RECORD NO. 11-1279

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 APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-1279 Caption: Dr. Gerald Miller v. Patrick Henry Estates Homeowner's Assoc.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Dr. Gerald Miller who is appellant, 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

****

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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Richard D. Day
(signature)

April 4, 2011
(date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION 1

A. Basis for District Court Jurisdiction 1

B. Basis for Court of Appeals Jurisdiction 1

C. Filing Dates Establishing Timeliness of Appeal 1

D. The Appeal is from a Final Order 2

II. STATEMENT OF THE ISSUES 2

III. STATEMENT OF THE CASE 2

IV. STATEMENT OF THE FACTS 10

V. SUMMARY OF THE ARGUMENT 28

VI. ARGUMENT 29

A. Standard of Review 29

1. Standard of Review as to Bench Trials 29

2. Standard of Review as to Injunctions 29

B. Discussion of the Issues 30

1. The Court Failed To Recognize The Validity Of The Ranson Annexation Order And Thereby Failed To Apply The Substantive Law Of The Forum State, West Virginia 30

a) The City of Ranson has Annexed Miller's Undeveloped Property into the City Limits 30

b) The District Court Ignored the Annexation Order and Thereby Usurped the Plenary Power of the City of Ranson 32

2. The Court Wrongly Construed The PHE Documents That Allow Miller To Reserve Easements When He Conveys The Streets To The HOA 37

3. Using The Easement For The Purpose For Which It Was Intended Is Not Overburdening The Easement.........................44

4. The District Court Erred When It Concluded That Lot C-1 May Not Be Used As An Access Point To Reach The Sloan Square Residential Apartments......................................48

5. The District Court Erred In Its Rulings Concerning Damages...49

a) The District Court abused its discretion when it issued a permanent injunction along with damages 49

b) The District Court erred in awarding damages to the HOA for repair of the streets and at the same time requiring the streets to be reconstructed.................55

c) The District Court should have precluded the Association's damages because of the Association's failure to mitigate damages.......................56

VII. CONCLUSION...59

VIII. REQUEST FOR ORAL ARGUMENT..59

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Ashbaugh v. The Corporation of Bolivar,
223 W. Va. 741, 679 S.E.2d 573 (2009) 36, 37

Chafin v. Gay Coal & Coke Co.,
109 W. Va. 453, 156 S.E. 47 (1930) 54, 55

Chesser by Hadley v. Hathaway,
190 W. Va. 594, 439 S.E.2d 459 (W. Va. 1993)....................57, 58

Collins v. Degler,
74 W. Va. 455, 82 S.E. 265 (1914) 39

Cotiga Development Co. v. United Fuel Gas Co.,
147 W. Va. 484, 128 S.E.2d 626 (1962) 39

Davis v. Jefferson County Tel. Co.,
82 W. Va. 357, 95 S.E. 1042 (W. Va. 1918)....................45

Dorsey v. Dorsey,
109 W. Va. 111, 153 S.E. 146 (W. Va. 1930).................... 43-44

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388, 126 S. Ct. 1837 (2006) 50

Farley v. Farley,
215 W. Va. 465, 600 S.E.2d 177 (W. Va. 2004)....................39

Foster v. Orchard Development Co., LLC,
227 W. Va. 119, 705 S.E.2d 816 (2010) 48

G Corp, Inc. v. MackJo,
195 W. Va. 752, 466 S.E.2d 820 (W. Va. 1995)....................45, 46, 47

Hoffman v. Smith,
172 W. Va. 698, 310 S.E.2d 216 (1983) 39

In re the City of Beckley to Annex, by Minor Boundary Adjustment, West Virginia Route 3 Right-of-Way Beginning at the Present Corporate Limits,
194 W. Va. 423, 460 S.E.2d 669 (1995) 31

Jenkins v. Johnson,
181 W. Va. 281, 382 S.E.2d 334 (1989) 39

Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.,
43 F.3d 922 (4th Cir. 1995) 30

National Lead Company v. Kanahwa Block Company,
288 F. Supp. 357 (S.D. W. Va. 1968) 52, 53, 54

O'Dell v. Town of Gauley Bridge,
188 W. Va. 596, 425 S.E.2d 551 (W. Va. 1992)..31

PBM Products, LLC v. Mead Johnson & Co.,
639 F.3d 111 (4th Cir. 2011) 50, 51, 52

Perez v. Mountaire Farms, Inc.,
No. 09-1917 (4th Cir. Jun. 7, 2011) 29

Ratcliff v. Cyrus,
209 W. Va. 166, 544 S.E.2d 93 (W. Va. 2001)..43

Sally-Mike Properties v. Yokum,
175 W. Va. 296, 332 S.E.2d 597 (1985) 39

Semler v. Hartley,
184 W. Va. 24, 399 S.E.2d 54 (1990) 39

Shaver v. Edgell,
48 W. Va. 502, 37 S.E. 664 (W. Va. 1900)..43

Shock v. Holt Lumber Co.,
107 W. Va. 259, 148 S.E. 73 (W. Va. 1929)..43

Singer v. Davenport,
164 W. Va. 665, 264 S.E.2d 637 (1980) 24, 25

Springer v. McIntire,
9 W. Va. 196, 1876 WL 3787 (W. Va. 1876) 44

State of West Virginia ex rel. City of Charles Town v. County Commission of Jefferson County, et al.,
221 W. Va. 317, 655 S.E.2d 63 (2007) 35

Stone v. United Fuel Gas Co.,
163 S.E. 48 (W. Va. 1932) 57

Teays Farms Owners Association, Inc. v. Cottrill,
188 W. Va. 555, 425 S.E.2d 231 (1992) 41

Universal Furniture Intern., Inc. v. Collezione Europa USA, Inc.,
618 F.3d 417 (4th Cir. 2010) 29

Volvo Construction Equipment North America, Inc. v. CLM Equipment Company, Inc.,
386 F.3d 581 (4th Cir. 2004) 34, 38

STATUTES

28 U.S.C. § 1291 1

28 U.S.C. § 1332(a)(1) 1

W. Va. Code § 8-6-4 ....30, 34

W. Va. Code § 8A-1-2(V) 35

W. Va. Code § 8A-5-12 41

W. Va. Code § 8A-5-12(F) 35

RULE

Fed. R. App. P. 4(a) 1

OTHER AUTHORITIES

2 Eugene McQuillin, *The Law of Municipal Corporations*, § 7.10 (3d ed. 1988) 31

Fisher, John. *A Survey of the Law of Easements in West Virginia*, 112 W. Va. L. Rev. 637 (2010) 38-39

Restatement (Third) of Property – Servitudes, § 4.10 (2000) 47, 48

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

A. Basis for District Court Jurisdiction

The Patrick Henry Estates' Home Owners Association (A West Virginia corporation) sued Dr. Gerald Miller (a Maryland resident) in the Jefferson County, West Virginia Circuit Court on October 27, 2008. The case was removed to the United States District Court for the Northern District of West Virginia by Dr. Miller based on diversity of citizenship (28 U.S.C.A. § 1332(a)(1)) since the matter arises between citizens of different states and the amount in controversy, exclusive of interest and costs, exceeds the $75,000 jurisdictional threshold.

B. Basis for Court of Appeals Jurisdiction

A bench trial was held before Judge John P. Bailey on January 11, 2011. The Court issued a Final Order on March 16, 2011. (J.A. 1155) Dr. Miller (herein "Miller") filed a Motion for Stay Pending Appeal, which was conditionally granted (based on Miller obtaining an appeal bond) on March 30, 2011. (J.A. 1179) This Court has jurisdiction of an appeal from a final Order pursuant to 28 U.S.C.A. § 1291.

C. Filing Dates Establishing Timeliness of Appeal

Miller's Notice of Appeal was filed on March 25, 2001 in the District Court, and was timely filed pursuant to Rule 4(a) of the Federal Rules of Appellate

Procedure, since it was filed within 30 days of the Final Order of March 16, 2011. (J.A. 1183)

D. The Appeal is from a Final Order

The appeal in this case is from a final Order issued by the District Court on March 16, 2011 that disposes of all claims between the parties that were made in the case below. (J.A. 1155)

II. STATEMENT OF THE ISSUES

A. The District Court failed to recognize the validity of the Ranson Annexation Order and thereby failed to apply the substantive law of the forum state, West Virginia.

B. The District Court wrongly construed the Patrick Henry Estates documents that allow Miller to reserve easements when he conveys the streets to Patrick Henry Estates.

C. The District Court wrongly limited the easement in the streets, since using an easement for the purpose for which it was intended is not overburdening the easement.

D. The District Court erred in failing to conclude that Lot C-1 be used as an access point to reach the Sloan Square residential apartments.

