

Thomas Murtaugh WV Bar No. 5613
RR 2 Box 498-A
Sinks Grove, WV 24976
(304)772-5546

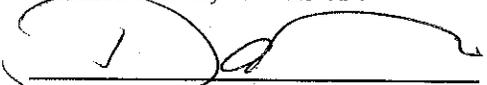
CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the forgoing **Plaintiff's Response To**
Petition For Writ Of Prohibition upon counsel for Defendant on the 16th day
of June, 2009, by U.S. Mail, postage prepaid to:

Tamara J. DeFazio, Esquire
Shuman, McCuskey & Slicer
1445 Stewartstown Road
Morgantown, WV 26505
Counsel for Petitioner
Corporation of Charles Town

Scott D. Clements, Esquire
Dickie, McCamey & Chilcote, P.C.
1233 Main Street, Suite 2002
Wheeling, WV 26003
Counsel for Respondent/Defendant
Jackson-Perks Post 71, Inc.

The Honorable David H. Sanders
Judge, 23rd Judicial Circuit
Jefferson County Courthouse
100 E. Washington Street
Charles Town, WV 25414


Dale A. Buck, Esquire WV Bar No. 4914
LAW OFFICE OF DALE BUCK, P.L.L.C.
306 West Burke Street
Martinsburg, WV 25401
(304) 260-0225
Counsel for Respondent/Plaintiff
Robert W. Furr

D. Buck

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

RECEIVED

2008 OCT 30 AM 10:55

JEFFERSON COUNTY
CIRCUIT CLERK

Robert W. Furr,

Plaintiff,

vs.

Case No. 08-C-297

Corporation of Charles Town,

Defendant.

ORDER DENYING MOTION

THIS MATTER came on for a decision this 30th day of October, 2008 upon the Defendant's Motion for Judgment on the Pleadings and to Dismiss the Complaint previously filed herein and fully briefed in accordance with this Court's Rule 22 Scheduling Order.

This matter is now mature for a decision.

With the recent amendment to the Complaint, it appears that the Motion as filed is pretty much neutralized because the Court cannot review the same and conclude "that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." However, the Court notes that there may well be an issue in this case as to whether or not the Defendant is entitled to protection by the immunity provisions under The West Virginia Governmental Tort Claims and Insurance Reform Act. The Court is also aware that it has the option to convert this motion to a Motion for Summary Judgment, which, of course, is decided by different criteria than a motion to dismiss. However, the Court believes that even if it were to convert this motion thus, that it would have to deny summary judgment at this time on the basis that further development of the facts was necessary for a proper application of the law. That being the case, the Court concludes that it should deny the motion without prejudice to the defense relied upon thereon.

Accordingly, it is ORDERED that Defendant's motion is overruled and the Court notes the timely exception of all parties to all adverse rulings herein contained.



The Clerk shall enter the foregoing as and for the day and date first above written and forward attested copies hereof to all counsel of record.

W. Steptoe
Judge of the Circuit Court

2cc
D. Buck
J. DeFazio
10/31/08
DP

A TRUE COPY
ATTEST:

PATRICK & ASSOCIATES
COURT REPORTERS
JEFFERSON COUNTY, VIRGINIA

BY *D. Putney*
DEPUTY CLERK

D Buck

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

ROBERT W. FURR,

Plaintiff,

RECEIVED

DEC 17 2008

JEFFERSON
CIRCUIT COURT

v.

CIVIL ACTION NO. 08-C-297
(Judge Thomas W. Steptoe, Jr.)

CORPORATION OF CHARLES TOWN,

Defendant.

ORDER DENYING THE CORPORATION OF CHARLES TOWN'S MOTION FOR JUDGMENT ON THE PLEADINGS AND TO DISMISS AMENDED COMPLAINT

This day came the Plaintiff Robert W. Furr, by his counsel, Dale Buck and Thomas Murtaugh, and came The Corporation of Charles Town, also known as The City of Charles Town, by its counsel, Tamara J. DeFazio and the law firm of Shuman, McCuskey & Slicer, PLLC, pursuant to Rules 12(h) and 12(b)(6) of the West Virginia Rules of Civil Procedure, to hereby move this Court for judgment on the pleadings and to dismiss the Amended Complaint filed against it with prejudice.

