

RECORD NO. 11-1279

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In The  
**United States Court of Appeals**  
For The Fourth Circuit

**PATRICK HENRY ESTATES  
HOMEOWNERS ASSOCIATION, INCORPORATED,**  
a West Virginia corporation,

*Plaintiff – Appellee,*

v.

**DR. GERALD MILLER,**

*Defendant – Appellant.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA  
AT MARTINSBURG**

—————  
**BRIEF OF APPELLEE**  
—————

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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No. 11-1279 Caption: Patrick Henry Estates Homeowners Association v. Dr. Gerald Miller

Pursuant to FRAP 26.1 and Local Rule 26.1,

Patrick Henry Estates HOA who is appellee, makes the following disclosure:  
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

**CERTIFICATE OF SERVICE**

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I certify that on April 4, 2011 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Berkeley Springs, WV 25411

s/Braun A. Hamstead  
(signature)

April 4, 2011  
(date)

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**I. JURISDICTIONAL STATEMENT**

Appellee Patrick Henry Homeowners Association (“the HOA”) is not in disagreement with Miller’s Statement of Subject Matter and Appellate Jurisdiction.

**II. STATEMENT OF THE ISSUES**

The Appellee HOA is not satisfied that Miller has appropriately stated issues for appeal. Appellee believes that the issues can more appropriately be stated as:

A. Does Miller propose to unlawfully expand his reserved easements and are the court ordered remedies appropriate?

B. Does the annexation of territory by a municipality invalidate the restrictive covenants and the scheme of development thereby created?

C. Did the court err in determining that Miller does not have the right to expand the reserved easements without limitation, and use all of them to access any property outside Patrick Henry Estates which he may own or subsequently acquire while converting one of the streets into public highway for use by the public at large?

D. Did the court err in finding that Miller does not have the right to violate his own development’s restrictive covenants by converting a

residential lot to a commercial use as a roadway and using common area property to expand the development outside its platted boundaries?

E. Did the court err in granting the HOA damages corresponding to Miller's breach of his obligations of common area maintenance and upkeep as set forth in his development's restrictive covenants or abuse its discretion in awarding injunctive relief?

### **III. STATEMENT OF THE CASE**

The suit follows a long history of written and oral communications between Miller and the HOA spanning some 24 years. The most recent event spurring the suit was a pending application before the Jefferson County Planning Commission wherein Miller sought a Conditional Use Permit to develop lands lying outside Patrick Henry Estates known as Sloan Square Apartments. Disconcerting to the HOA was the fact that Miller proposed to access Sloan Square by converting a residential lot within Patrick Henry Estates, Lot C-1, into an access easement and further burdening the inadequately designed and maintained roads of Patrick Henry Estates.

This suit was originally filed by the HOA against Miller in the Circuit Court of Jefferson County, West Virginia on or about October 25, 2008. Miller removed the case to federal court under 28 U.S.C. § 1332 and the

case proceeded there under the complaint as filed in state court but with two subsequent amendments discussed below. J. A. 12.

The complaint alleges that Miller “...failed and refused to dedicate and deed the common elements within the Subdivision to the Association, and has failed or refused to maintain the streets and roadways in the manner and to the extent specifically required by Article IX, Section 1 of the covenants. J. A. 16, ¶ 12. The HOA sought a mandatory injunction to require Miller to make “...necessary repairs to bring the common elements within compliance with the applicable Covenants, or alternatively, to award the HOA sufficient damages so that it could make the necessary repairs to the common elements. The HOA also sought a mandatory injunction against Miller to convey the roads to the HOA. J. A. 18.

In regard to the Lot C-1 conversion proposal, the HOA sought an injunction to prohibit C-1 from being used for the commercial purpose of an access road to Miller’s proposed “Sloan Square Apartment Complex.” J. A. 20.

On or about June 18, 2009, the HOA amended the complaint to add a count to require Miller to maintain his lot C-1 in accord with the Declaration of Covenants and Restrictions. *See* Count IV, J. A. 232-233. In a second amendment filed on or about September 29, 2010, the HOA added factual

assertions to Count V, claiming violations of state law. The additional assertions included the allegation that Miller had testified in his deposition taken in the case that he intended to convert the subdivision's street, "...Patrick Henry Way to a public throughway, at which point it will connect U.S. Route 340 to a West Virginia State Highway known as Flowing Springs Road." J. A. 361.

The HOA's claims in the complaint were based on common law contract violations and also violations of state statutory law, West Virginia Code § 36 B-1-1, *et seq.* (West Virginia's version of the "Uniform Common Ownership Interest Act").

In addition to the above-mentioned injunctive relief, the HOA sought reimbursement for moneys that it had expended to maintain the subdivision roads and monetary damages. The HOA also sought recovery of its attorney fees, primary based on West Virginia Code § 36 B-4-117. J. A. 234.

In response, Miller filed a counterclaim against the Association for damages. Miller's counterclaim was based on an assertion that the Association submitted a petition in opposition to his Sloan Square Apartment proposal that caused the Jefferson County Planning commission

to deny it.<sup>1</sup> Miller also sought to have the court rule that he could use Lot C-1 as access to his proposed Sloan Square development, that he was not responsible for road maintenance because the HOA had not paid him, and a ruling that the Declaration and the covenants were not lawfully adopted. J. A. 289-290.

Cross motions for partial summary judgment were filed by the parties in September 2010. J. A. 369-370. In its motion for partial summary judgment, the HOA sought to have Miller's counterclaim for damages against it dismissed. In Miller's motion for partial summary judgment, he sought to have all counts in the complaint dismissed except count III, relating to Miller's proposed use of Lot C-1.<sup>2</sup>

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<sup>1</sup> In his counterclaim, Miller alleged that the HOA's opposition to his Sloan Square proposal caused the planning commission to place onerous conditions on the approval of his Community Impact Statement ("CIS") that rendered the project unfeasible. The "CIS" is a part of the Conditional Use Permit approval process whereby the Planning Commission responds to the developer's statement of its proposal and the projected impact on the community and gives the developer an indication as to whether or not the proposal is consistent with the Ordinance.

<sup>2</sup> In Count III, the HOA sought to have Miller enjoined from using Lot C-1 as access to Miller's proposed Sloan Square Apartments.

By Memorandum and Opinion dated December 15, 2010, based on its *Noerr-Pennington* immunity,<sup>3</sup> the district court granted summary judgment in favor of the HOA as to all counts of Miller's counterclaim in which he sought damages against the HOA. J. A. 676.<sup>4</sup> As to Miller's motion for partial summary judgment, the court ruled that the Uniform Common Interest Ownership Act (West Virginia Code § 36B-1-1, *et seq.*) did not apply to Patrick Henry Estates. J. A. 687. The court also ruled that the HOA's claim for damages against Miller in Count I for failing to maintain the common areas was barred by the 10-year statute of limitations for written contracts. However, the court found that the HOA's claim for reimbursement for money it had spent to maintain the roads, up to a period of ten (10) years preceding the suit, would proceed to trial along with the balance of the HOA's claims. J. A. 691-694.

Multiple pretrial mediation sessions were conducted by the parties without any success. The last of these mediation sessions was conducted on the eve of trial.

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<sup>3</sup> See *IGEN Int'l, Inc. v. Roche Diagnostics FmbH*, 335 F.3d 303, 310 (4th Cir. 2003).

<sup>4</sup> The counts in Miller's counterclaim seeking declaratory judgment were mere contra assertions to the claims for declaratory relief contained in Plaintiff's complaint and proceeded on to trial.