E. The District Court erred in its ruling concerning damages.

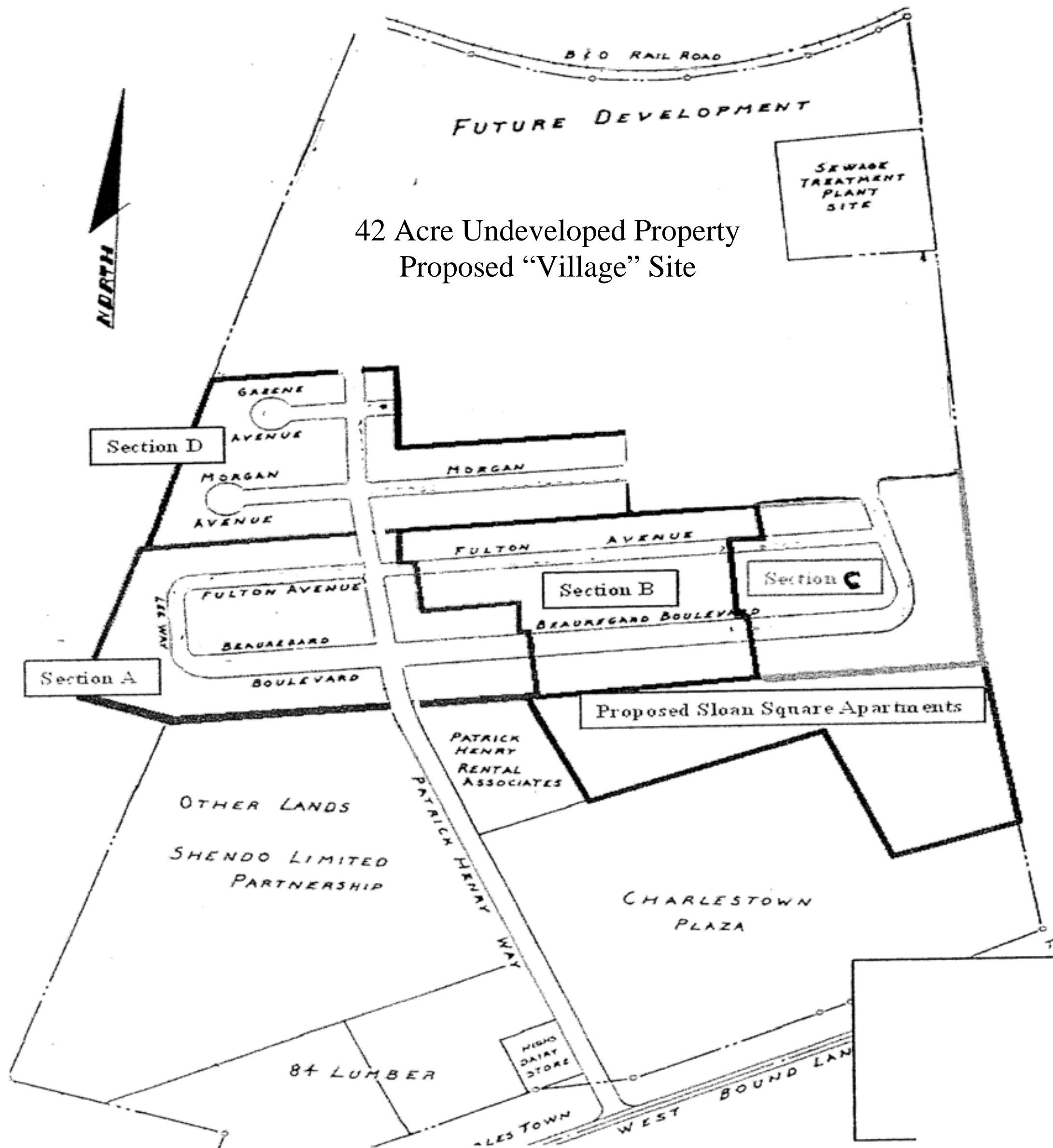
III. STATEMENT OF THE CASE

Summary: This is a dispute between the Patrick Henry Estates' Homeowners Association (herein "HOA") and Dr. Gerald Miller (herein "Miller) (the person who owned the subdivision's land prior to development), over the use and repair of the streets in the Patrick Henry Estates subdivision (herein "PHE").

It is also a dispute about Miller's right to use the streets to develop two adjoining parcels of real property that were once a part of the same parcel as PHE. The District Court has effectively blocked Miller's use of the subdivision's streets and prohibited Miller from developing the two parcels. The District Court ruled against Miller even though the PHE documents allow Miller an unrestricted right to reserve easements over the streets, the streets and subdivision were designed to allow development of the two parcels, and the development of the two parcels was contemplated throughout the history of PHE.

The Property: Miller invested in real estate in Jefferson County, West Virginia in approximately 1977. As an investor, Miller had no participation in the development of the real estate. The real estate was partly developed into a commercial shopping area and partly into the PHE residential subdivision.

Miller became the full owner of the real property upon which PHE is now situated on December 30, 1986.



The development[1] was constructed in sections (A, B, C, and D) from about 1981 to about 1992 and now consists of 148 residential units, with the commercial

[1] The drawing depicted is an adaptation of Trial Exhibit 35, (J.A. 1275) which is an early concept plan that roughly shows the layout of Patrick Henry Estates inside the bold lines, the undeveloped 42 acre site, the Sloan Square apartment site, and the streets of PHE, and has been modified to show the undeveloped property for the Court's convenience in visualizing the site. The Ranson street described herein

shopping area in front and an undeveloped 42 acre parcel behind the residential development. The completed sections of PHE lie in Jefferson County, West Virginia.

The Streets: Although Miller (and his predecessor) sold the various parcels of land to be developed into building lots in PHE, Miller retained ownership of the PHE streets in fee. The underlying covenants (which were adopted in the 1970s and re-applied to the development's subsequent sections) required that the developer convey the streets to the HOA when the development was completed, or by January 1, 1987.

Miller has never conveyed the streets to the homeowners, for several reasons. First, Miller did not obtain complete ownership of the development until December 30, 1986, and was initially unaware of the January 1, 1987 requirement to turn the streets over to the homeowners. After he learned of the requirement, Miller did not convey the streets to the HOA because the HOA was not formed until 1990. Also, the development was not yet completed and the HOA subsequently threatened Miller with closing the streets to Miller's use once he conveyed the roads to HOA. Since Miller needed the roads to finish the

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would enter from the west into the 42 acre tract. Patrick Henry Way is a state owned street depicted on the drawing which runs from the "west bound lane" of the state highway between "Highs Dairy" and "Charlestown Plaza" to the dark line showing the south boundary of PHE, and is owned by Miller through PHE from that point onward, subject to this litigation.

development and reach the 42 acre undeveloped property, he did not convey the roads to the HOA.

Dispute: One major dispute has been Miller's right to use the streets to develop the 42 acre parcel. The 42 acre parcel was originally part of the tract that became PHE. The streets in PHE were designed and built to extend into the 42 acre parcel. The 42 acre parcel has never been developed, with the exception that a sewer plant is located on one corner of the property.

The 42 acre parcel was annexed into the City of Ranson, West Virginia, on January 3, 2006. Miller proposes to construct a mixed use residential and minor commercial development on the 42 acre Ranson parcel called "The Village of Shenandoah Springs" (herein "the Village"), which would be developed under "smart growth" principles.[2] This means that the use would be mostly residential, although a portion of the property may contain small shops, professional offices, etc., with residences located above the shops, reminiscent of small towns of yesteryear.

[2] This is a view of the concept plat, for actual plat *see* J.A. 1436.

The above is the proposed "Village" concept plan submitted to Ranson as part of the annexation process. The current Patrick Henry Estates lies south of the proposed village.

The "Village" streets in the 42 acre parcel will be Ranson city streets and (as proposed to Ranson and approved in concept at the time of the Ranson Annexation Order) are designed to mesh into the PHE's streets, since it was always contemplated that the 42 acres would be reached through the streets of PHE.

Another major dispute between the HOA and Miller concerned the second of the two undeveloped parcels, upon which Miller has proposed to build a residential apartment complex called Sloan Square containing 37 apartments. This parcel is located near the front of PHE. Miller and a builder with whom Miller had worked,

Robert Pratt, had reserved the first building lot in PHE section C (Lot C-1) as an access point to reach the proposed Sloan Square property, and had never built a house on Lot C-1, even though all other building lots in section C contained houses.

An additional dispute arose between the HOA and Miller regarding who was responsible for maintaining the streets in the development. The development documents were somewhat conflicting regarding who should pay for street maintenance; the HOA collected road maintenance fees, but refused to reimburse Miller for repairs that he made. Miller did not believe that he should maintain the streets without reimbursement.

The resulting lawsuit by the HOA ultimately centered around these issues: 1) Who is responsible to maintain the PHE streets; 2) who owns the streets and common areas and should Miller be allowed to use the streets to develop the 42 acre property; 3) should Miller be allowed to use Lot C-1 as an access point to the residential Sloan Square apartment complex; 4) should Miller be forced to rebuild the streets in PHE?

The Order: The District Court issued a Final Order on March 16, 2011. In that Order, the Court:

1) found Miller is responsible to maintain the streets until they are conveyed to the HOA and awarded the HOA damages in the amount of $51,387.00 for past maintenance;

2) found no bad faith on the part of Miller in not conveying the streets, holding that "good cause existed in the past for delaying the transfer" but finding that Miller must now convey the streets to the HOA. However, the Court prohibited Miller from connecting to the Ranson city streets (as approved by Ranson in the 42 acre "Village" concept plan) and severely limited the easement that Miller may reserve to use the streets to develop the 42 acres. Taken together, the ruling effectively stops the development of the 42 acres since the requisite number of street entrances for the 42 acres cannot now be obtained to meet local ordinance requirements;

3) denied Miller the opportunity to use Lot C-1 as an access point to construct Sloan Square, leaving the project undevelopable as a residential apartment complex and,

4) in addition to the injunction effectively prohibiting Miller from using the streets, and in addition to awarding the HOA damages for maintenance, ordered Miller to rebuild the streets and upgrade the drainage systems at a cost of about $174,155.00, even though the streets are mostly 30 years old and the HOA's own

witness testified that the reasonable life of the streets is only 8-13 years, thus disregarding all normal wear and tear.

IV. STATEMENT OF THE FACTS

1. In 1973, Shendo Limited Partnership (herein "Shendo") was formed by Richard Singer and others. (J.A. 1156)

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 PHE and is the development at issue in this case. A commercial development was later built on a portion of the property adjacent to PHE that currently mostly holds retail stores, and an apartment complex. (J.A. 1156)

3. Between the years 1977 and 1981 Miller, the Appellant herein, owned twenty-three percent (23%) of Shendo. (J.A. 1156)

4. Miller was an investor and had no active role in the day to day operations of the development of the land, was not fully aware of the PHE documents, and had no decision making authority. (J.A. 1156) Until December 30, 1986, when Miller became 100% owner of the property, although Sections A and B of PHE had been previously sold.

