

**THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG**

**PATRICK HENRY ESTATES
HOMEOWNERS ASSOCIATION, INC.,**

Plaintiff,

v.

**Civil Action No. 3:08-CV-175
(Judge Bailey)**

DR. GERALD MILLER,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action brought by the homeowners' association of a residential development known as Patrick Henry Estates against the present owner of certain properties within the development as well as properties adjacent to the development seeking injunctive and declaratory relief as well as damages and restitution.

On December 15, 2010, this Court issued a Memorandum Opinion and Order (Doc. 98), which granted plaintiff's Partial Motion for Summary Judgment as to Defendant's Counterclaims (Doc. 83) and granted in part and denied in part defendant's Motion for Partial Summary Judgment (Doc. 84).

A bench trial was held on this matter on January 11 and 12, 2011, in Martinsburg, West Virginia. The Court conducted a view of Patrick Henry Estates, accompanied by counsel. The plaintiff presented the testimony of its expert, Bill Hoak, as well as the testimony of Susanne Malesic, Susan Pipes, Louise Cannon, and Betina Peyton. The defendant presented the testimony of his experts, Richard Klein and Paul Raco, testified

on his own behalf, and also presented the testimony of Robert Pratt. A large number of exhibits were admitted into evidence and all witnesses were also subject to cross-examination. Having heard the evidence, reviewed the documents admitted into evidence, and reviewed the submissions of counsel, this Court makes the following finding of facts and conclusions of law:

Findings of Fact

1. In 1973, Shendo Limited Partnership (herein "Shendo") was formed by Richard Singer and others.

2. Shendo was the owner/developer of real estate located in Charles Town District, Jefferson County, West Virginia, a portion of which later became a residential subdivision known as the Patrick Henry Estates and is the development at issue in this case.

3. Between the years 1977 and 1981, Dr. Gerald Miller, the defendant herein (herein "Miller"), owned twenty-three percent (23%) of Shendo.

4. At that time, Dr. Miller was an investor and had no active role in the day to day operations of the development of the land.

5. Dr. Gerald Miller invested more funds and obtained approximately fifty percent (50%) ownership in Shendo in 1981.

6. On or about October 22, 1981, Shendo drafted a Declaration of Road Maintenance Covenants and Restrictions (herein "Declaration" or "Covenants") pertaining to the real property located in Charles Town District, Jefferson County, West Virginia, thus creating a subdivision to be known as the Patrick Henry Estates Subdivision (herein "Subdivision") (Joint Exhibit 1).

7. Patrick Henry Estates is an exclusively residential development, comprised of 148 single family homes. The residences are characterized by the Patrick Henry Estates Homeowners' Association (herein "Association") as modestly priced homes owned by individuals and families with moderate incomes, who range in age from elderly to young families with young children.

8. The development is accessed from U.S. Route 340, over a short roadway that has been accepted into the State Road system. This portion of the roadway serves multiple commercial establishments.

9. The roadway, known as Patrick Henry Way, becomes a private road as it enters Patrick Henry Estates, running in a northerly direction through the development and providing access to lateral streets known as Beauregard Boulevard, Fulton Avenue, Georgia Avenue, and Greene Avenue.

10. Although the Declaration recites that prior to 1981 the developer had caused to be incorporated the Association, it was not formally organized until 1990.

11. On or about December 30, 1986, Miller obtained one hundred percent (100%) ownership of Patrick Henry Estates, when Shendo deeded to Miller three parcels of real estate, saving and excepting Lots No. 1 through No. 36 of Section A of Patrick Henry Estates and Lots No. B-1 through No. B-41 of Patrick Henry Estates, which had already been sold.

12. Miller later sold various sections of the Patrick Henry Estates development to others who developed Sections C and D of the Patrick Henry Estates property.

13. On or about December 19, 1988, Miller deeded to L. M. Everhart Construction, Inc. Lots D-1 through D-44 of Section D of Patrick Henry Estates.

14. Article I, Section 3 of the Declaration provides that it is the responsibility of the developer to maintain the streets and all common areas until such time as they are dedicated and deeded to the Association.