On January 11 and 12, 2011, the case proceeded to trial before the court, by agreement of the parties, sitting without a jury. Following the trial, the parties submitted proposed findings and the court wrote and entered its own Memorandum of Opinion and Final Order on March 16, 2011.

J. A. 1155-1175.

Based on the plain language of the Declaration, the court ruled that Miller was responsible for the maintenance of the common properties until dedicated and conveyed to the HOA. J. A. 1163. The court therefore ordered Miller to bring the roads and common areas to the condition which would have existed had they been properly maintained since their construction. The court permitted Miller to use his expert for this purpose and have him certify completion of the work to the court or, alternatively, pay the HOA the costs thereof as had been provided by the HOA's expert witness at trial.

Also based on the clear language of the Declaration, the court likewise ruled that Miller is required to convey the common elements to the HOA. The court therefore ordered Miller to accomplish the dedication of enumerated tracts as depicted on the plats submitted into evidence by the stipulation of the parties. J. A. 1164. In this regard, the court identified the reservations from the conveyance to which Miller was entitled in the deed of

dedication. J. A. 1167-1169. Specifically, the court pointed to Miller's reserved 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,..." quoting deeds in chain of title to Section B and Section D of Patrick Henry Estates. J. A. 1167.

The district court further found that the HOA's request for an injunction to prohibit Miller from using Lot C-1 as a roadway should be granted because it would be impossible to access Sloan Square without crossing the designated "Walking and Buffer Area." The court reasoned that for Miller to utilize the buffer area would require the permission of the HOA. J. A. 1169. The court also found that Miller's "...seasonal brush hogging [of Lot C-1] sporadically performed at the request of the defendant [was] insufficient..." to comply with paragraph 14 of the Declaration requiring that the vegetation on the lots be neatly trimmed. J. A. 1170. Therefore, Miller was ordered to maintain his lot by mowing it with a lawn mower and maintain it to eight (8) inches consistent with the rule and practice required of all lot owners by the HOA. J. A. 1170.

The court found that the HOA had incurred maintenance expenses over the past ten (10) years for which it was entitled to recover. The court found that the HOA proved it had expended the sum of \$51,387.00 for snow removal, fire hydrant repairs, and road repairs during the period. The court found that these expenses were reasonable, were spent on items that were Miller's responsibility, and were required in light of Miller's inaction or refusal to act. J. A. 1171.

Applying the "American Rule," the court denied the HOA's prayer for attorney fees. J. A. 1171.

Accordingly, Miller's counter claim was dismissed, comprised of Counts III, IV, and VI which had survived summary judgment. In Count III, Miller had sought to have the court interpret the Declaration so as to rule that Miller was only responsible for maintenance of the roads if the HOA provided him with the money to do so. In Count IV, Miller had sought to have the court determine that he could use Lot C-1 for access to his proposed Sloan Square development.

Accordingly, Counts III and IV were resolved by the above mentioned adverse rulings. In Count VI, Miller had essentially sought to repudiate the Declaration and to have the court declare the covenants void. However,

since no evidence or argument was made on this point at trial, the district court also dismissed Count VI.

Miller's Statement of the Case contains statements in the nature of argument with which the HOA disagrees prompting a response at this portion of Appellee's Brief.

Miller erroneously states that the district court decision effectively blocked Miller's use of the subdivision's streets and prohibited Miller from developing the two parcels that were once a part of Patrick Henry Estates. Miller's Brief 3. This statement is wrong. Not only did the court permit the residential development of these two parcels, but it permitted Miller to effectively adopt a supplemental declaration with new covenants to include limited commercial uses on these parcels. J. A. 1167. The relevant limitation imposed by the court is that Miller will not be able to convert the main subdivision entry, Patrick Henry Way, into a public highway so that it could be used to access any land, anywhere, by the public at large. J. A. 1168 ¶ C., 1169.<sup>5</sup>

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<sup>5</sup> As is outlined below, not only did Miller seek to expand the Patrick Henry Estates rights of ways into adjacent lands that he owned by running streets through a platted residential lot and dedicated common areas, but he sought to use the main street of the subdivision to connect two main public highways with a short-cut through the development—U.S. Route 340 and Flowing Springs Road, County Route 17.

According to Dr. Miller, his involvement with Patrick Henry Estates dates back to 1977, when he became a co-owner of the Shendo Partnership which acquired the subject real estate. Miller's Brief 3. Miller's ownership coincides with the recordation of the final plats for Sections B and D of Patrick Henry Estates which were approved by the Jefferson County Planning Commission in January of 1977. J. A. 1277, 1279. A master plat of the entire subdivision was filed with the Jefferson County Planning Commission on October 22, 1981. J. A. 1275. Simultaneously, the Declaration of Restrictions and Covenants was recorded in the Jefferson County Commission land books. J. A. 1216-1226.

To the extent that Dr. Miller finds himself now in legal conflict with the Association and legally indebted to it, Miller's problems result from his dogged insistence that he should be able to either interpret the covenants in a way that suits his needs or ignore them. Miller has done a little of both as is reflected in his unabashed testimony during the trial. *See* J. A. 1082-1083, in which Miller testified that the perimeter common areas could not be developed but *see* J. A. 1084, in which he opines that he should be able to do so.

Miller's factual statement begins with the suggestion that, despite his ownership interest in the developer, Shendo, Miller should be viewed as a

mere “investor” in the project. Therefore, apparently concludes Dr. Miller, he was not obligated to know about or abide by the restrictive covenants applicable to Patrick Henry Estates. Dr. Miller seems to believe that, unlike all of the lot owners who purchased in his development, he is exempt from constructive notice of the Declaration and the covenants by virtue of his deed acquisition on December 30, 1986, regardless of any lack of actual knowledge of their existence. J. A. 391-401, 409-417. After pointing to his ignorance of the applicable covenants in his chain of title as part of his weak explanation for violating the covenants, Miller then claims that the Association is to blame for his failure to convey the common areas as required by the Declaration of covenants. First, he asserts that the Association was not formed until 1990. Nonetheless, the minutes of the then very active HOA reflect that Miller interacted with its officers and attended HOA meetings in the years 1987 through 1990. J. A. 426, 1251. Next, Miller asserts that he believed that the HOA might close the streets if he conveyed them to the Association. This disingenuous assertion assumes that Miller would convey exclusive use to the Association and not reserve easements thereon for future conveyances. Accordingly, Miller’s justification for not conveying the common areas in compliance with the governing Declaration collides with his own theory of this case and is

contrary to what the HOA concedes to be the law of nonexclusive easements, binding the parties to the Declaration, which evidences their agreement.

Miller suggests that the HOA and the district court's order prevent him from using the streets of Patrick Henry Estates to access the residue of Patrick Henry Estates (42 acres, inclusive of sections E, F, and G). J. A. 1192. This suggestion is very far from the truth. It is not access to the residue lands of Patrick Henry Estates that formed the basis of the suit and resulting order to which Miller now objects. It is Miller's insistence that he will use the dedicated common areas of Patrick Henry Estates to access lands outside of the development that creates the conflict.