After giving due consideration to the Motion for Judgment on the Pleadings and to Dismiss Amended Complaint, the arguments of counsel and the memoranda subsequently filed with respect to The Corporation of Charles Town's Motion for Judgment on the Pleadings and to Dismiss Complaint, this Court is of the opinion to and does hereby make the following findings of fact and conclusions of law: The Court continues to see the question of whether or not the Defendant is entitled to immunity as being a viable issue and this case may, in the fullness of time, after discovery is completed, be a candidate for disposition by summary judgment. But the

EXHIBIT
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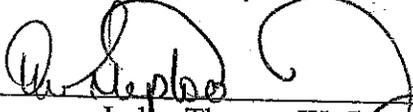
present fact appears to be that the Amended Complaint is sufficient to withstand scrutiny under either a motion to dismiss or a motion for judgment on the pleadings.

For these reasons set forth in the foregoing findings and conclusions, this Court does hereby ORDER that The Corporation of Charles Town's Motions be and the same are hereby denied.

An exception is hereby reserved to any party adversely affected by this ruling.

The Clerk of the Circuit Court of Jefferson County is hereby ORDERED to forward a certified copy of this Order to all counsel of record.

ENTER: 12/16/08



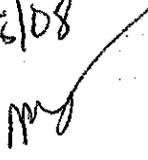
Judge Thomas W. Steptoe, Jr.

A TRUE COPY
ATTEST:

LAURA E. RATTENI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.

BY M. Scott
DEPUTY CLERK

2cc
T. De Janio
D. Buck

12/15/08




D. Buck

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

ROBERT W. FURR,

CIVIL DIVISION

Plaintiff,

Civil Action No.: 08-C-0297

v.

CORPORATION OF CHARLES TOWN
JACKSON-PERKS POST NO. 71, INC.,

Defendants.

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MAY 28 2009

JEFFERSON COUNTY
CIRCUIT COURT

ORDER OF COURT

This day came the Plaintiff, Robert W. Furr, by his counsel, Dale A. Buck, Esq. and Thomas Murtaugh, Esq.; the Defendant, Jackson-Perks Post No. 71, Inc., by its counsel, Scott D. Clements, Esq. and Dickie, McCamey & Chilcote, P.C.; and the Defendant, Corporation of Charles Town, by its counsel, Tamara J. DeFazio, Esq. and Shuman, McCuskey & Slicer, PLLC, whereupon Defendant, Corporation of Charles Town, did move this Honorable Court for judgment on the pleadings and to dismiss the Second Amended Complaint, with prejudice.

Upon consideration of the Corporation of Charles Town's Motion for Judgment on the Pleadings and to Dismiss Second Amended Complaint, and the Responses thereto filed on behalf of Plaintiff and Defendant Jackson-Perks Post No. 71, Inc., it is hereby ORDERED that the Corporation of Charles Town's Motion is DENIED.

The Clerk is DIRECTED to send certified copies of this Order to all counsel of record herein.

4 cc's ENTER this 28th day of May, 2009.

D. Buck
T. Murtaugh
S. Clements
T. DeFazio

5-29-09
-bc

A TRUE COPY
ATTEST:

LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA

BY THE COURT:

David H. Sanders
Circuit Court Judge



BY Becky Chalk
DEPUTY CLERK

EXHIBIT
3

THIS AGREEMENT Made this 1st day of April, 2003, by and between JACKSON-PERKS POST NO. 71, INC., THE AMERICAN LEGION, hereinafter designated LESSOR, AND CORPORATION OF CHARLES TOWN, a municipal corporation, hereinafter designated LESSEE.

WITNESSETH: That for and in consideration of the mutual covenants hereinafter contained, the LESSOR does hereby lease to the LESSEE that certain unimproved lot or parcel of land situate in Charles Town, Jefferson County, West Virginia, fronting on the east side of Lawrence Street 66.4 feet and extending back there from, within parallel lines, 105 feet, more or less, to the line of Piscitelli in the rear thereof, being PARCEL TWO which was conveyed to the Lessor from F. Dean Nichols, Executor, & c., by deed dated June 23, 1973, SUBJECT, HOWEVER, to that certain easement or right of way five (5) feet in width granted to Russell B. Roper, reserving unto the Lessor, its successors and assigns the right to use jointly and in common with Roper for purposes of making connection with the sanitary sewer running north and south on Lawrence Street as more particularly described in said deed.

TO HAVE AND TO HOLD the leased premises for a term of five (5) years beginning April 1, 2003, and ending, March 31, 2008, at an annual rent of One Thousand Two Hundred Dollars (\$1200.00), payable on August 1, 2003, and the first day of August each year thereafter during the term of the lease, unless the Lessor shall sell the property, then upon ninety days written notice and proof of sale from the Lessor to the Lessee, the Lessee shall surrender the lease to the Lessor with any fees prorated for the time of that years lese to the Lessor if and/or returned to Lessee by Lessor if after payment for that year.