5. Miller invested more funds and obtained approximately fifty percent (50%) ownership in Shendo in 1981. (J.A. 1156)

6. On or about October 22, 1981, Shendo drafted a Declaration of Road Maintenance Covenants and Restrictions (herein "Declaration" or "Covenants") pertaining to and creating the PHE subdivision. (J.A. 1156)

7. Under the Declaration, the HOA was to be created. However, the HOA was not formally organized until 1990. (J.A. 124)

8. Miller later sold various sections of the PHE development to others who developed Sections C and D of the PHE property. (J.A. 1157)

9. Article IX, Sections 3 and 4, of the Declaration states that the HOA's Board of Directors was to be responsible for managing road maintenance activities required that the Board open a road maintenance checking account on or before October 22, 1981. (J.A. 194)

10. Miller's position throughout the history of his ownership of the development has been that the declaration makes the HOA responsible to pay him to perform maintenance of the streets and common areas in the development. The HOA has never paid Miller for maintaining the streets and, because the HOA refused to pay Miller for maintaining PHE's common properties, Miller discontinued maintaining the streets. (J.A. 1069)

11. In 1999, Miller attempted to resolve PHE's road maintenance issues by approaching the HOA about having the State Highway Department take over

road maintenance of PHE's streets. The HOA actively opposed Miller's efforts to have the State Highway Department take over the streets. (J.A. 1051, 1055-1057)

12. On February 18, 2000, Miller submitted an application to the West Virginia Division of Highways for dedication of the commercial portion of Patrick Henry Way, which is the portion that leads through the commercial development to the subdivision entrance. This effort by Miller proved successful. (J.A. 1054)

13. On September 8, 2000, Miller sent a letter to residents of the Subdivision, requesting that the residents sign an enclosed petition if they approved of the proposal that the Subdivision streets be dedicated to the State, so the State would be responsible for maintaining the same. (J.A. 673-674)

14. On September 13, 2000, the Association disseminated a memo to the Subdivision homeowners discouraging them from approving the proposal, which ultimately caused the proposal to be rejected. (J.A. 675)

15. 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."

(J.A. 192)

16. Miller was unaware of the Declaration of Road Maintenance Covenants and Restrictions on January 1, 1987. (J.A. 1047, 1049-1050)

17. Miller did not turn the roads over to the HOA initially because he had just obtained full ownership of the property, did not possess a copy of the Declaration and Covenants, and was unfamiliar with any requirements in those documents to turn the roads over to the HOA. (J.A. 1047-1050)

18. Miller also did not turn the roads over to the HOA once they were completed because the HOA threatened to close the roads and deny him any further access to completing the undeveloped portion of his development (that now has been annexed into Ranson). (J.A. 1064)

19. Miller attempted to turn the roads over to the HOA in discussions with the past President of the HOA, Mr. Stevens, and asked Mr. Stevens what he wanted Miller to do to accomplish the turnover. In response, Mr. Stevens stated that he wanted Miller to pay the HOA $60,000 before deeding the roads over, then have the roads improved and brought up to the standards that the homeowners said it needed to brought up to at that particular time. Miller was unable to comply with this request because (although Section A had been completed for some time) Sections B, C, and D had only been completed seven or eight years prior to this request by the homeowners for the $60,000 and there was nothing wrong with the roads. Consequently, Miller did not believe that he should pay the $60,000 the

HOA demanded since the roads at that time did not need significant repair. Miller also did not have $60,000 to pay to the homeowners at that time. (J.A. 1064)

20. The demand poisoned the relationship between Miller and the homeowners and made Miller feel threatened, since the homeowners had indicated their plan to close the roads to his further development if they obtained ownership. Thus the HOA's request for the $60,000 precluded him from giving the roads to them at that time. (J.A. 1066)

21. It was necessary for the further development of the property that Miller 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 that Lot C-1 had always been intended to be utilized as access into that property. (J.A. 1065)

22. Miller upgraded the portion of Patrick Henry Way that ran though the commercial development and had deeded that portion to the State for maintenance. Miller had performed maintenance work on that portion of the property, and had a person who worked for him almost full time that went around the development to do road repair, patch repair and landscaping and cleaning up trash, which included maintenance of Lot C-1, up until about 2006 or 2007 when Miller's maintenance person had a stroke. (J.A. 1066-1067)

23. Miller maintained Lot C-1, except for a period of time when his maintenance person's equipment was broken, and if there were complaints, he responded to them and saw to it that the lot was mowed. (J.A. 1068-1069)

24. Miller began doing snow removal in 1992 for a year or two, and was never paid by the Homeowners Association to do the snow removal. Miller believed he should have been paid because the homeowners had been paying Mr. Everhart to remove snow and for other maintenance and Miller believed that the Declarations allowed the homeowners to utilize funds for these purposes. (J.A. 1070-1071)

25. In June 2008, knowledgeable of the fact that Article VII, Section 3 of the Declaration permitted him to use the Subdivision's easements and rights of way for further development, Miller submitted documents to the Jefferson County Planning Commission to develop land immediately adjacent to the subdivision into a residential apartment complex, to be known as Sloan Square. (J.A. 196-205)

26. Richard Klein, Miller's expert witness, is the engineer for both the Sloan Square Apartment complex and the undeveloped 42 acre area adjacent to PHE which will be known as the Village of Shenandoah Springs. (J.A. 953-954)

27. Sloan Square, as designed, contained 37 apartments and would have access from 2 different places along Beauregard Boulevard through PHE. One of

the access points would be through Lot C1, and the other from Gates Way. (J.A. 954)

28. Sloan Square Apartment Complex would have been constructed so that Miller would have upgraded Beauregard Boulevard, its entire length from Patrick Henry Way to Gates Way including drainage improvements, sidewalks where there are no sidewalks, a complete repair of the damaged road areas, any repaving of the road that just needs to be paved. (J.A. 955)

29. Miller, also knowledgeable that Article VI of the Declaration permitted him to change or modify the conditions on any PHE lot, sought to use his own PHE parcel, lot C-1, as a residential drive into the residential apartments.[3] Lot C1 was always intended to be used as an access point to the property upon which Miller now proposes to build Sloan Square. It is for that reason that no

[3] PHE Declaration, Article VI, Section 1 states in part: "These covenants, restrictions and conditions shall not apply to any other lands adjacent to or contiguous with Patrick Henry Estates, Section A, whether platted or not. The Patrick Henry Estates, which is being developed in stages may be enlarged or diminished, and nothing contained herein shall operated to impose and apply the restrictive covenants and conditions herein above set forth upon those areas within the Patrick Henry Estates which have not been developed prior to the date hereof and of which no plat has been made part of the public record prior to the date hereof. The Developers reserve and retain the right to provide within the Patrick Henry Estates areas for commercial, educational, civic, social, charitable, medical and other purpose: conductive to the convenience, health and general welfare of the lot owners within the said subdivision, provided that such intended purposes are consisted with prevailing, local, state and federal government regulations. The Developers also reserve and retain the right to change and modify the restrictive covenants and conditions on any lot or lots shown on any existing or further plat of the said Patrick Henry Estates."

house was built on Lot C-1, which is a buildable lot but was reserved to utilize as an access point to the current proposed Sloan Square property. (J.A. 1063)

30. Miller submitted a Community Impact Statement ("CIS") to the Jefferson County Planning Commission in support of the Sloan Square proposal. (J.A. 977)

31. The Jefferson County Engineering and Planning Department staff found no legal impediment or violation of regulations in using Lot C1 as an access point to Sloan Square. The Sloan Square upgrades would have resolved all of the drainage issues along Beauregard Boulevard. (J.A. 956)

32. The HOA opposed the Sloan Square project and the use of Lot C1 to access the Sloan Square project. Because of the Association's opposition, the CIS was defacto rejected and access to Lot C-1 denied. (J.A. 957)

33. In conjunction with the Sloan Square Apartment development, Miller intended to upgrade Beauregard and portions of Patrick Henry Way, but was prevented from doing so by the homeowners' opposition. (J.A. 1062)

34. In addition to the Sloan Square parcel, another 42 acres of the property was never developed. This property lies immediately adjacent to the existing PHE. (J.A. 953-954)

35. The undeveloped portion of the property has now been annexed into the Town of Ranson (the Village) and is now able to be developed in concert with

the existing Patrick Henry Estates. The Ranson portion will provide a second entrance into the PHE subdivision, and joining the Ranson portion into Patrick Henry Way will provide a required second entrance into that subdivision as well. (J.A. 963)

36. The streets in the existing PHE were designed to mesh with streets to be built on the undeveloped portion of the property. (J.A. 948)

37. Miller has never promised any of the residents of the Patrick Henry Estates that the undeveloped property would not be developed. (J.A. 863-864)

38. Miller intends to have at least Patrick Henry Way, which is the main street of the current PHE, annexed into Ranson. This will likely require an upgrade to at least Patrick Henry Way, and possibly the other streets in the current PHE. (J.A. 963-964)

39. The roads in the current PHE already slightly extend into the undeveloped area that has been annexed into Ranson and would be known as the Village. These roads include Georgia Avenue, Beauregard Boulevard, Green, and Patrick Henry Way, for a total of four streets that actually slightly extend into the undeveloped property now located in the City of Ranson, which means that the roads are paved outside of the existing subdivision and into the undeveloped (Ranson) area. (J.A. 959-960)

40. Exhibit 77 is the concept plan for the Village that has been approved by the City of Ranson. The project had been developed as smart growth, which means that the property is mixed use, with residences, and includes some streets with a small professional offices and shops with residences above them, much like a small town would have been constructed in the past, and areas set aside for ball fields and recreational areas. These facilities and stores would be available for use by the current resident of PHE. (J.A. 961-963)