Miller presents his grandiose scheme to develop the 42 acres with the inference that he cannot develop this land at all, unless he is able to turn Patrick Henry Way into a public throughway (for which private lot owners will have to provide maintenance).<sup>6</sup> Consistent with the HOA's position in

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<sup>6</sup> This anomaly in Miller's proposal to the City of Ranson, (sometimes referred to as his "Ranson Proposal") can be said to exist because neither Ranson nor Miller wanted to risk an attempt to annex Patrick Henry Way into the City of Ranson. Even though Miller doggedly has clung to ownership of the fee interest in Patrick Henry Way, to have proposed annexation of Patrick Henry Way, would have provided the residents of Patrick Henry Estates with early notice of Miller's plans (as freeholders entitled to notice of the annexation) and would have drawn substantial opposition to the annexation. What Miller does not disclose, is that he still

the matter, the court order permits Miller to develop the 42 acres using the rights of ways of Patrick Henry Estates. Likewise, nothing in the order precludes Henry from placing the kinds of improvements on the 42 acres which he has described in his scheme. Miller's dissatisfaction with the court order, is that it does not allow him to exploit the existing development's private right of way by converting it to a busy public highway that would bring the public and through traffic to his planned commercial development. Miller wishes to ignore the scheme of development from which he benefitted through the sale of residential lots. He wishes to expand the development's rights of ways to access real estate outside the scope of the platted and planned development.

#### **IV. STATEMENT OF THE FACTS**

Patrick Henry Estates is exclusively a residential development, comprised of 148 single family homes. J. A. 1157 ¶ 7. The residences are characterized by the HOA as modestly priced homes owned by individuals and families with moderate incomes, who range in age from the elderly, to young families with young children. J. A. 1157 ¶ 7. The development is

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has the additional option to develop the 42 acres using the right of way which he lawfully obtained through the adjacent development of Shenandoah Springs. The Shenandoah Springs subdivision is to be accessed by two entrances on Flowing Springs Road. J. A. 982. Perhaps he has chosen not to pursue that option because to do so, would undermine his hardship claims as presented to this Court.

accessed from U. S. Route 340, then over a short roadway that has been accepted into the State Road system known as a portion of Patrick Henry Way, which accesses multiple commercial establishments. J. A. 1157 ¶ 8. The public portion of Patrick Henry Way becomes a private road as it continues into Patrick Henry Estates, running in a northern direction into the development and providing access to lateral streets known as Beauregard Boulevard, Fulton Avenue, Georgia Avenue, and Greene Avenue, running east and west from Patrick Henry Way. J. A. 1157 ¶ 9.

The real estate within the Subdivision was subjected to that certain Declaration of Road Maintenance Covenants and Restrictions dated October 22, 1981, hereinafter referred to as “Declaration,” or “Declaration of Covenants,” which was recorded in the Office of the Clerk of Jefferson County, West Virginia, in Deed Book 541, at Page 241, by the original Developer, Shendo Limited Partnership. J. A. 391-401.

On or about December 30, 1986, Miller acquired 100% ownership of Shendo and Shendo simultaneously transferred title of the then remaining lots into Miller’s name of record. J. A. 1157 ¶ 11.

Miller then proceeded to convey the lots in Patrick Henry Estates to third parties, but retained ownership of the roads and common areas. J. A. 1157. Miller also retained ownership of one lot, Lot C-1, with the

clandestine purpose of using it as an access for a future development on land outside Patrick Henry Estates. It is undisputed that each of the successive sections of Patrick Henry were made subject to the Declaration. Miller's Brief 5.

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. J. A. 1158, 391-401. While it has been Miller's position throughout the history of his ownership of the development that the Declaration makes the HOA responsible for paying him to perform maintenance of the common areas, his position is contrary to the language and intent of the Declaration. J. A. 1158. On at least two occasions, Miller attempted to avoid his responsibility to maintain the streets and common areas by attempting to have the State Highway Department take over road maintenance. J. A. 1158, 1052-1054. Specifically, the Declaration states, in Article VII, 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 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.

J. A. 1158; 391-401.

It was not disputed at trial that the roads are in need of repair. J. A. 1159 ¶ 20.

Miller appears to have suggested, on at least one occasion reflected in the Association minutes dated November 12, 1987, that he would transfer certain recreation areas over to the Association. J. A. 428. However, Miller had also suggested that he may want to convert the use of recreational areas for development purposes. J. A. 1227. At trial, Miller testified that he does not believe he can otherwise develop the platted areas designated for “recreation.” J. A. 1082-1083. However, when asked on cross examination at trial if this rule would not then apply to a tract of land bordering Patrick Henry Estates that is designated on the recorded plat as “Recreational Area,” Miller said that it would not apply there. J. A. 1084.

In 2005, Miller annexed the undeveloped portions of Patrick Henry Estates into the Town of Ranson. Since Miller was the sole freeholder of these lands, the Homeowner Association had no involvement process and was given no notice of the Petition for Annexation.

The historic tensions between Miller and the Association resulted in this litigation after Miller filed an application with the Jefferson County Planning Commission in early 2008 to develop Sloan Square Apartments. The proposed Sloan Square project was to be situate on real estate outside

Patrick Henry Estates, but would be accessed through Patrick Henry Way, Beauregard Avenue, and Lot C-1, which lot Miller says he had always retained with the intention of converting it into a right of way. However, the fact that this intention was not disclosed to the Association until the Sloan Square Apartment application was filed does not appear to be disputed.

The Association has been collecting lot assessments from the owners for a number of years and has expended \$29,490.00 on major road repairs since 2003. J. A. 1368. The most substantial expenditure occurred in the year 2008, after this suit was filed. Prior to the recent work which was undertaken at the intersection of Patrick Henry Way and Beauregard, near the subdivision entrance, the Association gave Miller notice of its intentions and Miller did not object or offer to have the work done himself. *See* J. A. 1400, bank statements of the Association reflecting payment in the total amount of \$21,450.00 to US Paving for 2008 road work. *See* also J. A. 1327, 1331, letters to Dr. Miller giving notice of the Association's intentions. Photographs of this road section prior to Plaintiff's expenditure of \$21,450.00 reflect that the intersection was in a deplorable state of repair and that the work was critical to the welfare of the community. J. A. 1309: B1-B4, C1-C6. Since October 27, 1998, Plaintiff has also expended \$18,675.00 for snow removal, \$2,411.45 for repair and maintenance of street

lights and signage within the subdivision, and \$3,222.00 for water fees incurred incident to maintenance of the fire hydrants located within the development. J. A. 1368.

The circumstances that form a central basis for the dispute between Miller and the HOA are his attempts to expand the roads and common areas of Patrick Henry Estates into outside developments. The HOA's suit against him was initially prompted by his application for a CUP with the Jefferson County Planning Commission wherein he sought to use Lot C-1 of Patrick Henry Estates to access an adjoining proposed apartment complex. Then, after the suit *sub judice* was filed, the HOA discovered that Miller was planning to open up Patrick Henry Way as a public thoroughfare connecting two major highways.<sup>7</sup> Through Dr. Miller's deposition, it was discovered that Miller had acquired an adjoining lot situate in the Town of Ranson and had annexed his undeveloped 42 acres comprising sections E, F, G, and remaining residue of Patrick Henry Estates into Ranson. However, to complete the connection of U. S. Route 340 and Flowing Springs Road as

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<sup>7</sup> To do this Miller had acquired a lot in an adjoining subdivision known as Shenandoah Springs, situate in the Town of Ranson. The HOA concedes that Miller, in purchasing the lot in Shenandoah Springs, had acquired a right, expressly reserved in the Declaration of Shenandoah Springs, to use the Shenandoah Springs lot as access to his 42 acre undeveloped tract. Miller's Shenandoah Springs lot is accessed via Flowing Springs Road situate to the North.

proposed in his subdivision plan with the City of Ranson, Miller would need to use Patrick Henry Way a street which he failed to annex into the Town of Ranson, and which Miller was obligated to convey to the Association.