15. While it has been Miller's position throughout the history of his ownership of the development that the Declaration makes the Association responsible to pay him to perform maintenance of the streets and common areas in the development, such a position is contrary to the language and intent of the Declaration.

16. On at least two occasions, Miller has attempted to avoid his responsibility to maintain the streets and common areas by attempting to have the State Highway Department take over road maintenance, but the residents of Patrick Henry Estates opposed those efforts.

17. Article VII, Section 3 of the Declaration states:

"The Developer may retain the legal title to the common properties until such time as he has completed improvements thereon but, notwithstanding any other provision herein, the Developer hereby covenants, for himself, his heirs and assigns that he shall convey the common properties to the Association, free and clear of all liens and encumbrances, but subject to easements and rights of way, not later than January 1, 1987."

18. The roads in the subdivision were not completed as of January 1, 1987. The only road that was complete as of that date was the western side of Beauregard and a portion of Beauregard on the other side of Patrick Henry Way for sixty or seventy feet, all contained in Section A of the Patrick Henry Estates. It appears undisputed that, at most, only Section A of the development had the streets completed as of January 1, 1987.

19. Dr. Miller also did not turn the roads over to the Association once they were completed.

20. Both parties agree that, at present, the roads are in need of repair.

21. The drainage system in the development is also in need of repair.

22. Plaintiff's expert, Bill Hoak, a contractor, submitted a proposal to repair the roads for \$156,155 and to repair the drainage system for \$18,000.

23. Defendant's expert, Richard Klein, an engineer, presented a plan to repair the roads, which he estimates to cost \$151,335. Mr. Klein's estimate does not include repairs to the drainage system.

24. Miller believed that it was necessary for the further development of the property that he be allowed to retain right of ways to use the roads to continue the rest of the development and also to access the Sloan Square property. The only access into Sloan Square would be through Lot C-1, and Miller testified that he had always intended to utilize Lot C-1 as access into that property. *Miller testimony*, p. 121 (Jan. 12, 2011).

25. In July 2008, Miller informed the Association of his intentions to develop land immediately adjacent to the Subdivision into a residential apartment complex, to be known as Sloan Square.

26. Sloan Square is a proposed apartment complex adjacent to Patrick Henry Estates, which, as designed, contained 37 apartments and would have access from 2 different places along Beauregard Boulevard through Patrick Henry Estates. One of the access points would be through Lot C1, and the other from Gates Way. *Klein testimony*, p. 10 (Jan. 12, 2011).

27. Dr. Miller claims that he always intended, during the development of the

Patrick Henry Estates, to utilize Lot C-1 to access the remaining property that he has currently proposed as the Sloan Square development. He claims that it is for that reason that no house was built on Lot C-1, which is a buildable lot. *Miller testimony*, p. 119 (Jan. 12, 2011).

28. Lot C-1 is shown on the Plat of Patrick Henry Estates as a residential lot.

29. On the Plat, there is a strip of land running behind Lot C-1 (and other lots), which is marked as a "Walking and Buffer Area." This strip separates Lot C-1 from the property on which Sloan Square is intended to be constructed.

30. Approximately 42 acres of the property were never developed. This property lies immediately adjacent to the existing Patrick Henry Estates.

31. The undeveloped portion of the property has now been annexed into the Town of Ranson (called the Village of Shenandoah Springs).

32. The streets in the existing Patrick Henry Estates were designed to mesh with streets to be built on the undeveloped portion of the property.

33. There is no evidence that Dr. Miller has ever promised any of the residents of the Patrick Henry Estates that the undeveloped property would not be developed.

34. With respect to Lot C-1, the defendant permits the weeds and grass to grow to an excessive height. When a complaint is received, Dr. Miller will have someone "brush hog" the lot.

35. The excess vegetation on Lot C-1 provides a breeding ground for snakes and other vermin and is unsightly.

36. The use of the brush hog to cut the grass leaves the lot unsightly and not in character with a residential area.

37. At trial, the Association presented a claim for restitution for costs expended for maintenance of the Development from October, 1998, through December, 2010, when Dr. Miller refused.