The lessee covenants and aggress that it shall maintain said leased premises as a public parking lot only and will keep the macadam, or blacktop, in a reasonable state of repair and shall keep the premises policed and free from trash, debris, weeds, snow and ice.

In the event the Lessee shall breach any of its obligations in the payment of the rent and other covenants and agreements herein contained, the Lessor, after ten day notice in writing to the Lessee of



any such breach of any agreement or covenant, shall, if the Lessor so demands, surrender the lease to the said Lessor, and, at the option of the Lessor, the Lessor shall have the right to re-enter and repossess the premises or require the Lessee to fulfill the covenants and conditions herein expressed or resort to such other legal remedy as the Lessor may deem proper.

This lease is not assignable, in whole or part, without the written consent of the Lessor.

WITNESS the signature and seal of JACKSON-PERKS POST NO. 71, INC, THE AMERICAN LEGION, by its Commander AND FURTHER WITNESS the signature and seal of CORPORATION OF CHARLES TOWN, a municipal corporation, by J. RANDOLPH HILTON, its Mayor

JACKSON-PERKS POST NO. 71, INC.
THE AMERICAN LEGION

BY: *C. H. Smith*
Commander

CORPORATION OF CHARLES TOWN, A
Municipal Corporation

BT: *J. Randolph Hilton*
Mayor

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

ROBERT W. FURR
Plaintiff,

v.

CIVIL ACTION NO. 08-C-297

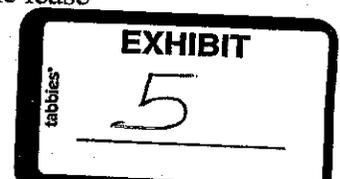
CORPORATION OF CHARLES TOWN
JACKSON-PERKS POST NO. 71, INC.

SECOND AMENDED COMPLAINT

To the Honorable Judges of the Court:

Comes now the plaintiff, Robert W. Furr, and for his Second Amended Complaint, alleges the following:

1. Plaintiff Robert W. Furr is a resident of Jefferson County, West Virginia.
2. Defendant Corporation of Charles Town, is, and at all times herein mentioned was, a municipal corporation organized and existing under the laws of the State of West Virginia, located in Jefferson County, West Virginia.
3. The Jackson-Perks Post No. 71, Inc. is a West Virginia Corporation operating in Jefferson County, West Virginia.
4. For many years, and at all times mentioned herein, the City has operated a public parking lot, located within the City on the east side of Lawrence Street, near its intersection with Washington Street, from which the City derives revenues collected from approximately 33 parking meters installed by the City.
5. The land upon which the aforesaid parking lot is situate is leased by the City from the local American Legion Post, the Jackson-Perks Post No. 71, Inc. ("the Post"). Attached hereto as an exhibit, and made a part hereof, is a copy of the lease



between the City and the Post that was in effect at the time of the injury complained hereinafter. In the lease, the City affirmatively covenanted and agreed to keep the blacktop pavement in a reasonable state of repair, and to keep the parking lot free of snow and ice.

6. The said parking lot abuts the rear entrance of the Post building. Members of the Post, their guests and invitees, frequently park their vehicles in the parking lot, from which the City derives revenue, and regularly use the rear entrance as access to the interior of the Post. Plaintiff is an intended beneficiary of the contractual benefits of the lease agreement.

7. The operation of the metered parking lot for revenue constitutes a proprietary function of Corporation of Charles Town, as opposed to a governmental function of the City, such as the operation the City's water system.

8. Over the past several years, the City breached its Agreement with the Post. The City and the Post negligently allowed the subject parking lot to be improperly and dangerously maintained, in that the expansions and contractions caused by the forces of Nature over time resulted in a worn and uneven parking lot surface and contained low places in which water would collect, and during cold weather, said water would freeze in patches of black ice, making it dangerous and unfit for safe passage, all in violation of the lease agreement.

9. During cold weather, the City removes snow and ice from its streets and highways, but as a matter of practice, never removes snow and ice from the subject parking lot after the formation thereof. After accumulations of snow and ice, cycles of thawing, evaporation, melting, draining and refreezing would occur, so that

dangerous patches of ice would exist in the subject parking lot for extended periods, to be ignored and neglected by the City.

10. The City had actual notice or knowledge of the above-described icy conditions, or should have had such notice or knowledge in the exercise of reasonable diligence.

11. On the 14th day of February, 2007, Plaintiff, Robert W. Furr, a member of the Post, traveled to Charles Town for purposes of having lunch at the restaurant operated by the Post. Upon arrival, Plaintiff parked his vehicle in the City's parking lot, as a business "invitee" of the City.