41. Miller also purchased a lot in the adjacent Shenandoah Springs Development (which is located in Ranson adjacent to the 42 acres) for the sole purpose of using that lot for an access road to connect the Village property to the Ranson roadways. This provided a second access point (along with Patrick Henry Way) which would allow Miller to complete the undeveloped portion of the property based on Ranson's standards. (J.A. 1058-1059)

42. Joint Exhibit 77 was the presentation made to the authorities in the City of Ranson depicting the proposed Village of Shenandoah Springs development and was a condition for annexation into Ranson that the development proceed in substantially the form is depicted therein. (J.A. 1060-1061)

43. If the Village is constructed, Patrick Henry Way will be repaired and upgraded, widened to include sidewalks and drainage problems remedied. Patrick Henry Way would be completely rebuilt under this plan. (J.A. 964)

44. In order to complete this plan, Miller needs to reserve unrestricted rights of way through PHE streets to upgrade and finish the roads. (J.A. 964)

45. These plans have been put on hold because of the current litigation. Ranson would have annexed Patrick Henry Way into the City of Ranson but for the current lawsuit. This annexation would have required road upgrades which Miller would have done as part of the development of the property. Exhibit 74 contained an annexation plat depicting the annexation of Patrick Henry Way into Ranson which he prepared for Ranson's use and which annexation procedure was stopped because of the current litigation. (J.A. 964-966)

46. If the "Village" development were allowed to proceed, the PHE streets would be upgraded and repaired to meet Ranson's requirements for annexation, making some of the PHE streets a higher quality than they were originally constructed. (J.A. 968-969)

47. Road construction should be bid out to obtain the most favorable pricing and that the roads should be constructed in phases as the property is developed. This is to accommodate for market conditions, tax issues, wear and tear on the roads during construction, and the unbearable expense of building roads all at one time without deriving income from lot sales. (J.A. 969-970)

48. The plan (J.A. 1436) for the Village was the concept presented to Ranson and approved by Ranson in the process of annexation. The concept plan

shows two entrances, one from Shenandoah Springs, and one through Patrick Henry Way, which are both required under the Ranson Ordinance in order to construct the Village as proposed. (J.A. 993)

49. The HOA has demonstrated uncertainty about the amount of damages being claimed against Miller, and a lack of knowledge as to the accuracy of the HOA's records, especially as to records and documentation related to damages and road repair. (J.A. 893)

50. The HOA's primary expenditure was a re-paving of a certain portion of Patrick Henry Way. This re-paving totaled at most approximately $21,450.00. (J.A. 895)

51. Damages which the Association claims for certain other expenses are mostly mere rough estimates, and for which little documentation exists, such as snow removal and mowing. (J.A. 895)

52. Had the homeowners not interfered with the Sloan Square project, Miller testified that he would have already repaired the roads that led to Sloan Square, which would include portions of Patrick Henry Way and Beauregard. Further, if Miller were allowed to go ahead with the Village project, he would finally be able to repair the roads leading to that particular development, which would include Patrick Henry Way. If Miller had been allowed to proceed with both Sloan Square and the Village Development, without interference by the

homeowners, that the PHE roads would have been finished by now and the lawsuit would have been unnecessary. (J.A. 1073-1074)

53. Miller told Ms. Susan Pipes (HOA officer) in 2008 that he would proceed with the development, and was willing to go ahead and begin the Beauregard and Patrick Henry Way repairs immediately and bring them up to current standards, if the homeowners would cooperate and allow him to finish the development. However, Ms. Pipes said that they would not agree to any further development in PHE and would not approve his plan to finish the development. Consequently, the streets were not repaired, not through Miller's intransigence, but through the homeowners' failure to cooperate. (J.A. 1074)

54. Robert Pratt, who works for Miller as a contractor, testified that he has 50 years of experience in the construction of subdivisions, roads, commercial buildings, high rises, flat houses, custom homes, and remodeling, with most of that, forty years, in construction management experience. (J.A. 1029)

55. Pratt lived in PHE for four or five years. (J.A. 1031)

56. The HOA was not formed until 1990, when Pratt assisted James Neaton, another PHE resident, in forming the HOA. (J.A. 1032)

57. As of January, 1987, the only section of PHE that was completed was Section A. (J.A. 1032)

58. Pratt worked with Miller to obtain approval of the Jefferson County Planning Commission for Section C of PHE regarding the infrastructure of the roads and the platting of the lots. Pratt also constructed the houses, roads, water, sewer, power, pavement and the stormwater management system for Section C of PHE. (J.A. 1029-1030)

59. Pratt did not begin construction of Section C of PHE until 1990. At that time, only Section A of the subdivision was complete, though Section B of the subdivision was almost complete. Construction of Section D of the subdivision was begun shortly before Pratt began the construction of Section C. (J.A. 1032)

60. When Pratt constructed the roadways and sewer and water lines in Section C of the PHE subdivision, he extended them into the adjoining 42 acre undeveloped area. Pratt testified that Larry Everhart, who developed Sections B and D of PHE subdivision, likewise extended the pavement of Patrick Henry Way, as well as the sewer and water lines, into the 42 acres now in Ranson and proposed as the Village. (J.A. 1035-1036)

61. Pratt never constructed a house on Lot C-1 because he foresaw the need to use Lot C- for a road to access the proposed Sloan Square acreage. (J.A. 1037-1038)

62. The roadway planned for Lot C-1 is not depicted on the recorded plat. When Pratt foresaw that another road was needed to access the acreage beyond

Section C, he contacted the county engineer and was told that nothing further would be needed from Jefferson County to put a roadway on Lot C-1, since he would not be creating a lot, subdividing a lot, or creating a minor subdivision. (J.A. 1038)

63. One reason that the Sections B, C and D of PHE were not developed sooner than they were is that the economy was bad in the 1980's. (J.A. 1044)

64. Pratt also testified that he offered to pave the residential section of Patrick Henry Way for $5,000 when he paved the commercial section, but the HOA refused. (J.A. 1034-1035)

65. Paul J. Raco, Miller's expert as to the Jefferson County land planning process, is the owner of P.J. Raco Consulting, LLC.

66. Raco is familiar with PHE subdivision and its regulatory history based on his previous positions of employment with Jefferson County as Executive Director of Planning, Zoning, Engineering and Building. (J.A. 998)

67. PHE was first proposed as a 400-unit trailer park project in the 1970's. Ultimately, after several permutations, PHE was proposed as a 300-lot non-manufactured housing, modular housing type subdivision. (J.A. 998)

68. In 1977, the Jefferson County Planning Commission denied the proposed plat for PHE, an action which was challenged and resulted in the case of *Singer v. Davenport*, 164 W. Va. 665, 264 S.E.2d 637 (1980). During the

pendency of the *Singer* appeal and decision, the developer of the PHE subdivision and Jefferson County entered into an agreement that permitted the development of Section A. The result of the *Singer* case was that the Court required the approval by the Jefferson County Planning Commission of PHE. (J.A. 998-999)

69. The Jefferson County bond requirement prior to recordation of the plat was to guarantee the completion of the improvements associated with the project. (J.A. 1005)

70. When a bond was released, the release was a certification by the county engineer that the project was built to required standards. (J.A. 1002, 1005-1006, 1008)

71. Section A of PHE was approved on April 25, 1978, but the Section A plat was not recorded until October 22, 1981, when the bond was posted for the remaining improvements in Section A. The construction bond was ultimately released by the County in October 28, 1983. (J.A. 999-1000)

72. Based on the Court's mandate in *Singer*, the Planning Commission approved Sections B through G of PHE on April 23, 1985. (J.A. 1002-1003)

73. Section B of PHE was approved on April 23, 1985, and the bond for Section B was released on June 30, 1988. (J.A. 1003)

74. In 1991, there was litigation involving Section B and Larry Everhart over disputed improvements. The case was mediated and closed in 1995. (J.A. 1003-1004)

75. Section C was approved by the Planning Commission on April 23, 1985, and the plat was approved on August 27, 1990. The bond for Section C was released on May 17, 1995. (J.A. 1004-1005)

76. Section D was approved by the Planning Commission on April 23, 1985, was originally recorded in December 1988, and rerecorded on June 26, 1990 to fix a surveying problem. The bond for Section D was released on October 22, 1992. (J.A. 1006-1007)

77. The county's policy concerning when the roads in a subdivision would be turned over by the developer to the subdivision's homeowners association was that as soon as 50 percent of the properties were sold by the developer, a homeowners association had to be created and the common areas had to be dedicated to the association. (J.A. 1011)

78. In 1995, based on a Fourth Circuit Court of Appeals decision and the period of time since 1985 when Sections E, F, and G were approved by the Planning Commission, Raco took the position that Sections E, F and G were "retired." Raco's position was further that an upgrade of all subdivision roads that could be accessed directly by a state road was required to develop the undeveloped

portion of the property (now annexed into the City of Ranson and called the Village). Raco notified Robert Pratt and Miller that because Sections E, F, and G were not recorded, an upgrade of all the roads in PHE leading to Patrick Henry Way was required to current county grade standards before the 42 acres could be developed. There was no further development of PHE after that decision by Raco. (J.A. 1016, 1019)

79. Raco also took the position that any further development of Sections E, F, and G would have to proceed under the new development ordinances. There is a two-entrance requirement for developments under the new ordinance. (J.A. 1017-1018)

80. Lot C-1 is suitable for an entrance onto the Sloan Square Apartment complex as proposed by Miller, according to the Jefferson County Planning Commission subdivision regulations. At the time the subdivision was approved, there was no note added to the plat that would prohibit the construction of a road on Lot C-1. The construction of a road on Lot C-1 would meet the county's setback requirements. (J.A. 1009)

V. SUMMARY OF THE ARGUMENT

The District Court abused its discretion and made clearly erroneous decisions in the following ways:

A. The District Court committed plain error by refusing to follow the state law and by prohibiting Miller from connecting Patrick Henry Way to Mountain Laurel Boulevard (a Ranson street) as set forth in the Annexation Order adopted by the City of Ranson.