38. The plaintiff claimed the following:

Snow removal	18,675.00
Allegheny Power	949.88
Fire hydrant Repairs	3,222.00
Road repairs	29,490.00
Signage/Lights-maint. Repairs	2,411.45
Charles Town Water Dept.	5,184.00

Conclusions of Law

I. Injunction requiring repair and maintenance

In Count I of the Second Amended Complaint (Doc. 82), the plaintiff seeks a mandatory injunction requiring the defendant to make all necessary repairs to bring the common elements up to standard.

The crux of this issue is the interpretation of the Declaration, particularly Article IV (Assessments), Section 3, and Article VII (Property Rights and Rights of Enjoyment of Common Property), Section 3. Article IV, Section 3 provides:

Section 3. The Developer shall be responsible for the original construction of the streets and common areas in the subdivision. Upon completion of the streets and common areas, the same shall be dedicated and conveyed to the Association. It shall be the further responsibility of the Developer to maintain the streets, and all other common properties . . . until such time as these amenities are dedicated and deeded to the Association.

Upon dedication of the common properties . . . to the Association, the initiation fees and assessments levied by the Association shall be used exclusively for the purpose of promoting the recreation, health, safety, and welfare of the residents and other persons owning and using lots in Patrick Henry Estates Subdivision and in particular for the improvement and maintenance of properties, services and facilities devoted to this purpose.

Pursuant to the foregoing, the Association may use and employ initiation fees and assessments to provide for repair, improvement and maintenance of the common properties, payment of taxes and insurance thereon, repaving, improvement, repair and maintenance of streets, alleys, and common ways and for construction, reconstruction, repair, and maintenance and improvement of storm sewers. Any enumeration of specific uses herein, however, shall not be construed to limit the Association to the use of initiation fees and assessments for purposes similar to the foregoing.

Article VII, Section 3 provides:

Section 3. The Developer may retain the legal title to the common properties until such time as he has completed improvements thereon but, notwithstanding any provision herein, the Developer hereby covenants, for himself, his heirs and assigns that he shall convey the common properties to the Association, free and clear of all liens and encumbrances, but subject to easements and rights of way, not later than January 1, 1987.

To date, Miller has not conveyed the common properties to the Association. The common properties of the Subdivision have become deteriorated and are in need of repair. Miller denies responsibility for the repairs.

This Court finds that pursuant to the clear language of the above-quoted provision of the Declaration, it is clear that Miller has the obligation to maintain the roads and

common properties until the same are dedicated and conveyed to the Association.

“Under West Virginia law, injunctive relief is appropriate where the right of the applicant is clear and where any other legal remedy would be less efficient than an injunction. **Sams v. Goff**, 540 S.E.2d 532, 534 (W.Va. 1999). Moreover, ‘[i]njunctive relief based on a contract must be coextensive with the terms of the contract.’ **Standard Hydraulics, Inc. v. Kerns**, 182 W. Va. 225, 387 S.E.2d 130 (W.Va. 1989).” **Thornhill, Inc. v. NVR, Inc.**, 2006 WL 2222354 (N.D. W.Va. August 2, 2006) (Stamp, J.).

This Court will not, however, require Dr. Miller to utilize the services of the Association’s preferred contractor. Rather, this Court will leave it up to Dr. Miller to utilize whatever licensed and insured contractor that he chooses, provided that the work is planned and supervised by the defendant’s engineering expert, Richard Klein.

Dr. Miller will be ordered to forthwith bring the roads, drainage, and other common elements of Patrick Henry Estates up to the condition which would have existed had the roads, drainage systems and common elements been properly maintained since their construction. Such work is to be completed no later than October 1, 2011. Such work must be planned and supervised by the defendant’s expert, Richard Klein, who, upon completion of the work, is to certify to this Court that the work has been completed in accordance with his plans and specifications and in accordance with this Order.