The HOA substantially disagrees with a number of statements made by Miller as “facts.” The HOA would dispute Miller’s claim that he did not timely dedicate the roads because the HOA threatened to close them.

Miller’s Brief 13, ¶ 18. Miller’s claim is unsupported in the record, saving Miller’s self-serving statement.<sup>8</sup>

The HOA would disagree with Miller’s statement, as fact, that he generally maintained Lot C-1. Miller’s Brief 15, ¶ 23.

The exhibits offered in evidence and the collective testimony of the witnesses, including that of Miller’s witnesses, well establish the fact that Miller’s lack of maintenance on Lot C-1 consisted of “seasonal brush hogging sporadically performed at the request of the defendant.” J. A. 1170.

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<sup>8</sup> In effect, Miller now argues that his reason for not complying with his covenant to convey the roads was his lack of knowledge as to his legal rights. Yet Miller’s reason for not conveying the roads *after* he obtained legal counsel in the county and city planning commission proceedings is more clearly a reflection of his desire to proceed without limitations on his use of the easements before the administrative bodies. Miller’s scheme enjoyed some success with the City of Ranson so as to set him up for his present argument that governmental approval of the expanded use of the easements trumps his lack of legal title and preempts the contract rights vested in the HOA. *See* Miller’s Brief, first argument at pp. 30-37.

It is undisputed that the equipment used by Miller's "maintenance person" was a farm tractor with brush hog attachment, designed for rough brush cutting but not for "neat and trim" maintenance as required by Miller's covenants.

In paragraph 29, page 16 of his Brief, Miller states as fact, that Miller was free to modify the covenants for Lot C-1 when he applied for Jefferson County Planning Commission approval for Sloan Square. Cleverly, Miller quotes the covenants applicable to Section A which permitted changes in the covenants for lands adjacent to Section A. What Miller does not mention in this context, is that the same identical covenants were later applied to Section C which had been fully developed with a recorded plat many years before Miller sought to modify the use of Lot C-1 in violation of the recorded covenants. J. A. 477 and Miller's Brief 16.

Despite Miller's attempt to give the 42 acre residue of Patrick Henry Estates the same treatment as his Sloan Square proposal in paragraph 34 of his Brief (p. 17), the 42 acres were made a part of the original concept plan in a master plat recorded with the Jefferson County Planning Commission. J. A. 474. The 42 acres encompass the undeveloped sections E, F, and G of Patrick Henry Estates. J. A. 474; 1275-1282. Therefore, Miller need not

infer to the Court that his right to extend the streets of Patrick Henry Estates into those sections is, in any way, in dispute.

Miller suggests as fact in paragraph 48, page 21 of his Brief, that he must use Patrick Henry Way in order to be able to develop the 42 acres which he has now annexed into Ranson.<sup>9</sup> However, Shenandoah Springs, with which Miller says he will merge his 42 acres, is already planned for two entrances. J. A. 982.

Miller claims, in paragraph 53, page 22 of his Brief, that the HOA “would not agree to any further development in PHE” and asserts that he wanted to “finish the development.” What the HOA did not agree to was Miller’s overburdening of the existing streets by extending into Sloan Square apartments. J. A. 1075. The HOA was not aware of Miller’s plans in Shenandoah Springs until after the suit was filed and Miller’s deposition was taken. J. A. 1078. The HOA had no reason to object to Miller’s cleaning up and developing the 42 acres and never suggested to Miller that he should not do so.

Miller also erroneously asserts that under current subdivision regulations, the Jefferson County Planning Commission would have required

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<sup>9</sup> In essence, Miller pleads for equitable relief because he claims to have caused himself a self imposed hardship with his annexation of the residue of Patrick Henry Estates.

Miller to have two separate entrances to Patrick Henry Estates in order for Miller to proceed with completion of Sections E, F, and G comprising the 42 acres. Miller claims that his expert, the former Jefferson County Planning Commission director, Paul Raco, had advised Miller that he would have to have an additional entrance to Patrick Henry Estates in order for Miller to develop the 42 acres. *See* Miller's Brief 27, ¶ 79. While irrelevant to the issues before the Court, Miller would apparently again feign hardship as a result of regulatory changes to justify breaching his contractual obligations under the restrictive covenants. However, Miller's ploy lacks factual support and is belied by the Jefferson County Planning Commission's treatment of his Sloan Square proposal. Indeed, in the paragraph following, Miller suggests that Sloan Square (proposed with only the existing Patrick Henry Way as access) would meet county standards. Incredulously, the same expert, Paul Raco, who claimed that Patrick Henry Estates required a second entrance for pre-existing Sections E, F, and G, opined under oath that an entirely new multi-unit development outside the subdivision, Sloan

Square, would meet county standards using only one entrance into the development, Patrick Henry Way.<sup>10</sup> J. A. 1009 and Millers' Brief 4.

Miller's statement of facts contains numerous arguments which are unsupported by the record and are therefore not wholly reliable.

## **V. SUMMARY OF THE ARGUMENT**

The district court committed no error in either its analysis of state law or in applying state law to the Miller's Declaration of covenants. The court merely recognized the validity of the Declaration as established by the developer, Shendo Limited Partnership, with whom Miller had been associated as a partner. The court rejected Miller's disingenuous attempts to undermine, with incompatible development schemes, and invalidate, by counterclaim, the very scheme of development in which Miller had invested and which Miller used in the sale of lots. The district court enforced the contract that Miller made with the lot owners and their HOA requiring him to dedicate and convey the common areas to the HOA. It enforced Miller's common area maintenance obligations by awarding the HOA equitable

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<sup>10</sup> Raco's testimony pertaining to Lot C-1 was essentially deemed irrelevant to the proceedings. J. A. 996, 1008, 1012. For this reason Plaintiff did not call a rebuttal expert. Raco also concealed that the two entrance requirement was not a "hard rule." J. A. 1018-1019. The C-1 and Beauregard entrances into Sloan Square were to be fed by the single Patrick Henry Way access. See plat on p. 4, Miller's Brief.

reimbursement of HOA maintenance expenses incurred prior to dedication of the common areas. Finally, the court correctly precluded Miller from overburdening the roads and common areas. In this regard, the court declined to permit Miller to convert the main street of Patrick Henry Estates into a public highway, connecting two major highways. It also correctly enjoined Miller from converting a residential lot and adjoining common buffer area into a road to access a new proposed development situate outside Patrick Henry Estates.

#### **IV. ARGUMENT**

The HOA does not disagree with Miller's statement as to the Standard of Review on this appeal as it relates to the issues.