B. The District Court failed to apply the unambiguous language in the PHE documents that allow Miller to reserve unrestricted easements in the PHE streets to use the streets to complete the development of his property.

C. The District Court wrongly decided that the streets would be overburdened.

D. The District Court should have allowed Miller to use Lot C1 to access Sloan Square because it was part of the development plan to use Lot C1 as an access point.

E. The District Court improperly issued injunctions and awarded damages.

1. The District Court should not have issued a permanent injunction against using the streets and Lot C1 to develop the undeveloped 42 acres and the Sloan Square property.

2. The District Court's award of damages plus reconstruction of the streets is a double recovery.

3. The damages should have been precluded because of the HOA's failure to mitigate.

VI. ARGUMENT

A. Standard of Review

1. Standard of Review as to Bench Trials

> We review a district court's judgment entered after a bench trial under a "mixed standard of review." *Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 427 (4th Cir. 2010). Under this standard, we review the district court's findings of fact for clear error and conclusions of law de novo. *Id.*

Perez v. Mountaire Farms, Inc., (C.A.4 (Md.), 2011)

> We review a judgment resulting from a bench trial "under a mixed standard of review – factual findings may be *reversed* only if clearly erroneous, while conclusions of law ... are examined de novo." *Roanoke Cement Co., LLC v. Falk Corp.*, 413 F.3d 431, 433 (4th Cir. 2005). A court's calculation of damages "is a finding of fact and therefore is reviewable only for clear error, but to the extent those calculations were influenced by legal error, review is de novo." *United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 334 (4th Cir. 1996).

Universal Furniture Intern., Inc. v. Collezione Europa USA, Inc., 618 F.3d 417, 427 (C.A.4 (N.C.), 2010).

2. Standard of Review as to Injunctions

> We review the district court's granting or denial of a permanent injunction for abuse of discretion. *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 814 (4th Cir. 1992). In applying this standard, we accept the factual findings of the district court unless they are clearly erroneous and review the district court's application of legal principles *de novo. See North Carolina v. City of Virginia Beach*, 951 F.2d 596, 601 (4th Cir.1991).

Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc., 43 F.3d 922, 939 (C.A.4 (Va.), 1995).

B. Discussion of the Issues

1. The Court Failed to Recognize the Validity of the Ranson Annexation Order and Thereby Failed to Apply the Substantive Law of the Forum State, West Virginia

a) The City of Ranson has Annexed Miller's Undeveloped Property into the City Limits

Although the PHE subdivision lies in Jefferson County, West Virginia, the City of Ranson has annexed Miller's 42 acre undeveloped property into the Ranson city limits. On February 14, 2005, the City of Ranson adopted "an Annexation Ordinance Annexing the Property of Miller Containing an Aggregate of 42.297 Acres" (herein "Annexation Order").[4]

The Certificate of Annexation adopted by the City of Ranson, and the Order confirming and approving the annexation was final in 2006.

The annexation was completed by following the full legal process for annexation as outlined in W. Va. Code § 8-6-4 and related statutes. The appropriate notices were given pursuant to that statute. A final hearing was held on January 3, 2006. No one appeared before the City to object to the annexation, from the HOA or elsewhere.

[4] (J.A. 1160)

Pursuant to the annexation statute in West Virginia, the annexation becomes final if not appealed within 120 days. In this case, no appeal was filed and the statutory time parameters have long passed to file such an appeal.

The West Virginia Supreme Court of Appeals, in the case of *In re the City of Beckley to Annex, by Minor Boundary Adjustment, West Virginia Route 3 Right-of-Way Beginning at the Present Corporate Limits*, 194 W. Va. 423, 460 S.E.2d 669 (1995), stated:

> * * *
>
> "The extension of the boundaries of a city or town is viewed as purely a political matter, entirely within the power of the state legislature to regulate. It is, in other words, a legislative function. This power is sometimes said to be inherent in the legislature, while in other instances it has been said to be power incidental to the power to create and abolish municipal corporations.
>
> * * *
>
> [The] enactment [of annexation statutes] is regarded as a discretionary legislative prerogative, and unless the obligations of contracts or vested rights of third persons are impaired by such action, in accordance with the well established rule, the judiciary cannot interfere. [Footnotes omitted]."

Id. (quoting 2 Eugene McQuillin, *The Law of Municipal Corporations* § 7.10 (3d ed. 1988)), see also *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 601, 425 S.E.2d 551, 556 (W. Va. 1992).

Consequently, the annexation is a final legislative act of the City of Ranson and cannot be overturned.

b) <u>The District Court Ignored the Annexation Order and Thereby Usurped the Plenary Power of the City of Ranson</u>

However, by the terms of the March 16, 2011 Order, the District Court has ignored or refused to recognize the validity of the Ranson annexation and usurped the plenary power of the City of Ranson to control its streets, prohibiting Miller from connecting through Patrick Henry Way to a public street in Ranson. (J.A. 1169)

Specifically, although the PHE subdivision is located in Jefferson County, Miller's 42 acre undeveloped property now lies within the City of Ranson, and has been named as the Village of Shenandoah Springs. The streets and layout of the Village development design (which were designed to connect to the PHE streets) were reviewed by the City of Ranson and approved as part of the annexation process.

Nonetheless, the District Court ruled that Miller cannot connect his undeveloped property (now lying totally within Ranson) to the Ranson city streets. The Court ruled that:

> 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.

(J.A. 1168-1169)

This is error on the part of the District Court. It is an error of fact because Miller does not intend to "utilize Patrick Henry Way to access *property in addition to* the residual portion of Patrick Henry Estates." The "residual portion" is the same property as Miller's 42 acre undeveloped property that is to be the site of proposed Village. Miller intends to use Patrick Henry Way to reach the undeveloped 42 acres that will become the Village. So Miller is not "extending the easement to other lands owned by the developer" as the Court apparently believed, but is only using the easement to access his own 42 acre undeveloped property – an easement that was always contemplated in the covenants and other deed documents. The fact that Miller's undeveloped property lies in Ranson and will connect to and contain a Ranson street is not the same as "extending the easement to other lands owned by the developer" and it was a factual error for the District Court to so rule.[5]

[5] When the District Court states the "defendant has secured property adjacent to Patrick Henry Estates" the Court can only be referring to one single lot that Dr. Miller purchased to convert into a street and dedicate to Ranson as part of Ranson City streets. (J.A. 1058-1059) *See* also Statement of Facts herein No. 41. He is not "accessing" this property. True, the city streets run through a nearby development. But accessing a public street is not the same as using an easement to reach "other lands of the developer."

The Court's ruling is also an error of law. The District Court's ruling that Miller cannot use those Ranson streets, as designed and reviewed in the annexation, disregards Ranson's plenary power to control its streets and fails to recognize the validity of the Annexation Order.

In *Volvo Construction Equipment North America, Inc. v. CLM Equipment Company, Inc.*, 386 F.3d 581, 599-600 (4th Cir. 2004) this Court held:

> "A federal court exercising diversity jurisdiction is obliged to apply the substantive law of the state in which it sits, including the state's choice-of-law rules. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Klaxon Co. v Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (observing that forum state's choice-of-law rules are substantive)." *See* also *Colgan Air, Inc. v. Ratheon Aircraft Co.*, 507 F.3d 270 (2007); *Limbach Co., LLC v. Zurich American Ins. Co.*, 396 F.3d 358 (2005); *In re Nantahala Village, Inc.*, 976 F.2d 876 (C.A.4 (N.C.), 1992); *Fortress Re., Inc. v. Central Nat. Ins. Co. of Omaha*, 766 F.2d 163 (C.A.4 (N.C.), 1985); *Seabulk Offshore, Ltd. v. American Home Assur. Co.*, 377 F.3d 408 (C.A.4 (Va.), 2004); *Crosson v. Conlee*, 745 F.2d 896 (C.A.4 (Va.), 1984); *Tobacco Technology, Inc. v. Taiga Intern, N.V.*, 388 Fed. Appx. 362 (C.A.4 (Md.), 2010).

In this diversity case, the District Court was bound to follow West Virginia substantive law. An act of the legislation of West Virginia is substantive law.

Miller's Annexation Petition and Order was accomplished through W. Va. Code § 8-6-4 (2001). W. Va. Code § 8-6-4, in pertinent part, states:

> "If satisfied that the petition is sufficient in every respect, the governing body shall enter that fact upon its journal and forward a certificate to that effect to the county commission of the county wherein the municipality or the major portion of the territory thereof, including the additional territory, is located. *The county commission*

> *shall thereupon enter an order as described in the immediately preceding section [§ 8-6-3] of this article.* After the date of the order, the corporate limits of the municipality shall be as set forth therein."

State of West Virginia ex rel. City of Charles Town v. County Commission of Jefferson County, et al., 221 W. Va. 317, 655 S.E.2d 63, 68 (2007)

The Annexation Order for Miller's 42 acre "Village" property, named the Village, required the Village property to connect to a public street designated in the annexation plat, known as Mountain Laurel Boulevard. (J.A. 1448-1449)

The District Court's Order ignores the Annexation Order and prohibits Miller from connecting to a public street in complete derogation of its obligation to apply the law of the forum in these proceedings. (J.A. 1168-1169) The District Court had no authority, inherent or otherwise, to ignore a valid annexation by a municipality pursuant to applicable state law. The basis for the Court's decision is misplaced and clearly does not defer to the state law with regard to the law of annexation in West Virginia. The Order further ignores the fact that Miller was not using Patrick Henry Way to access the 42 acres to "other lands" owned by Miller (J.A. 1166), but to connect to a public city street.