In the alternative, Dr. Miller may, within thirty (30) days of the entry of this Order, pay the Association an amount equal to the costs provided by Bill Hoak, if the price quote is still valid, and allow the Association to have the work conducted.

II. Injunction requiring dedication and conveyance of the common elements

In Count II of the Second Amended Complaint, the Association seeks an injunction requiring the defendant to dedicate and convey the common elements of the Development to the Association. As noted above, Article VII, Section 3 of the Declaration states:

Article VII, Section 3 provides:

Section 3. The Developer may retain the legal title to the common properties until such time as he has completed improvements thereon but, notwithstanding any provision herein, the Developer hereby covenants, for himself, his heirs and assigns that he shall convey the common properties to the Association, free and clear of all liens and encumbrances, but subject to easements and rights of way, not later than January 1, 1987.

Under the above clear and unequivocal language, Dr. Miller is required to dedicate and convey the common properties to the Association. Good cause existed in the past for delaying the transfer, but that cause no longer exists. Within ten (10) days of the entry of this Order, the plaintiff shall present to counsel for the defendant a deed complying with this Order. Within ten (10) days thereafter, the defendant shall execute the deed and return it to the plaintiff's counsel for recordation.

The deed must dedicate and convey to the Association all of the common properties shown on the Plats, including, but not limited to, the following, free and clear of all liens and encumbrances, but subject to easements and rights of way:

1. The "Walking and Buffer Area" situate at the southern boundary of Patrick Henry Estates depicted on the recorded plats of Section C (Ex. 38), Section B (Ex. 38), and the Revised Replat for Section A (Ex. 36);

2. The Lot described as “Recreation Play Area,” situate at the southeast corner of Patrick Henry Way and Fulton Avenue as depicted on the recorded Revised Replat of Section A (Ex. 36);

3. The Lot described as “Recreation ‘Bus Stop,’” situate at the northeast corner of Patrick Henry Way and Fulton Avenue as depicted on the recorded Revised Replat of Section A (Ex. 36);

4. The open space and buffer area situate on the western boundary of Patrick Henry Estates as depicted on the Plat of Section D (Ex. 39);

5. The tract containing the notation “Recreation Area,” situate on the eastern boundary of Patrick Henry Estates as depicted on the Plat of Section C (Ex. 38); and

6. All streets and roads depicted on the above mentioned recorded plats.

One of the major issues presented by this case is the issue of the nature of the rights to be retained or reserved by the defendant to use the roads. Specifically, the defendant desires to use certain of the roads to provide access to the commercial/residential development known as “Village of Shenandoah Springs.” The plaintiff objects to the use of the roads through the residential area due to the concerns of increased traffic, as well as wear and tear on the roads.

In determining the scope of the reserved right of way, several decisions of the West Virginia Supreme Court are instructive.

1. ““The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish.” *Wallace v. St. Clair*, 147 W.Va.

377, 390, 127 S.E.2d 742, 751 (1962).’ Syl. pt. 2, **Allemong v. Frenzel**, 178 W.Va. 601, 363 S.E.2d 487 (1987).” Syl. Pt. 3, **G. Corp, Inc. v. MackJo, Inc.**, 195 W.Va. 752, 466 S.E.2d 820 (1995).

2. “Where an easement exists by express grant its use must be confined to the terms and purposes of the grant.” **Shock v. Holt Lumber Co.**, 107 W.Va. 259, 148 S.E. 73, 74 (1929). See **National Lead Co. v. Kanawha Block Co.**, 288 F.Supp. 357, 363 (S.D. W.Va. 1968).

3. “A principle which underlies the use of all easements is that the owner cannot materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon.” **National Lead Co. v. Kanawha Block Co.**, 288 F.Supp. 357, 365 (S.D. W.Va. 1968), quoting **Chafin v. Gay Coal & Coke Co.**, 109 W.Va. 453, 156 S.E. 47 (1930).