##### **Introduction.**

At the center of Miller's appeal lies the expansion of reserved easements through Patrick Henry Estates. Two aspects of easement expansion were addressed in the district court. First, Miller seeks to expand the reservation of easements geographically into other lands. Under West Virginia's clearly established common law, the court correctly ruled that Miller could not expand the easements to reach land later acquired by Miller. J. A. 1168-1169. Second, Miller seeks to expand the nature of the use of the easements beyond the use for which they were reserved to Miller in the

Declaration of Covenants. Again, based on West Virginia's well established common law, the Court correctly ruled that Miller's use of the easements is limited to that contemplated by the covenants in which the easements were reserved. J. A. 1168, 1169. Miller's argument on the easement expansion question embodies issues numbered as 1, 2, and 3 spanning pages 30 through 48 of his Brief. Miller's remaining grounds for appeal relate to Miller's refusal abide by the restrictive covenants and to convey the common areas to the HOA while maintaining them prior to conveyance.<sup>11</sup>

Miller's creative attempts to complicate the easement expansion issue with extraneous deliberation over the effects of annexation and planning commission proceedings are addressed later in this Response. However, the HOA would first address the heart of the issue at hand—"does Miller propose to unlawfully expand his reserved easements?" Miller's arguments in regard to maintenance and conveyance of the common areas will be addressed in

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<sup>11</sup> As is seen below, on the expansion of the easement question, Miller believes the covenants should be strictly construed. On this question, Miller advocates a departure from well established common law requiring consideration of the intended purposes of the covenants in which the easements are reserved. On the maintenance and conveyance of the common areas question, Miller seems to believe that the plain language of the covenants should be ignored in favor of his personal beliefs as to their intent.

the order that he assigns to them at the end of his Brief as his issues 4 and 5 on pages 49 through 58.

A.) **Miller proposes to unlawfully expand his reserved easements and the court ordered Injunction is therefore appropriate.**

1.) **Expansion of the Reserved Easement Geographically.**

Miller seeks to utilize his reserved easement over Patrick Henry Way to provide a second access to a recently acquired lot in an adjoining subdivision, Shenandoah Springs, and beyond. J. A. 1169 and Miller's Brief 19, 21. Instead of terminating at the boundary line of his undeveloped lands comprising Sections E, F, G, and the remaining balance of 42 acres, Miller seeks to extend Patrick Henry Way into what would be the public streets of Ranson, W. Va., connecting two public highways – (herein referred to as Miller's "Ranson Proposal"). J. A. 1169, 1437. This aspect of the case is perhaps the easiest to resolve. Miller's reserved easements are not personal to him, but were acquired as the dominant owner from Shendo, his predecessor in interest who reserved them when the lots adjoining Miller's residue parcel were conveyed out and developed. *See* deed from Shendo to Everhart referred to by court, J. A. 1167. Therefore, the easements' use must be confined to Patrick Henry Estates, to which they are appurtenant. *See Springer v. McIntire*, 9 W. Va. 196, 1876 W. Va. LEXIS 22, *see Shaver*

*v. Edgell*, 48 W. Va. 502, 37 S.E. 664, 1900 W. Va. LEXIS 81, and *see Dorsey, et al. v. Dorsey, et al.*, 109 W. Va. 111, 153 S.E. 146, 1930 W. Va. LEXIS 25, all cited by the court. As in *Springer*,

[H]e cannot claim the right to increase this burden or charge upon these servient lots or subdivisions, which was made for the benefit of one, so as to increase them by serving another lot or subdivision. On this proposition, there is a concurrence and agreement in the authorities, to a uniformity that is seldom met with, in difficult legal questions.” *Id.*, p. 203.

Therefore, Miller’s “Ranson proposal” is clearly an impermissible geographic expansion of his reserved right of way over Patrick Henry Way. However, Miller threatens even greater violence against West Virginia’s common law on the expansion of private easements. While complaining that the court’s order will effect a taking of his residual real estate by the City of Ranson, Miller effectively seeks a private condemnation of the HOA’s right of way over Patrick Henry Way by converting it to a public highway. As it has been held in *Shaver*, “[t]he most serious burden to which a man’s ownership of land can be subjected is that of a public highway.” J. A. 1166.

2.) **Expansion of the Nature of Use of the Easement.**

Miller also complains because the court found that the nature of Miller’s use of Patrick Henry Way leading into the residue of the land which

it was designed to serve, is limited by the instrument permitting its expansion. While the court ruled that he may use Patrick Henry Way for “limited commercial purposes” the court’s order provides that Miller will become liable for the maintenance and repair of the whole of Patrick Henry Way once commercial development is begun. J. A. 1167. The court also determined that from the concept drawing that Greene Avenue and Beauregard Boulevard “...are side streets which exist to access single family homes” and therefore 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.”

J. A. 1168.

The parties agree that the proper starting point for analyzing the scope or nature of use of the reserved easement, is the instrument creating it. In analyzing Miller’s claim to a reserved easement over Patrick Henry Way to serve the residue of his lands, the court looked at the deed of conveyance from which the easement was reserved. J. A. 1167. Embodied therein is the very language by which Miller claims the right to modify the covenants for his 42 acres of residue land. As emphasized by the court, the right to modify the covenants applicable to the 42 acres is not unlimited but restricted to

“...purposes conducive to the convenience, health and general welfare of the lot owners within the Patrick Henry Estates Subdivision....” J. A. 1167. It has already been established in the above section that Patrick Henry Way cannot extend beyond the land to which it is appurtenant consisting of 42 acres. Accordingly, Miller can hardly claim that he may expand the nature of the use of Patrick Henry Way beyond the uses permitted on the 42 acres it will serve. As indicated above and noted by the court, a scheme of development applicable to the 42 acre residue parcel appears of record along with the covenants applicable to the developed lots.

Therefore, the nature of the use to which Miller may put the reserved easements in our case is defined by the law of restrictive covenants, not the rules otherwise governing easements as suggested by Miller. Contrary to Miller’s suggestion, the district court was required to look at the entire instrument and surrounding circumstances to ascertain the intent of the instrument.

The fundamental rule in construing covenants and restrictive agreement 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. The rule that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of property should not be applied in such a way as to defeat

the plain and obvious purposes of the contractual instrument or restrictions.

*See Wallace v. St. Clair*, 127 S.E.2d 742, 751-752, 1962 W. Va. LEXIS 32.

The district court's analysis applied the principle that, "...although restrictive covenants must be strictly construed, they cover things forbidden by necessary implication, just as they cover things named with unmistakable exactness." *Id.* 127 S.E.2d 750, 751; quoting 26 C.J.S. Deeds, Section 163 p. 1102.

Given the required analysis under the facts before the court, it cannot properly be said that the trial court abused its discretion. The four sections of Patrick Henry Estates thus far developed are exclusively residential. Miller has agreed that the Declaration of Covenants applicable to Section A, was made applicable to Sections B, C, and D. Miller's Brief 5. Future modifications of the covenants may be made for future sections, but only in the context that the uses will be conducive to the "convenience, health, and general welfare" of the 148 lot owners within the exclusively residential neighborhood that Miller and his predecessor developer have created.

3.) **The Injunctive Relief Is Proper.**

As the court noted, "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." *See J. A.* 1163,

quoting *Sams v. Goff*, 540 S.E.2d 532, 534, 1999 W. Va. LEXIS 146. In the case *sub judice*, the HOA clearly lacks a remedy at law. The real estate rights at stake are unique and are entitled to protection. The court has also fashioned the injunctive relief “coextensive with the terms of the contract.” The injunction is specifically tailored to the contractual intent per the applicable common law prohibiting Miller from expanding Patrick Henry Way beyond the parcel to which it is appurtenant. The use restrictions on the easements, which have been identified by the court, are specifically connected with the intention of the covenants “gathered from the entire instrument by which the restriction [was] created, the surrounding circumstances and the objects which the covenant is designed to accomplish.” See *Wallace v. St. Clair*, 127 S.E.2d 742, 752, 1962 W. Va. LEXIS 32.

B.) **Municipal annexation of real estate by a municipality will not invalidate lawful restrictive covenants.**

The annexation of Miller’s undeveloped sections E, F, G, and the residue of Patrick Henry Estates did not modify or invalidate the Declaration of covenants applicable to the development and therefore the district court correctly applied state law in enforcing the Declaration.