The District Court also ignored the vested rights that Miller may have in the undeveloped land pursuant to the Ranson approval of Miller's concept plan pursuant to W. Va. Code § 8A-5-12(F) and W. Va. Code § 8A-1-2(V).

The Court thus committed two errors, namely: 1) failing to abide by the substantive law of the State of West Virginia concerning annexation; and 2) misconstruing the facts of the case to reflect that Miller was using Patrick Henry Way to extend Patrick Henry Way through other lands owned by Miller, (J.A. 1166), when in fact, Miller was to connect to a public street, i.e., Mountain Laurel Boulevard. (J.A. 1436)

It is unquestioned that in West Virginia a city has control over its owns streets. More than control, a city has plenary power to control its streets. In *Ashbaugh v. the Corporation of Bolivar*, 223 W. Va. 741, 679 S.E.2d 573 (2009), the Court recognized that municipalities by legislative designation have plenary power over city streets, stating:

> "The Legislature has expressly delegated authority over issues of road use and maintenance to municipalities such as Bolivar. *See* W. Va. Code § 8-12-2(a)(5) (2007) (providing that municipalities have control over "acquisition, care, management and use of the city's streets, avenues, roads, alleys, ways and property"); W. Va. Code § 8-12-5(1) (2007) (granting municipal governing bodies "plenary power and authority" to "lay off, establish, construct, open, alter, curb, recurb, pave or repave and keep in good repair, or vacate, discontinue and close, streets, avenues, roads, alleys, ways sidewalks, drains and gutters, for the use of the public"); *see also Brouzas v. City of Morgantown*, 144 W. Va. 1, 106 S.E.2d 244 (1958) (upholding authority of municipality to adopt ordinance vacating portion of street under predecessor statute to W. Va. Code § 8-12-5(1)); *Barker v. City of Charleston*, 134 W.Va. 754, 760, 61 S.E.2d 743, 747 (1950) (recognizing statutory "power and authority" of municipality to vacate or close streets as "valid" under parallel language of predecessor statute to W. Va. Code § 8-12-5(1)). Implicit in the express legislative delegation of matters governing road use and access to

> municipalities is the continuing authority to address these areas as the respective municipalities see fit within the bounds of the law."

Id. at 577.

Consequently, the Court disregarded the effect of the annexation of the undeveloped property into Ranson and Ranson's authority to control its own streets when it made the determination in the March 16, 2011 Order that Dr. Miller was not allowed to connect to the Ranson streets. This is an issue of jurisdiction, since, if the Court was attempting to regulate the activities of the City of Ranson, the City of Ranson should have been made a party to the case below.

The Court should reverse the District Court Order on the long standing proposition that requires a District Court sitting in a simple diversity case to apply the substantive law of the forum state, here West Virginia law.

2. The Court Wrongly Construed the PHE Documents that Allow Miller to Reserve Easements When He Conveys the Streets to the HOA

The District Court wrongly decided a major issue in the case – specifically, the question is: when Miller conveys the streets to the PHE subdivision, what rights may Miller reserve to use the streets for the 42 acre development?[6]

[6] (J.A. 1165)

The District Court erroneously held that:

- Although Dr. Miller may reserve an easement to use Patrick Henry Way to reach the 42 acres, Dr. Miller may not connect the 42 acres to Ranson, and must pay for the upkeep and maintenance of Patrick Henry way, apparently in perpetuity, if he chooses of have any commercial development on the 42 acres.[7]
- Dr. Miller may not use Beauregard Boulevard or Green Avenue to access any commercial development on the 42 acres.[8]

The ruling effectively prevents the development of the 42 acres since local ordinances require two entrances to develop the 42 acres. Precluding the use of the Ranson street will block one of the entrances and stop the proposed development.

The reason these rulings are clearly erroneous is that the District Court ignored the unambiguous language in the documents that allows Miller to reserve an unencumbered right to use the streets in further development of his property. The rulings also ignore the parties' intent as evidenced by the same express language.

In West Virginia,[9] the intent of the parties to the agreement controls and, when clear and unambiguous from the language within the documents shows the intent, that document is not open to judicial interpretation. In his article, *A Survey*

[7] (J.A. 1167-1168)

[8] (J.A. 1168)

[9] The District Court is obligated to apply the substantive law of the forum state. *Volvo*, *supra*.

of the Law of Easements in West Virginia, 112 W. Va. L. Rev. 637 (2010), West Virginia University professor John Fisher cited the West Virginia Supreme Court in *Farley v. Farley*:

> Furthermore, we have held that the rule governing the construction of other writings is the same as the rule relating to the construction of grants of easements; that rule provides that the rights of parties must be ascertained from the words of the grant so long as the words are unambiguous.
>
> ***
>
> "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."
>
> ***
>
> . . . the "language of the instrument itself, and not surrounding circumstances, is the first and foremost evidence of the parties intent."

Id. (Citations omitted) citing *Farley v. Farley*, 600 S.E.2d 177, 180 (W. Va. 2004) *See also Semler v. Hartley*, 184 W. Va. 24, 399 S.E.2d 54 (1990); *Jenkins v. Johnson*, 181 W. Va. 281, 382 S.E.2d 334 (1989); *Hoffman v. Smith*, 172 W. Va. 698, 310 S.E.2d 216 (1983); *Collins v. Degler*, 74 W. Va. 455, 82 S.E. 265 (1914); *Cotiga Development Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 128 S.E.2d 626 (1962); *Sally-Mike Properties v. Yokum*, 175 W. Va. 296, 300, 332 S.E.2d 597, 601 (1985).

The PHE Declarations,[10] Article VII, Section 3 contains unambiguous language that permits Miller to reserve unrestricted easements when he turns the roads over to the HOA:

> "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." (emphasis added)

There is no restriction in this easement reservation. As a result of the intent as revealed in the unambiguous language in the documents, Miller is entitled to reserve unrestricted easements and rights of way that would allow him to finish the development of the 42 acre property. The development, even within PHE, may include commercial use, or, any use that does not ". . . violate any local, state or federal land use laws or regulations."[11] Outside of the developed area, (i.e., within

[10] The Declarations (J.A. 185) is the foundational document that controls the streets in PHE while other sections of the Declaration also discuss conveying the common areas.

[11] The clear, unambiguous intent is also shown in the deed language, which states in relevant part that 1) the restrictions in PHE do not apply to the undeveloped areas (for example, the 42 acres) and 2) PHE may contain commercial, educational, civic, social, charitable, medical and other uses. (J.A. 1167-1168)

the undeveloped 42 acres) even this limited restriction does not apply, there are no restrictions to the easement.[12]

The Court made no finding that the portions of the documents allowing Miller to reserve easements when he conveyed the streets were ambiguous. The Court was therefore obligated to apply and enforce the documents without interpretation. Instead, the District Court disregarded this fundamental principle and interpreted the documents broadly when applying them to the HOA, but

[12] The undeveloped land has not been made subject to the covenants and restrictions that apply to the existing PHE. Each section of the platted and approved PHE covenants and restrictions clearly applies that section's covenants and restrictions to that section only, and says (either explicitly or by reference) that the covenants and restrictions do not apply to other sections. (J.A. 185)

In *Teays Farms Owners Association, Inc. v. Cottrill*, 188 W. Va. 555, 425 S.E.2d 231 (1992), the Court stated, in relevant part:

> "In resolving this dispute, we must be cognizant of the homeowners' desire for continuity and adherence to the restrictive covenants. However, we must also recognize the ownership rights of the Appellants and must not subjugate their rights to the restrictive covenants of the subdivision if those restrictive covenants were not specifically made applicable to the four-acre tract."

Id. at 234, 558.

In this case, there are no covenants and restrictions that preclude the development of the 42 acres. The 42 acres was never subjected to a final plat by the Jefferson County Planning Commission. Further, the annexation of the property into Ranson places the property under the jurisdiction of Ranson and removes it from Jefferson County's jurisdiction. The HOA has no authority to overturn the approvals of Ranson for the development, or to interfere with Miller's vested rights to use the undeveloped property as a development pursuant to W. Va. Code § 8A-5-12.

modified the documents and interpreted them narrowly when applying the documents to Miller. Nowhere is this more evident than in the Court's decision about the use of the streets. The Court broadly construed the documents in favor of the HOA when it made Miller rebuild the streets (as opposed to repairing the streets as called for in the declaration), and then narrowly construed the documents against Miller when it restricted the use of the streets, limiting him from fully using Patrick Henry Way to service his undeveloped property, and preventing him from using the other streets for the mixed use commercial/residential development that is proposed for the undeveloped property.

For the same reason, the Court erred when it decided that Miller must maintain Patrick Henry Way if he allows any commercial development in the 42 acres – that restriction is simply not in the PHE documents.

The Court's failure to apply the simple language of the declaration is made worse by this fact –Miller currently owns the streets in fee, and will convey the streets to the HOA with a reservation of what should be an unrestricted easement based on the Declaration language. This is not a case where Miller has sought an

easement across the lands of another[13] and is expanding the use of the easement beyond what is reasonable or contemplated.