4. “Even in the absence of . . . restrictive language, it is well established in West Virginia that the easement cannot be extended to serve other lands of the owner of the dominant tenement, but its use must be confined to the tract to which it is appurtenant. **Springer v. McIntire**, 9 W.Va. 196 (1876); **Shaver v. Edgell**, 48 W.Va. 502, 37 S.E. 664 (1900); **Dorsey v. Dorsey**, 109 W.Va. 111, 153 S.E. 146 (1930). The underlying reason for this general rule of servitude is stated in the **Shaver** case:

‘Except for this rule, the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate.’” **Nat’l Lead**, *supra* at 363-64.

5. “‘An easement cannot be extended as a matter of right, by the owner of the dominant estate, to other lands owned by him.’ Syllabus point 1, **Dorsey v. Dorsey**, 109 W.Va. 111, 153 S.E. 146 (1930).” Syl. Pt. 3, **Ratliff v. Cyrus**, 209 W.Va. 166, 544 S.E.2d

93 (2001).

6. “While there is authority apparently to the contrary, it has been held that a user in excess of, or different from, that to which the owner of the dominant tenement has acquired a right may be enjoined, especially where the excessive user is continuous and repeated under a claim of ownership.’ 19 C. J., 990.” ***Shock v. Holt Lumber Co.***, 107 W.Va. 259, 148 S.E. 73, 74 (1929).

An application of these rubrics to the case at hand results in the following parameters for the reservation:

A. Dr. Miller may utilize a reserved right of way over Patrick Henry Way to access the residue of his property to the north for limited commercial purposes. That certain deed dated June 13, 1985, from Shendo Limited Partnership to Lawrence M. Everhart, III, and Georgia Y. Everhart contains the following provision:

The Grantees acknowledge that the lot or parcel of real estate, the subject of this conveyance, are a part of the Patrick Henry Estates Subdivision, as the same may be enlarged or diminished, which is being developed by Shendo Limited Partnership, hereinafter referred to as Shendo, in stages, and nothing contained herein shall operate to impose and apply the restrictive covenants and conditions hereinabove set forth upon those areas within the Patrick Henry Estates Subdivision which have not been developed prior to the date hereof. **The Grantees acknowledge that Shendo has reserved and retained the right to provide within the Patrick Henry Estates Subdivision areas for commercial, educational, civic, social, charitable, medical and other purposes conducive to the convenience, health and general welfare of the lot owners within the Patrick Henry Estates Subdivision, provided such commercial, educational, civic, social, charitable, medical and other purposes do not violate any local,**

state or federal land use laws or regulations.

Joint Ex. 45.

The above deed appears in the chain of title for all of the lots in Section B of Patrick Henry Estates. The same language appears in that certain deed dated December 19, 1988, from Gerald A. Miller and Lillian R. Miller to L.M. Everhart Construction, Inc. covering all of the lots in Section D.

In addition, the developer has never indicated to the lot owners that there would not be any commercial ventures placed on the residual land. In fact, Exhibit 35, which is an unrecorded map indicating how Patrick Henry Estates would be developed shows an area to the north marked as “future development or recreational development.”

Based upon the foregoing, this Court can find no impediment to the defendant placing some commercial development on the residual property. The Court would note however, that, in the event that commercial development is begun on the property, the defendant shall become liable for the maintenance and repair of the whole of Patrick Henry Way.

B. Dr. Miller may **not** utilize Beauregard Boulevard or Greene Avenue to access any commercial development. It is clear from the concept drawing (Ex. 35), that these streets are side streets which exist to access single-family homes. Any use of these streets for commercial, or even high density residential purposes, would greatly increase traffic in a wholly residential area and would “materially increase the burden of it upon the servient estate, [and] impose a new or additional burden thereon.”

C. Dr. Miller may **not** utilize Patrick Henry Way to access property in addition to the residual portion of Patrick Henry Estates. According to the testimony at trial, the

defendant has secured property adjacent to Patrick Henry Estates through which he intends to bring additional roadways to access a major development on the residual property. This Court finds that such a plan would cause Patrick Henry Way to become a “through road” greatly increasing the traffic through the Development and would have the effect of extending the easement to other lands owned by the developer.