The fallacy of Miller’s appeal is no more dramatically illustrated than in his initial argument on page 30 of his Brief. Miller proposes, without any

supporting legal authority, the proposition that a municipal planning commission's approval of a development invalidates and preempts any conflicting restrictive covenants otherwise applicable to the development. The common law of the State of West Virginia runs decidedly contrary to such a proposition since restrictive covenants constitute reciprocal easements, enforceable as any other valid contractual relationship. *See Wallace v. St. Clair*, 127 S.E.2d 742, 750.

It is undisputed that the HOA was given no notice of Miller's annexation of his undeveloped 42 acres. Had Miller chosen to proceed with annexation of the street necessary to complete his new open development scheme, Patrick Henry Way, notice to the HOA and the existing lot owners as freeholders would have been required. J. A. 850. Under those circumstances, Miller would not have been able to now suggest to this Court that no one appeared in opposition to his annexation petition. Miller's Brief 12.

Having established that he has annexed his 42 acres into Ranson, Miller surreptitiously characterizes the district court as having ruled that "Miller cannot connect his undeveloped property (now lying totally with Ranson) to the Ranson city streets." Miller's Brief 32. What the court ruled, as accurately quoted but mischaracterized in Miller's Brief, is that Miller

may not utilize Patrick Henry Way to access property *in addition to* the residual portion of Patrick Henry Estates. Miller's Brief 32. Under the court's order, Miller is free to access his undeveloped property from Ranson streets and he is free to use it for any purpose. Likewise, if Miller does not intend to "access" his recently acquired Shenandoah Springs lot and the roads in Shenandoah Springs from Patrick Henry Way, then he can easily comply with court's order. Miller need only terminate Patrick Henry Way within the confines of his 42 acres with no connection to the lands outside and he will be in full compliance.

Miller crudely mixes the vested property rights relating to his development approval by the Town of Ranson under West Virginia Code Sections 8A-5-12(F) and 8A-1-2(V) with the preexisting self imposed limitations on those rights as dictated by his Declaration. The cited code provision merely protects Miller from subsequent changes in Ranson's ordinance if his development proceeds in reliance on Ranson's approval. The planning and zoning statute has nothing to say about Miller's private contracts with lot owners. Miller's common law contractual obligations are not pre-empted by "side agreements" which may have been made with the Town of Ranson. *See Wallace v. St. Clair, supra.*

Miller was satisfied to have the lot owners in his development purchase in reliance on his scheme for a quiet, closed, dominantly residential community. However, now that he has sold all the platted lots, Miller finds no impropriety in his suggestion that by simply annexing the undeveloped portion of Patrick Henry Estates into a municipality, he should be permitted to overburden the existing common areas and convert the main right of way into a public highway.<sup>12</sup>

- C.) **The district court correctly held that Miller's right to reserve easements over the existing roads neither permits him to expand his use beyond the scope originally intended nor overburden the existing co-tenants with maintenance expenses and upkeep without contribution from third party users.**

Having suggested early in his Brief that the court precluded Miller from accessing the 42 acres from the existing streets (p. 9), Miller subsequently retreats from this argument clarifying that the court simply enforced restrictions on Miller's easement reservations that are not to Miller's liking. Miller's Brief 38. Miller then suggests that the court should not have enforced the HOA's property rights, limiting his use of its roads,

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<sup>12</sup> Since the HOA is the rightful owner of the roads in Patrick Henry Estates, what Miller seeks to accomplish includes an unconstitutional private condemnation of private land for a public purpose. As Miller points out, the City of Ranson would ultimately obtain a completed street, improved to its specifications, at no cost.

because the court's order will leave his 42 acres not develop-able under Ranson's ordinances. Miller's blended "self imposed hardship-takings argument"<sup>13</sup> is both irrelevant to this suit<sup>14</sup> and not well grounded in fact. Miller does not demonstrate that his 42 acres cannot be presently developed without the use of Patrick Henry Way. It is submitted that Miller's hardship assertion is merely reflective of his intransigence. Stubborn on the point that he should be able to use the easements any way he chooses, Miller refuses to explore his options as limited by the existing contract made with the HOA and the lot owners of Patrick Henry Estates.

In his Statement of Facts, Miller makes the same fictive hardship argument in regard to his 42 acres when under the jurisdiction of Jefferson County and prior to Miller's annexing it into Ranson. Miller claims that Jefferson County would have required two separate highway entrances to the 42 acres. Miller's Brief 27, 52. Therefore, suggests Miller, he annexed the 42 acres into Ranson with a plan to use the adjoining Shenandoah Springs

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<sup>13</sup> If Miller has committed Patrick Henry Way to a use not permitted by its rightful owner, the HOA, and thus bound up the residue of his real estate in performance obligations made to the City of Ranson which he cannot keep, Miller has only himself to blame.

<sup>14</sup> With the same breath Miller argues that the unambiguous language of the Declaration is controlling and therefore extrinsic facts are irrelevant to the inquiry citing *Farley v. Farley*, 600 S.E.2d 177 (W. Va. 2004). Miller Brief 39.

access as his second highway entrance. However, at best, Miller's claim that Jefferson County would have required two highway entrances for the build-out of his pre-existing development is imaginary. While affording him a convenient argument, Miller has not shown that Jefferson County would have required two entrances to the 42 acres. In fact Jefferson County did not even require two entrances for Miller's Sloan Square proposal located outside Patrick Henry Estates.<sup>15</sup> What Miller does not disclose in regard to his current Ranson proposal is that the adjoining development that he plans to utilize for access to the 42 acres, Shenandoah Springs Subdivision, is to be accessed by two entrances as required by Ranson. J. A. 982.

Ironically, in Miller's more direct attempt to address the question of scope of the easement, Miller's extrinsic evidence is rendered irrelevant. Here, Miller suggests that the court's inquiry should have been limited to the instrument itself. Miller's Brief 37-42. Miller would have the trial court ignore the mandated inquiry in which the intention is to be "gathered from

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<sup>15</sup> The facts do not bear out Miller's "factual claim," that Jefferson County would have required two highway entrances in order for him to develop the 42 acres. Just prior to the filing of this suit the Jefferson County Planning Commission had reviewed Miller's Sloan Square Community Impact Statement ("CIS") proposed with the singular Patrick Henry Way highway access. The single highway access is not even mentioned in the county's treatment of Miller's CIS indicating that this particular component of the application was consistent with the ordinance.

the entire instrument by which the restriction [was] created, the surrounding circumstances and the objects which the covenant is designed to accomplish.” See *Wallace v. St. Clair*, 127 S.E.2d 742, 752. Miller points to the Declaration of Covenants for his source of the reserved easements, but ignores all limitations therein imposed on his reserved easements. Miller’s Brief 40. As has been Miller’s historical pattern leading to this conflict, Miller finds it appropriate to only consider those portions of the Declaration which are to his liking on a particular point and disregards the rest. If pressed on the issue, surely even Miller will have to agree that some limitations on his reserved easements exist by virtue of the scheme of exclusively residential development comprised of 148 lots surrounding the easements and created in the same instrument by which he claims his reserved easement.