Since the Declarations, Article VII, Section 3 contains unambiguous language that permits Miller to reserve unrestricted easements when he turns the roads over to the HOA, the Court's reliance on *Shock v. Holt Lumber Co.*, 148 S.E. 73, 74 (W. Va. 1929) is misplaced. In *Shock*, the holder of the easement went beyond the terms of the express grant to acquire timber from other lands not contemplated in the grant and transport that timber across the easement. That is not the case here, because the prospective grant is unrestricted. Likewise, the Court's reliance on *Shaver v. Edgell*, 37 S.E. 664, 666 (W. Va. 1900) is misplaced, because in *Shaver* the purported holder of the easement simply had no right to an easement over the Plaintiff's land, again, which is not the case here. *Dorsey v.*

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[13] Of course, it is unquestioned that the law does not permit express easements to exceed the limitations of the grant, and cannot be extended by the owner of the dominant estate to serve other lands owned by him. A classic example is found in *Ratcliff v. Cyrus*, 209 W. Va. 166, 169, 544 S.E.2d 93, 96 (W. Va. 2001), where the Ratcliff's purchased three parcels of property and were granted an express easement over Cyrus' land for ingress to and egress from one of the parcels. When the Ratcliff's attempted to use the easement to access two additional parcels that they owned, Cyrus sued, and the West Virginia Supreme Court found that the easement was limited to the one parcel for which the easement was specifically granted.

But that is not the case here. Miller is not exceeding the limitations of the grant (since there has been no grant, only unlimited rights to grant). Neither has Miller accessed other land "owned by him." It was an error by the District Court to hold otherwise. The unrestricted easement will connect to the 42 acres, and that 42 acre parcel will connect to a public street. There is no connection to other lands owned by Miller.

Dorsey, 153 S.E. 146, 146 (W. Va. 1930) upon which the Court relied, is likewise distinguishable because it involved using an easement by virtue of necessity to reach lands owned by the defendant that were not part of the original necessary right of way. Again, Miller is not reaching other lands owned by him, but is instead reaching his own 42 acres and connecting to a public street. *Springer v. McIntire,* 9 W. Va. 196, 1876 WL 3787 (W. Va. 1876) is also distinguishable because it analyzes a right of way that was granted with specific language for a specific purposes, (i.e., to go to a specific coal shaft). Again, in this case, there is no restriction associated with the prospective easement, it is wholly unrestricted.

Consequently, the District Court should have construed the unrestricted access contemplated in Declaration Article VII, Section 3 to allow the streets to be used to access the 42 acres and concluded that Miller be allowed to complete the development of the property.

3. Using The Easement For The Purpose For Which It Was Intended Is Not Overburdening The Easement

The District Court erred when it determined that the use of the streets to reach the undeveloped 42 acre property is an overburden of the right of way. (J.A. 1169) This is an error because an unrestricted easement was reserved in the subdivision documents.

Unlimited easements allow unlimited reasonable use:

> The general rule is that where a right of way is granted or reserved without limit of use it may be used for any purpose to which the land accommodated thereby may naturally and reasonably be devoted.
>
> *** "An unlimited conveyance of an easement is in law a grant of unlimited reasonable use…"

Davis v. Jefferson County Tel. Co., 95 S.E. 1042, 1044 (W. Va. 1918) (Portions and internal citations omitted).

The unlimited easement contemplated in the documents assumed that the streets would be used for traffic to move through them to reach the undeveloped property. The streets in PHE were designed to connect with future development on the undeveloped property. How then can the use of the streets for the purposes which they were designed be an overburden? Especially in view of the easement's unlimited nature.

The underlying principle in this case is very similar to the case of *G Corp, Inc. v. MackJo*, 195 W. Va. 752, 466 S.E.2d 820 (W. Va. 1995). In *MackJo*, the owner/developer, conveyed a parcel of property to G Corp, along with a non-exclusive easement. G Corp's property was in an exclusively commercial park. MackJo reserved for itself, successors, and assigns, the "right to use the streets" in relation to the easement. MackJo then later conveyed adjacent property to another party, allowing the third party to use the easement as well. The third party's land was a residential subdivision. G Corp asserted that the third party could not use

the easement because it led to the residential subdivision, through the exclusively commercial park.[14]

The *Mackjo* Court found that MackJo had reserved into itself the right to use the streets to develop the adjacent tract.

The *Mackjo* Court said "the Circuit Court recognized the declaration's protective covenants but not the rights reserved by MackJo" – essentially holding that the Circuit Court's broad view of G Corp's rights and narrow view of MackJo's reservation of rights constituted an abuse of discretion.

This case is much like *MackJo*, in that the documents unambiguously allow conveying the streets to the PHE "subject to easements and rights of way"[15] – without restriction. Also like *MackJo*, the adjacent property is of a somewhat different use from the subdivision, but that did not mean in *MackJo* that the easement was invalid, since it was a part of the declaration from the beginning of

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[14] The West Virginia Supreme Court of Appeals stated *MackJo*:

> "An owner of a servient estate may legally grant successive easements for purposes of travel in and over a certain road or way in favor of various property owners having need for such travel easements, to be used jointly by them; and a person having such an easement right may not be permitted to object to any use of or change in the character of such road or way by the owner of the servient estate or by any other owner of such an easement right or way so long as the rights of the one complaining are not thereby impaired or interfered with in an undue or unreasonable manner or degree."

[15] (J.A. 192)

the development that the easement could be reserved to reach the adjacent undeveloped property. So it is here.

Here, like in *MackJo*, the District Court's broad view of the HOA's rights while narrowly construing Miller's rights is an abuse of discretion.

Even if the Court views the opening of the streets to the undeveloped property as a substantive change, (which it is not) much has changed, i.e., 40 years have elapsed since the development began. The modern state of the law and public policy have responded to these changes. For example, in the Restatement (third) of Property – Servitudes, Section 4.10, the writers state:

> Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement for profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

Here, like the development contemplated by the restatement, there is "normal development of the dominant estate or enterprise benefited by the servitude" which should be accommodated "except as limited by the terms of the servitude ...." Since the terms of the servitude in this case allow for unrestricted use of the streets, the Court should allow the "manner, frequency and intensity" of the use to accommodate the change in the laws and growth in the community, since

the "public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate." *Id.*

4. <u>**The District Court Erred When It Concluded That Lot C-1 May Not Be Used As An Access Point To Reach The Sloan Square Residential Apartments**</u>

The District Court erred when it concluded that Lot C-1 may not be used as an access point to reach the Sloan Square Residential Apartments. (J.A. 1169)

First, the use of Lot C1 as an access point to reach more residential units is wholly consistent with the Covenants limitation that the lots may only be used for "residential purposes."

Second, *Foster v. Orchard Development Co., LLC*, 227 W. Va. 119, 705 S.E.2d 816 (2010) stands for the proposition that a developer can change the emphasis of the development to meet changing conditions. Here, like *Foster*, the documents allow the change of use, generally, and the use of lots, specifically.[16] Article VI Section 1 of the Declaration (in relevant part) allows Miller to change the use of Lot C-1 from residential to a street access:

> ". . . 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."

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[16] The principle applies to an even greater degree than the development in *Foster*, since the developer in the *Foster* development changed its "design guidelines" to allow smaller homes to be constructed, whereas the documents themselves in this case allow for change of use.

Third, the evidence shows that the builder chose not to build on Lot C1 to preserve it as an access route to the Sloan Square property. (J.A. 1037-1038)

Yet the District Court narrowly construed the provisions of the covenants against Miller, holding that Lot C1 cannot be used as an access point to reach the Sloan Square development, and also held that the "buffer" areas behind Lot C1 belonged to the HOA, which also precludes using Lot C1, since one would have to cross the "buffer" to get to Sloan Square from Lot C1. It is unthinkable that the developer would reserve Lot C1 as an access point and then place a "buffer" behind Lot C1 that would preclude using Lot C1 as an access point. This cannot have been the developer's intent, and the District Court should have so ruled.

In this ruling, like the others, the District Court ignored the express intent of the developer and held in favor of the HOA, broadly construing the documents in favor of the HOA and narrowly construing the documents against Miller. This was error and an abuse of discretion by the District Court.

5. **<u>The District Court Erred In Its Rulings Concerning Damages</u>**

a) **<u>The District Court abused its discretion when it issued a permanent injunction along with damages</u>**

The United States Supreme Court has held:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such

> as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.

eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 1839 (U.S. 2006) (citations omitted).

This Court reviews injunctions with the following standard:

> We review an order granting an injunction for abuse of discretion, reviewing factual findings for clear error and legal conclusions *de novo.* … As previously stated, a court "has abused its discretion if its decision is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." … "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." … "If the district court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."
>
> ***
>
> "It is well established that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." … To be sure, "[a]n injunction should be carefully addressed to the circumstances of the case." … In other words, the court will vacate an injunction if it is "broader in scope than that necessary to provide complete relief to the plaintiff" or if an injunction does "not carefully address only the circumstances of the case."

PBM Products, LLC v. Mead Johnson & Co., 639 F.3d 111, 125-126, 128 (C.A.4 (Va.), 2011) (citations omitted).

Here, the District Court far exceeded the boundaries established in *PBM Products* when it 1) granted a permanent injunction against Miller to prevent him from using Patrick Henry Way to connect to a Ranson city street; 2) granted a permanent injunction against Miller to prevent him from using the other streets for any access to commercial development; and 3) prohibited Miller from using Lot C1 to access the proposed residential Sloan Square apartments.

With regard to Patrick Henry Way, the Court's conclusion was based on a clearly erroneous error of fact – the Court's ruling that Miller was attempting to "access property in addition to the residual portion of Patrick Henry Estates." (J.A. 1168)

This is a clearly erroneous factual finding. The only "property adjacent to Patrick Henry Estates" is Miller's 42 acre undeveloped residual property that is to be the site of proposed Village, and which the easements were designed to reach. The fact that Miller's 42 acre property lies in Ranson and will connect to a Ranson street over the one lot Miller precluded is not the same as "extending the easement to other lands owned by the developer" and it was a factual error for the District Court to so rule.

The Court's injunction is also more burdensome than necessary and broader in scope than necessary, all in derogation of the *PBM Products* standard. The injunction has the effect of prohibiting development on the 42 acre property, since

it leaves the property with only one entrance and the subdivision regulations require two entrances to further develop the 42 acres. (J.A. 1017-1018) Even if the development could be constructed, the injunction against using the other PHE streets[17] for any commercial use destroys the "Village" concept of residential and light commercial use.