12. After parking, Plaintiff, a dues paying member of the said Post, in the exercise of due care for his own safety, was waling across said public parking lot after depositing a 25 cent coin, the requisite amount, in the parking meter, when as a proximate result of the City's negligence, and without any negligence of his part contributing thereto, Plaintiff slipped on black near-invisible ice that was then and there present on the parking lot surface, and fell violently to the ground, whereby he was knocked unconscious and seriously injured.

13. The City was negligent and in breach of its contractual obligations in the following manner:

A. In failing to remove snow and ice from the subject parking lot as a matter of practice, even though the City was equipped with ample equipment such as snow plows, snow scrappers, snow blowers and chemical (salt) spreaders as would be sufficient for removal of snow and ice.

B. In failing to have practices and procedures proving for regular inspections and reports of safety conditions of the said city parking lot.

C. In failing to either warn the public or close the parking lots when dangerous conditions, such as the presence of snow and ice, existed.

14. The Post had a duty to keep the premises safe for members of the public who used the parking lot.

15. As a result of the City's negligence, Plaintiff Robert W. Furr suffered a "right chronic subdural hematoma" for which he underwent a craniotomy on April 17, 2007; suffered a severe injury to his right shoulder for which he underwent a surgical procedure to replace his right shoulder with a prosthetic device and repair other shoulder damage on January 9, 2008; suffered other permanent and disabling injuries to his body and mind; he has been unable to live his life in a normal manner; he suffered great emotional distress; he suffered loss and impairment of his earning capacity, loss of ability to earn a living, and lost of enjoyment of life, and he has suffered a diminishment of his life expectancy. He has caused to incur medical charges and expenses in the past and will continue to incur medical expenses in the future.

WHEREFORE, Plaintiff Robert W. Furr demands judgment against defendant Corporation of Charles town for damages in the amount of two million dollars (\$2,000,000.00) plus interest thereon and his cots herein expended.

ROBERT W. FURR
By Counsel


Dale A. Buck, Esquire WV Bar No. 4914
LAW OFFICE OF DALE BUCK, P.L.L.C.
306 West Burke Street
Martinsburg, WV 25401
(304) 260-0225

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

ROBERT W. FURR
Plaintiff,

v.

CIVIL ACTION NO. 08-C-297

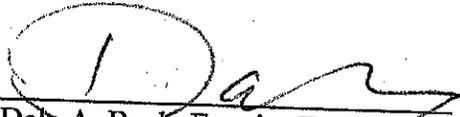
CORPORATION OF CHARLES TOWN
JACKSON-PERKS POST NO. 71, INC.

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the forgoing **Second Amended Complaint** upon counsel for Defendant on the 13 day of February, 2009, by

U.S. Mail, postage prepaid to:

Tamara J. DeFazio, Esquire
Shuman, McCuskey & Slicer
1445 Stewartstown Road
Morgantown, WV 26505



Dale A. Buck, Esquire WV Bar No. 4914
LAW OFFICE OF DALE BUCK, P.L.L.C.
306 West Burke Street
Martinsburg, WV 25401
(304) 260-0225

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The lessee covenants and aggress that it shall maintain said leased premises as a public parking lot only and will keep the macadam, or blacktop, in a reasonable state of repair and shall keep the premises policed and free from trash, debris, weeds, snow and ice.

In the event the Lessee shall breach any of its obligations in the payment of the rent and other covenants and agreements herein contained, the Lessor, after ten day notice in writing to the Lessee of

any such breach of any agreement or covenant, shall, if the Lessor so demands, surrender the lease to the said Lessor, and, at the option of the Lessor, the Lessor shall have the right to re-enter and repossess the premises or require the Lessee to fulfill the covenants and conditions herein expressed or resort to such other legal remedy as the Lessor may deem proper.

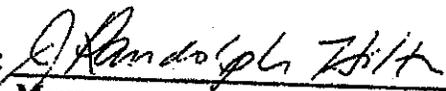
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WITNESS the signature and seal of JACKSON-PERKS POST NO. 71, INC, THE AMERICAN LEGION, by its Commander AND FURTHER WITNESS the signature and seal of CORPORATION OF CHARLES TOWN, a municipal corporation, by J. RANDOLPH HILTON, its Mayor

JACKSON-PERKS POST NO. 71, INC.
THE AMERICAN LEGION

BY: 
Commander

CORPORATION OF CHARLES TOWN, A
Municipal Corporation

BT: 
Mayor