While ignoring the law applicable to the instrument in question, Miller cites a number of right of way cases all clearly off the point and distinguishable. The cited case of *Farley v. Farley*, 215 W. Va. 465, 600 S.E.2d 177, 2004 W. Va. LEXIS 42, is a *per curiam* opinion involving a simple grant of a 50 foot easement without any appending use covenants. The dominant estate was a part of the land for which the 50 foot easement was reserved and therefore the owners of the easement had the right to

improve it from eight feet to 18 feet within the 50 foot easement to access 16 townhouses.<sup>16</sup> The cited case, *Semler v. Hartley*, 184 W. Va. 24, 399 S.E.2d 54, 1990 W. Va. LEXIS 183, involved an issue over the width of a right of way. The trial court ruling was reversed because, without justification, it had reformed a clearly delineated 30 foot right of way and permitted the servient estate to reduce the effective width at the entrance to 11 ½ feet. Miller cites *Jenkins v. Johnson*, 181 W. Va. 281, 382 S.E.2d 334, 1989 W. Va. LEXIS 103, which also involved the width of a right of way. The express grant in *Jenkins* did not contain a meets and bounds description and the width was therefore fixed by the court at its existing width. The issue was whether or not the matter should be reopened under Rule 60(b) based on a change in circumstances.

The court in *Collins v. Degler*, 74 W. Va. 455, 82 S.E. 265, 1914 W. Va. LEXIS 147, was asked to interpret the words “free right of way” in the context of a claim that the easement could not be obstructed by a gate. The West Virginia Supreme Court, in the *Collins* case, undertook a deliberation over “the terms of the grant, the purposes for which it was made, the nature

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<sup>16</sup> Given Miller’s reliance on *Farley*, one wonders why Miller found it necessary to digress into such plethora of extrinsic evidence about his defeated “Ranson Proposal” before mentioning *Farley*. One is also left to wonder, if Miller really believes that his reserved easement rights are to be unfettered, why did he not long ago convey the easements to the HOA?

and situation of the property,...” *Collins* simply demonstrates that, where the language of the easement is ambiguous, the court will apply essentially the same analysis as in the case of restrictive covenants. Miller also cites *Cotiga Development Company v. United Fuel Gas Company*, 147 W. Va. 484, 128 S.E.2d 626, 1962 W. Va. LEXIS 41, which involved construction of a lease instrument and is hardly helpful. Finally, included in his string of citations pertaining to contract construction, Miller cites *Sally-Mike Properties v. Yokum*, 175 W. Va. 296, 332 S.E.2d 597, 1985 W. Va. LEXIS 597, which involved plain language in a deed reserving a burial ground from the conveyance.

In stressing his claim that no restriction is contained in his easement reservation, Miller mistakenly cites and quotes *Teays Farm Owners Association, Inc. v. Cottrill, et al.*, 188 W. Va. 555, 425 S.E.2d 231, 1992 W. Va. LEXIS 256, which gives support to the district court’s decision. *See* Miller’s Brief, footnote 12, p. 41. In *Teays*, the restrictive covenants did not address the residue land from the subject development. Therefore, unlike the language *sub judice*, expressly limiting covenant changes for future sections, the covenants did not apply to the residue in *Teays*. However, in quoting from the case, Miller has overlooked a significant aspect of the ruling. Citing the cases relied upon by the court *sub judice*, *Wallace v. St.*

*Clair*, 127 S.E. 2d 742, 751-752, 1962 W. Va. LEXIS 32, and *Allemong v. Frendzel*, 178 W. Va. 601, 363 S.E.2d 487, 1987 W. Va. LEXIS 641, the West Virginia Supreme Court in *Teays* nonetheless held that “[w]hen all tangible indicia of the legal status of property and the application of restrictive covenants fail to provide a resolution, attention must be shifted to the original intention of the parties.” Therefore, while the Court permitted the use of the residue property as intended, as a stable area, it expressly held that “...its status as a part of the subdivision prevents unrestricted usage by the [owners].” *Ibid.*, 425 S.E.2d 231, 235. Contrary to Miller’s “unlimited uses” theory, which also ignores the express compatibility language incorporated in the Shendo deed of conveyance, (*see* J. A. 1167), the Court specifically took note of the “pleasant residential community” with which the use of the residual parcel would have to be compatible. 425 S.E.2d 231, 235.

Miller also makes reference to *Davis v. Jefferson County Telephone Company*, 82 W. Va. 357, 95 S.E. 1042, 1918 W. Va. LEXIS 95, to support his strict construction theory. Miller’s Brief 45. *Davis* is factually distinguishable because the reserved easement was an easement “...through and over said land for all purposes to the Winchester and Charles Town

road....” 95 S.E. 1042, 1043. Unlike the case *sub judice*, no restrictive covenants were attached to the land.

The HOA agrees with Miller that *G Corp. Inc. v. MackJo*, 195 W. Va. 752, 466 S.E.2d 820, 1995 W. Va. LEXIS 259 (unpublished opinion) may be instructive. It is the only case cited by Miller that, like the case *sub judice*, involves an easement reservation embodied within the language of restrictive covenants. It is, accordingly, the only case cited by Miller in which the court undertook an analysis of an easement’s scope applying the interpretative rules of *Wallace v. St. Clair, supra*. See *G Corp* Sylb. Point 3 and 466 S.E.2d 825. However, in *G Corp.*, no limiting language such as that contained in the Shendo deed to Miller existed. In issue was the developer’s desire to use the rights of ways in an industrial development to access a residential development. In *G Corp.*, the Declaration simply provided that it was contemplated the owner-developer ““will develop tracts adjacent and neighboring to Childress Place and, most likely, will utilize the entrance, roads and streets of Childress Place in such development and use thereof.”” 466 S.E.2d 825.

D.) **The district court did not err in finding that Miller does not have the right to violate his own development's restrictive covenants by converting a residential lot to a commercial use as a roadway and using common area property to expand the development outside its platted boundaries.**

Miller agrees that Lot C-1 may only be used for “residential purposes” under the restrictive covenants. A residential use covenant is generally construed as most restrictive, limiting the use to a lot on which to live and the uses directly related thereto. *See Kessler v. Stough*, 361 So.2d 1048, 1978 Ala. LEXIS 1928. Miller has not appealed or contested the court’s requirement that he convey the buffer area behind Lot C-1 to the Association as a part of the common area to which the HOA is entitled.

Yet Miller launches into his attempted justification for wanting to convert Lot C-1 to a roadway with the unsupported assertion that because the traffic and utilities running through the lot will reach residences on the other end, the use will be residential. No authority is offered for such a proposition.

Next, Miller fictitiously suggests that the Declaration contains express language permitting Miller to change the covenants on existing lots that have already been conveyed subject to the residential only covenants. Bordering on fraud upon the reader, Miller quotes but a portion of the Declaration:

The Developers also reserve and retain the right to change and modify restrictive covenants and

conditions on any lot or lots shown on any existing or further plat of the said Patrick Henry Estates.  
J. A. 30.

Omitted from the quotation is the operative condition precluding Miller from changing the “residential only” covenant for Lot C-1 which was made subject to the covenants by the recording of the plat for Section C-1.

The Patrick Henry Estates, which is being developed in stages may be enlarged or diminished, 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, which have not been developed prior to the date hereof and for which no plat has been made part of the public record prior to the date hereof. J. A. 29-30.

Upon recordation of the plat for Lot C-1, the expectations of purchasers in that section became fixed and the covenants do not permit modification. Finally, having argued at length that the court should not look beyond a selected portion of the documents and strictly construe them, Miller disingenuously injects into the equation his secret intention to use Lot C-1 as an access instead of a residual lot.