The prohibition against using Lot C1 effectively precludes Miller from constructing the Sloan Square residential apartments, since it also requires two entrances and Lot C1 is the only viable alternative for a second entrance.

Taken together, the effect of the Court's Order is devastating, since it precludes development of the property while at the same time requires Miller to expend large amounts of money as damages to repair the existing streets and reimburse the HOA for dubious expenditures they purportedly made for street repair. This violates *PBM Products* burdensome and overbroad standard.

In *National Lead Company v. Conola Block Company*, 288 F. Supp. 357 (S.D. W. Va. 1968) (cited by the District Court)[18] the Plaintiffs in that case attempted to permanently enjoin the Defendants from using an easement that

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[17] (J.A. 1169)

[18] Like the other cases cited by the District Court, the Court correctly cited the legal principle in *National Lead*, however, failed to apply the principle properly under these facts, since the Defendant in *National Lead* was attempting to reach other land owned by the Defendant, whereas Miller is only attempting to connect to a public street.

crossed the Plaintiffs' land and had been granted to Defendants by Plaintiffs. While the facts are somewhat complicated, the Court denied the permanent injunction that the Plaintiffs sought because injunction is an extraordinary remedy which requires a higher burden than ordinary relief.

The *National Lead* Court said

> "when this extraordinary writ is asked for enforcement of a right respecting an easement, equity will consider the relative expense and inconvenience to which the parties would be put, and deny it if there is a great disproportion against the Defendant. If the issuance of the writ will operate oppressively or inequitably the writ will be denied … equities must be balanced. And if the injury done to a servitude by a grant is capable of being ascertained and compensated at law, an inconvenience and loss to the other party would be serious, generally the bill will be dismissed, reserving to Plaintiff his right to proceed at law." *Id.* (citations omitted).

Consequently, the Court in *National Lead* dismissed the injunctive relief because of the disproportionate damage that the injunctive relief would have incurred on the Defendant, but left the parties with damages. Here, the District Court issued both injunctive relief and granted the Plaintiff's damages, violating the principles in *National Lead*.

In balancing the equities here, Miller is in effect totally precluded from developing his property by the Court's ruling, since (in the intervening time period from when the development was begun until now), the zoning regulations have changed and Miller cannot further develop the property without obtaining a second entrance. Since the development was always contemplated in the documents of

PHE, it is patently unfair to now burden Miller with what is in effect a prohibition against further development, while at the same time awarding damages to the HOA.

The HOA have their damages at law, which have already been awarded by the District Court in the amount of $51,387.00, and the Court should not have at the same time issued a permanent injunction which has the effect of depriving Miller of his reasonable use and development of the undeveloped property.

Further, the Court in *Chafin v. Gay Coal & Coke Co.*, 109 W. Va. 453, 156 S.E. 47 (1930) (cited by the District Court)[19] held that "injunction is an extraordinary remedy and, to award it, a stronger and higher ground must be shown than is required for ordinary relief. When this extraordinary writ is asked for enforcement of a right respecting an easement, equity will consider the relative expense and inconvenience to which the parties would be put, and deny it if there is a great disproportion against the defendant. If the issuance of the writ will operate oppressively or inequitably, the writ will be denied…." *Id.*

In this case, like in *Chafin*, permanently enjoining Miller from using most of his roads to connect to the 42 acres because of the mixed commercial use, and permanently enjoining Miller from exercising his right to connect the 42 acres to

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[19] The District Court misapplied *Chafin*, like *National Lead*, because the facts are related to reaching additional lands that were leased by the Defendant in that case, which is not the same as connection to a public street like Miller intends.

the City of Ranson (when the property has already been annexed and when Ranson was not even a party to this case) is inequitable. The ruling effectively deprives Miller of being able to ever develop his property as was originally envisioned in the documents of PHE. The burden (in the financial damage) to Miller is extreme, while the benefit to the homeowners association is negligible at best. Under the *Chafin* analysis, the injunction is improper and an abuse of discretion.

b) The District Court erred in awarding damages to the HOA for repair of the streets and at the same time requiring the streets to be reconstructed

The Court erred when it awarded damages against Miller for repair of the streets then additionally ordered that Miller completely rebuild the streets in PHE, since this amounts to a double recovery.

The HOA has long collected money for a road maintenance fund.[20] The Court determined that the evidence showed that the HOA had expended approximately $51,387.00 in maintenance that the Court believed Miller was required to pay pursuant to the Declarations and thereupon ordered Miller to pay this amount to the HOA as damages.

[20] The records of the HOA (especially prior to 2000) are incomplete and inconsistent. Although the declaration requires that the HOA have a road maintenance fund checking account, the HOA has disregarded that requirement since 1983. Recent records are more exact, but the HOA representative testified at trial that the HOA had approximately $50,000.00 in its checking account. Miller, as a lot owner in the subdivision, also contributed to this maintenance fund. (J.A. 859)

As a result, the homeowners were reimbursed for maintenance expended on the streets.

However, after ordering that the HOA be reimbursed for maintenance, the Court also required Miller to reconstruct the streets in PHE, at an estimated cost of $174,335.00.[21] The Court ordering Miller to reimburse the HOA for repair of the streets and additionally rebuild the streets is a double recovery. This is an error, especially since Miller was never responsible for rebuilding the streets, but only (at most) responsible for repair and maintenance of the streets. The Court's Order wholly disregards normal wear and tear on the streets, which were thirty years old and, according to the Plaintiff's own expert, had a life expectancy of only 8-13 years. At most, Miller should be required to reimburse the HOA for the maintenance cost they incurred in maintaining the streets.[22]

c) The District Court should have precluded the Association's damages because of the Association's failure to mitigate damages

The HOA's claims for damages centered on the alleged failure of Miller to maintain the roads in PHE. Miller, however, made several attempts to resolve the subdivision's road maintenance issues in 1999 and 2000, by soliciting the HOA's

[21] (J.A. 838)

[22] Ironically, had the subdivision not objected to Miller's development of the 42 acre tract, the streets would be mostly upgraded as part of the development of the 42 acre tract and repaired to a level beyond that which the District Court ordered.

agreement to have the West Virginia State Highway Department take over the subdivision's streets. The State already owns and maintains a portion of Patrick Henry Way that reaches the development outside of the residential section.

Although Miller was able to secure the opportunity for the roads to be taken over by the State and therefore maintained by the State, the HOA launched a campaign to circumvent Miller's efforts to resolve the road maintenance issues by disseminating a memo to all Subdivision homeowners discouraging them from approving the proposal, which ultimately resulted in the failure of the State to take over the streets.

If the streets were maintained by the State, the maintenance of the streets would have been resolved. Instead, the HOA's refusal constituted a failure to mitigate its damages. The HOA should not have been allowed to pursue further claims of damages as those damages relate to the road maintenance. "Where a contract is breached, and the injured party can avoid resulting expense with reasonable effort, it is his duty to do so." Syl. Pt 2, *Stone v. United Fuel Gas Co.*, 163 S.E. 48, 48 (W. Va. 1932).

In *Chesser by Hadley v. Hathaway*, 190 W. Va. 594, 600, 439 S.E.2d 459, 465 (W. Va. 1993), the Court stated that:

> "In West Virginia, we have recognized that one generally has duty to mitigate damages: 'As a general rule a person whose property is endangered or injured must use reasonable care to mitigate the damages; but such person is only required to protect himself from the

> injurious consequence of the wrongful act by the exercise of ordinary effort and care and moderate expense.' *Hardman Trucking, Inc. v. Poling Trucking Co. Inc.*, 176 W. Va. 575, 579, 346 S.E.2d 551, 555 (1986), citing *Oresta v. Romano Bros., Inc.*, 137 W. Va. 633, 650, 73 S.E.2d 622, 632 (1952)."

Here, the evidence easily meets the test stated in *Chesser* because there would have been little effort required on the part of the homeowners to allow the State to take over the roads within PHE, and their claimed damages would have been eliminated. In fact the evidence shows that although it was the duty of the Association to mitigate its damages, it instead took action against the proposition to have the State maintain the remainder of Patrick Henry Way, which proved successful in thwarting Miller's attempt to mitigate the HOA's alleged damages.

As a result of the HOA's failure to mitigate its alleged damages, the District Court should have concluded that the HOA is precluded from claiming road repair and maintenance damages against Miller.

VII. CONCLUSION

For the reasons asserted above, this Court should reverse the Final Order of the District Court entered on March 16, 2011, in the following respects:

1. Dr. Miller should be allowed to convey the streets in PHE to the HOA but reserve unrestricted easements in all PHE roads to develop the 42 acres, including timely upgrading and/or rebuilding the PHE roads and drainage and connecting to Ranson's public streets as deemed necessary by Miller's engineer for the "Village" project and/or further development of the 42 acres.

2. Dr. Miller should be allowed to use Lot C-1 and related "buffer" area to connect to the proposed residential Sloan Square Apartment site and use the PHE roadways to connect to that site.

3. Dr. Miller should at most reimburse the HOA for provable expenses for past road maintenance in an amount not to exceed $51,387.50.

4. Dr. Miller should not be required to rebuild the streets in PHE because the HOA has been awarded damages and the streets were subject to normal wear and tear.

VIII. REQUEST FOR ORAL ARGUMENT

Miller respectfully requests oral argument on all issues presented for appeal.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

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Dated: August 15, 2011

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of August, 2011, I caused this Brief of Appellant 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 15th day of August, 2011, I caused the required number of bound copies of the Brief of Appellant and Joint Appendix to be hand-filed with the Clerk of the Court, and a copy of the Joint Appendix to be served, via UPS Ground Transportation, upon Counsel for Appellee at the address listed above.

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