Such a plan would also “materially increase the burden of it upon the servient estate, [and] impose a new or additional burden thereon.”

III. Injunction prohibiting defendant from utilizing Lot C-1 as a roadway

Count III of the Second Amended Complaint seeks an injunction prohibiting the defendant from utilizing Lot C-1 of Patrick Henry Estates in violation of the restrictive covenants governing the property. An examination of the Plat of Section C discloses that at the rear of the Lot C-1 is a “Walking and Buffer Area,” which this Court has ordered to be conveyed to the plaintiff. It is impossible to use Lot C-1 for access to the proposed “Sloan Square” apartments without crossing the “Walking and Buffer Area.” Accordingly, without the permission of the Association, Lot C-1 cannot be used for access.

Accordingly, this Court will grant the injunction prohibiting the defendant from utilizing Lot C-1 as a roadway.

IV. Injunction requiring maintenance of Lot C-1

Count IV of the Second Amended Complaint seeks an order requiring the defendant to mow or otherwise maintain the vegetation on Lot C-1. The evidence presented at trial demonstrated that the defendant permits the weeds and grass to grow to an excessive

height, then when a complaint is received has someone “brush hog” the lot.

The restrictive covenants governing Patrick Henry Estates include the following:

14. . . . All lots shall be kept free of garbage and trash and the vegetation thereon shall be neatly trimmed and maintained so as not to be a nuisance.

This Court finds that the seasonal brush hogging sporadically performed at the request of the defendant is insufficient to conform to the purpose and intent of the restrictive covenant. This covenant governs the property in a residential neighborhood. Occasional brush hogging is not intended nor does it bring vegetation in conformity with a residential neighborhood.

The Association presented evidence that when grass on lots reaches eight (8) inches or more, lot owners are requested and required to mow their lot (using a lawn mower). There is no basis to exclude the defendant from this requirement.

Accordingly, the defendant will be ordered to maintain the lot in such a manner that the grass or other vegetation thereupon does not reach a height of eight (8) inches and requiring that the grass be mowed with a lawn mower.

V. Claim for compensatory damages

Count V of the Second Amended Complaint seeks restitution for moneys spent in maintaining the Development in the absence of action by Dr. Miller. In this Court's prior Order entered December 15, 2010, this Court limited the recovery to expenses incurred since October 27, 1998.

As noted above, at trial the plaintiff presented testimony concerning the moneys spent after that date.

This Court finds that with respect to the following amounts, the plaintiff has proven by a preponderance of the evidence that the expenses were reasonable, were spent on items that were the responsibility of the defendant, and were required in light of the defendant's inaction or refusal to act:

Snow removal	18,675.00
Fire hydrant repairs	3,222.00
Road repairs	<u>29,490.00</u>
TOTAL	51,387.00

This Court is denying the claims for Allegheny Power and Charles Town Water Department on the basis that these expenses are not maintenance charges, but rather ongoing utility costs. The claim for signage, lights, etc., is denied due to the plaintiff having failed to prove the purpose and necessity for the repairs to the satisfaction of the Court.

Accordingly, the plaintiff will be granted a judgment against the defendant in the amount of \$ 51,387.00.

VI. Attorneys Fees

The plaintiff in this case also seeks an award of attorneys fees. "Federal courts apply the 'American Rule' in deciding whether an award of attorneys' fees is appropriate. In the United States, each party in a lawsuit bears its own attorneys' fees 'unless there is express statutory authorization to the contrary.' *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). The Supreme Court has recognized three exceptions, pursuant to which a federal

court can award attorneys' fees through its inherent powers. These exceptions are: (1) where a party's litigation efforts directly benefit others (the 'common fund' exception); (2) where a party willfully disobeyed a court order; and (3) where a party acts in bad faith, vexatiously, or for oppressive reasons (the 'bad faith' exception). See **Chambers v. NASCO, Inc.**, 501 U.S. 32, 45-46 (1991). The Fourth Circuit also has recognized an 'essential to equity' exception that may apply in exceptional circumstances. See **Rolax v. Atlantic Coast Line R.R. Co.**, 186 F.2d 473 (4th Cir. 1951). Although these exceptions exist, their status as exceptions must not be forgotten. The Supreme Court cautioned that 'because of their very potency, inherent powers must be exercised with restraint and discretion.' **Chambers**, 501 U.S. at 44." **Kreischer v. Kerrison Dry Goods**, 2000 WL 1157805, *3 (4th Cir. August 16, 2000).