- E.) **The district court did not err in granting the HOA damages corresponding to Miller’s breach of his obligations of common area maintenance and upkeep as set forth in his development’s restrictive covenants nor abuse its discretion in awarding injunctive relief.**

The court awarded damages for Miller’s past breach of the contract to maintain the common areas. The court awarded a permanent injunction to require Miller to convey the common areas to the HOA in accord with the contract and abide by the contractual limitations on his future exercise of his easement rights. The HOA will respond to Argument paragraph “5” of Miller’s Brief in the same order presented, commencing first with Miller’s assertion that the injunctive relief awarded constitutes an abuse of the court’s discretion.

- 1.) **The district court did not abuse its discretion when it issued a permanent injunction along with damages.**

It is unclear how Miller makes the connection between the award of damages for past contract breaches and an injunction to prohibit future contractual breaches so as to conclude that both should not have been granted. However, Miller identifies three components in his complaint over the injunctive relief. Miller’s Brief 51. The HOA will first address the court’s grounds for determining that relief should be granted as to each of the three areas. Then, the scope of the injunction will be reviewed.

First, Miller reiterates his fictitious claim that the injunction prohibiting Miller from extending Patrick Henry Way to reach his adjoining lot in Shenandoah Springs and the Ranson City streets and adjoining highways will preclude any development of the 42 acres. To the extent that Miller rehashes his misguided factual basis for assigning this error, the HOA submits that Miller's claimed hardship over the "Ranson Proposal" is a "dead horse" and does not merit further discussion. Second, Miller complains that the injunction prohibited him from using the residential streets Beauregard Boulevard and Greene Avenue to access commercial development on his 42 acres. This component of the injunction was expressly grounded in the court's factual finding that the two streets "...were side streets which exist to access single-family homes." J. A. 1168. Miller does not contest the court's factual finding and therefore it is presumed to be correct. Finally Miller asserts that the prohibition against converting the residential Lot C-1 into a right of way lot constituted an abuse of discretion. It is respectfully suggested that factual and legal grounds for relief on this component of the injunction have also been adequately addressed above.<sup>17</sup>

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<sup>17</sup> Miller's argument for a right of way over Lot C-1 is devoid of merit. It is based on his professed state of mind rather than the legal documents upon which Miller professes to rest his case.

Having thus established that the HOA is entitled to relief, the question of whether the injunctive relief is appropriate remains.

Although Miller cites case law to support a suggestion that the injunctive relief was too broadly framed, he offers no suggestion as to how it may have been more properly limited. Instead, Miller merely reiterates his fictitious claim that the adjoining properties will be left un-develop-able. As is pointed out in Argument Section A, *supra*, the Court carefully tailored the injunctive relief to fit the reserved easement, gathered from the entire instrument by which it was created, which contains limiting language as to Miller's right to amend the recorded covenants.

- 2.) **The district court did not err in awarding damages to the HOA for its past maintenance expenses incurred as a result of Miller's breach of the covenant to maintain the streets while requiring Miller to make current repairs to bring the streets to the condition they would have been had they been properly maintained since their construction.**

The irony of Miller's damages argument in Subsection (b) is delightful when taken with his argument in the succeeding Subsection (c). Miller's Brief 55, 56. On one hand, Miller claims that the Association should not be reimbursed for attempting to maintain the streets, which mitigated against deterioration. In the next breath, Miller complains that the HOA failed to mitigate its damages.

Apparently, Miller now concedes that the conveyance of the roads was required by the covenants. Miller complains only of the damages he must pay incident to the conveyance with which he agrees.<sup>18</sup> The court correctly found that the HOA had been damaged in two ways by Miller's breach of the covenant to maintain the roads until conveyance to the HOA. First, the HOA was improperly put to the expense of trying to maintain the roads during the time when Miller was obligated to maintain them. Had it not done so, the roads would have become impassible and, undoubtedly, Miller would now assert that the HOA had failed to mitigate its damages. Secondly, in the absence of necessary repairs to bring the roads up to the condition in which they should have been if properly maintained, Miller will not have complied with the Declaration when he conveys the roads. Rather than contest the need to bring the roads up to standard, Miller presented an expert to testify as to the cost of so doing. His expert's cost estimate very nearly matched that of the HOA's expert. J. A. 969, L4; J. A. 838. The court gave Miller the option of bringing the roads up to the required condition (which he may undertake incident to the development of his 42

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<sup>18</sup> In Miller's appeal, we find no contest of the injunction requiring conveyance of the common areas.

acres if he so chooses), or he may pay the HOA to accomplish the work.

Therefore, the court committed no abuse of discretion.

- 3.) **The HOA was not required, under a duty to mitigate damages, to facilitate Miller's abrogation of his responsibility for maintenance of the roads by conveyance to the West Virginia State Highway Department.**

Miller concludes his Brief with the suggestion that the HOA was legally required to participate in Miller's scheme to avoid his responsibility for maintaining the roads in Patrick Henry Estates by conveying them to the State of West Virginia. Miller cannot deny that 100% participation of all lot owners was required for the undertaking under the "orphan roads program," a practical impossibility. *See* W. Va. Code § 17-2C-2. The HOA had absolutely no duty to support Miller's ploy and every right to oppose it including a petition against it to the State Highway Department if it so chose. *See IGEN Int'l, Inc. v. Roche Diagnostics FmbH*, 335 F.3d 303, 310 (4th Cir. 2003).

Miller cites two cases, neither of which support his contention. The first case, *Stone v. United Fuel Gas Company*, 111 W. Va. 569, 163 S.E. 48, 1932 W. Va. LEXIS 43, involved a breach by a gas company of a term in Plaintiffs' lease by which Plaintiff was to receive free gas. The gas company was ordered to provide Stone with free gas but then failed to

comply with the Court's order. Plaintiff then used wood to heat his house, his house burned down and then he sued for loss of his house and the expense of using wood for fuel. The gas company claimed that Stone should have mitigated his damages by purchasing gas from it instead of buying wood. The court rejected the gas company's argument but instead found that Stone should have come back to court to enforce the injunction. The Supreme Court's decision therefore limited Stone's damages to the value of the gas that he should have received. Unlike Miller's mitigation claim *sub judice*, the defendant in *Stone* did not claim that Miller failed to mitigate damages because he did not give his property away to the State of West Virginia and the Court did not so find.

The second case cited by Miller, *Chesser v. Hathaway and Kingsville Wood Products, Inc.*, 190 W. Va. 594, 439 S.E.2d 459, 1993 W. Va. LEXIS 203, involved facts closer to those at bar and a ruling that supports the HOA's position. In *Chesser*, Plaintiffs' property was erroneously timbered by the Defendants who had not been given permission. The case went to trial under the applicable statute (W. Va. Code § 61-3-48) which provides for treble damages to an owner whose property is entered without permission and the timber is cut or removed. The Court in *Chesser* found that the Plaintiffs had not failed to mitigate their damages by failing to allow the

defendant to remove the cut timber and place the proceeds of the sale in escrow. The Court in *Chesser* effectively found that Plaintiffs were not required to sell property otherwise rendered useless by the trespassing defendants. *Chesser* is hardly supportive of Miller's claim that the HOA should have given its property away to the State or induced the lot owners to do so in order to mitigate damages.

## **VII. CONCLUSION**

The decision of the district court for the Northern District of West Virginia should be affirmed.

Respectfully Submitted,

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Dated: September 19, 2011

/s/ Braun A. Hamstead  
*Counsel for Appellee*

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 19th day of September, 2011, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 19th day of September, 2011, I caused the required number of bound copies of the Brief of Appellee to be hand-filed with the Clerk of the Court.

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