The only applicable basis for an award in this case is the "bad faith" exception. This Court does not find the actions or positions taken by the defendant in this case to warrant an award of attorneys fees. Accordingly, this Court, in its discretion, will not award attorneys fees to the plaintiff.

VII. Counterclaims by defendant Miller

In this Court's Order of December 15, 2010, this Court dismissed Counts 1, 2, and 5 of the Counterclaim filed by the defendant (Doc. 7). Count 3 of the Counterclaim seeks declaratory judgment that the "Association is responsible for collecting funds sufficient to cover the cost of the road maintenance and that the developer is only required to maintain the roads if provided with sufficient funds by the Homeowners Association." This Court's ruling on plaintiff's Count I decides this issue adversely to the defendant. Accordingly,

defendant's Counterclaim Count 3 is **DISMISSED**.

Count 4 of the Counterclaim seeks declaratory judgment that the defendant be permitted to utilize Lot C-1 for access to the proposed Sloan Square development. This Court's ruling on plaintiff's Count III also decides this issue adversely to the defendant. Accordingly, defendant's Counterclaim Count 4 is **DISMISSED**.

Count 6 of the Counterclaim seeks a declaration that the Road Maintenance Covenants and Restrictions were not properly adopted and are void. The defendant appears to have abandoned this issue, since no evidence was presented at trial and the defendant presented no proposed findings of fact and conclusions of law on this issue. To the extent the issue remains viable, this Court will dismiss the claim. The covenants and restrictions are shown on the face of the recorded plats under which the defendant and his predecessors in title sold the lots. The defendant is estopped from denying the efficacy of the covenants and restrictions. Accordingly, Count 6 of the Counterclaim is **DISMISSED**.

Conclusion

For the reasons stated above, it is hereby **ORDERED** that:

A. The defendant is hereby **ORDERED** to forthwith bring the roads, drainage, and other common elements of Patrick Henry Estates up to the condition which would have existed had the roads, drainage systems and common elements been properly maintained since their construction. Such work is to be completed no later than October 1, 2011. Such work must be planned and supervised by the defendant's expert, Richard Klein, who, upon completion of the work, is to certify to this Court that the work has been completed in accordance with his plans and specifications and in accordance with this Order.

In the alternative, Dr. Miller may, within thirty (30) days of the entry of this Order, pay the Association an amount equal to the costs provided by Bill Hoak, if the price quote is still valid, and allow the Association to have the work conducted:

B. The defendant is **ORDERED** to dedicate and convey the common properties to the Association. Within ten (10) days of the entry of this Order, the plaintiff shall present to counsel for the defendant a deed complying with this Order. Within ten (10) days thereafter, the defendant shall execute the deed and return it to the plaintiff's counsel for recordation;

C. The defendant is enjoined and prohibited from utilizing Lot C-1 as a roadway;

D. The defendant is **ORDERED** to maintain the lot in such a manner that the grass or other vegetation thereupon does not reach a height of eight (8) inches and requiring that the grass be mowed with a lawn mower;

E. The plaintiff is hereby awarded a judgment against the defendant in the amount of \$ 51,387.00;

F. Defendant's Counterclaim Count 3 is **DISMISSED**;

G. Defendant's Counterclaim Count 4 is **DISMISSED**;


H. Defendant's Counterclaim Count 6 is **DISMISSED**; and

I. The Clerk is **DIRECTED** to enter a separate judgment consistent with this Order.

It is so **ORDERED**.

The Clerk is directed to transmit true copies of this Order to all counsel of record herein.

DATED this 16th day of March, 2011.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE