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

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

*Plaintiff – Appellee,*

v.

**DR. GERALD MILLER,**

*Defendant – Appellant.*

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

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**REPLY BRIEF OF APPELLANT**

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## I. SUMMARY

The HOA is incorrect in its assertion that Miller intends to impermissibly expand the street easements beyond that which he is entitled, since the documents contemplate that Miller could reserve of an unrestricted easement that would allow the Village property to be developed.

The documents in the development, by their terms, do not apply the covenants to the undeveloped land (now the “Village” site). The HOA’s attempt to use the covenants to block the further development of the property therefore fails.

Contrary to the HOA’s position, the District Court’s ruling effectively precludes the development of the 42 acre “Village” property that was annexed into Ranson, because the ruling eliminates the required second entrance to the “Village” that Ranson Ordinances require.

## II. ARGUMENT

### A. Dr. Miller does not propose to expand the street easements to serve other lands

The District Court erred when it ruled<sup>1</sup> that Dr Miller could “**not** utilize Patrick Henry Way to access property in addition to the residual portion of Patrick Henry Estates . . . .” The HOA brief urges this Court to adopt the same error.

#### 1. Patrick Henry Way will be used to reach a Ranson City Street within the Village property

Miller owns no other lands outside of PHE boundaries<sup>2</sup> which he intends to access -

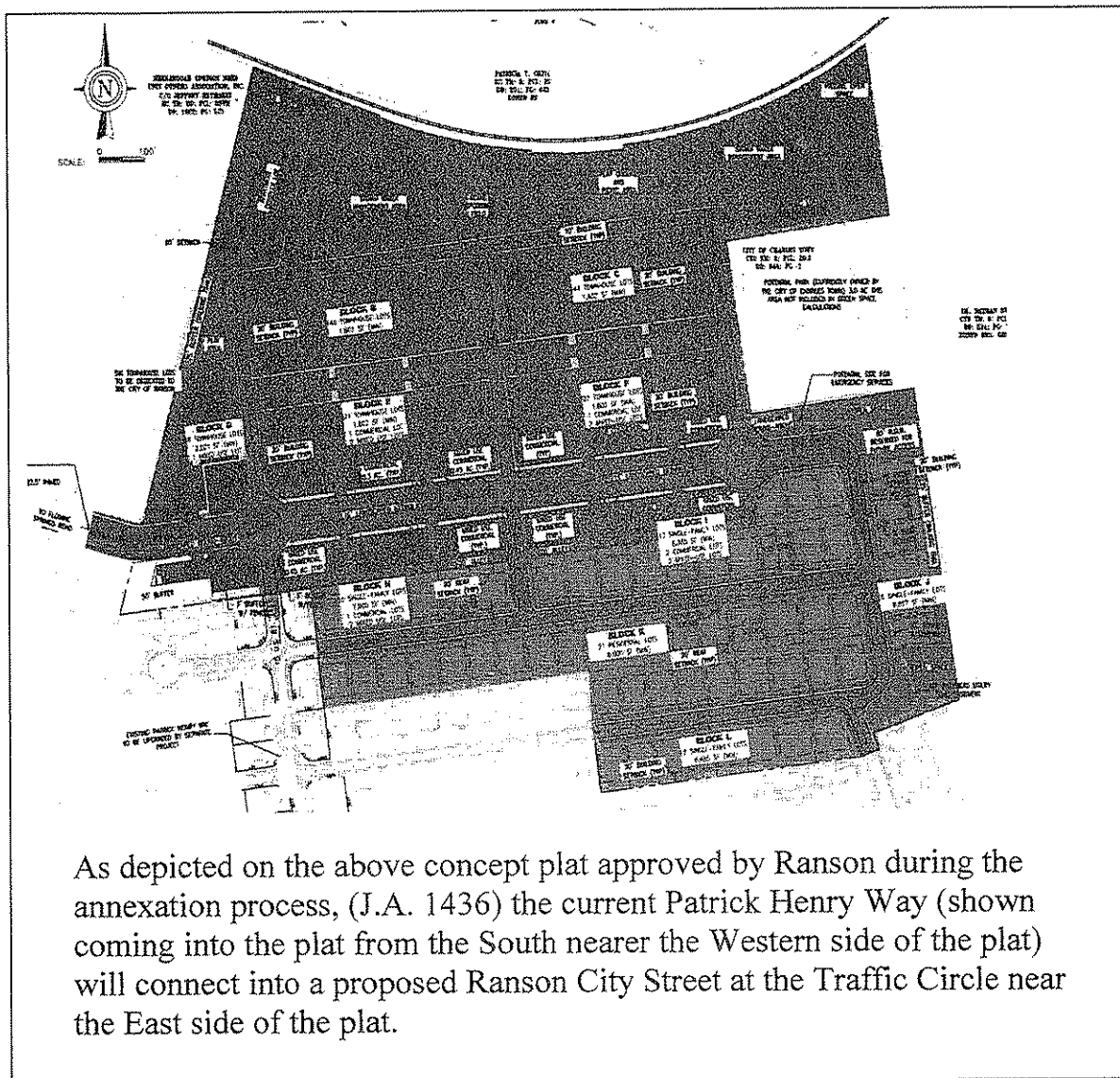
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<sup>1</sup> The Court ruled that:

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)

<sup>2</sup> 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 No. 41 in the opening brief. Miller is not “accessing” this property. True, the city streets run through a nearby development, (known as Shenandoah Springs) but that development has its main entrance on Flowing Springs Road. In any event, accessing a public street is not the same as using an easement to reach “other lands of the developer.”



As depicted on the above concept plat approved by Ranson during the annexation process, (J.A. 1436) the current Patrick Henry Way (shown coming into the plat from the South nearer the Western side of the plat) will connect into a proposed Ranson City Street at the Traffic Circle near the East side of the plat.

instead, the proposed Ranson city street will lie within the Village property. Patrick Henry Way will terminate at a Ranson city street – not outside the Village, but inside the Village. It is not a connection to other lands Miller owns, but to a

city street in property already annexed by Ranson, within the land Miller will develop as the Village.<sup>3</sup>

As explained in the opening brief, 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 in concept as part of the Ranson annexation process.

The District Court therefore erred factually, because the design does not extend “the easement to other lands owned by the developer.” Terminating Patrick Henry Way at a Ranson city street inside the Village (which lies within the boundaries of the undeveloped 42 acres), is not the same as if Miller owned other land to which he intended to extend the street to the detriment of PHE. The Court also erred legally, since the Court did not honor the effect of the annexation of the Village property into Ranson, and did not recognize the legal effect of connecting to a Ranson City street.

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<sup>3</sup> As set forth below, Miller obtained this access to the Shenandoah Springs development only so he could gain another entrance into the 42 acre village site and meet the local ordinance requirement that the property have two entrances – otherwise, he could not develop the 42 acres.

**2. The proposed easement is unrestricted and the documents contemplated that Miller would reserve those easements to develop the undeveloped property**

The PHE Declarations,<sup>4</sup> 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. 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.”<sup>5</sup> Outside of the developed PHE area, (i.e.,

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<sup>4</sup> The Declaration (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.

<sup>5</sup> 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)

within the undeveloped 42 acres) even this limited restriction does not apply; there are no restrictions to the easement.<sup>6</sup>

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)

Also, as stated in the Opening Brief, the Court’s decision in *G Corp, Inc. v. MackJo, Inc.*, 195 W. Va. 752, 466 S.E.2d 820 (1995) is illustrative, since the *MackJo* court, under similar circumstances, allowed the developer to use the streets to reach the remainder of his development, the HOA’s attempt to distinguish the case notwithstanding.

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. That is exactly what Miller proposes to do, and so

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<sup>6</sup> 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)

Miller's plan fulfills the purpose of the original design, and does not violate that purpose.

**B. The covenants of PHE do not apply to the undeveloped 42 acres (proposed "village" site)**

The HOA insists that this Court should apply the PHE covenants to the "Village" site and to the Sloan Square site, and, as a result analyze the case based on whether using the streets violates the PHE covenants.

The HOA's argument is also premised on applying the covenants in PHE to the undeveloped Village land, and, presumably, to Sloan Square. Developing the Village would infringe on the PHE covenants, they insist. (*Response Brief* at 30-33, 40-43, 44, and elsewhere)

There are two problems with that argument. First, for purposes of appeal, the HOA offered no evidence in the trial that shows the covenants of PHE apply to the undeveloped land in any way.

Second, by the terms of the underlying documents, the undeveloped land has not been made subject to the covenants and restrictions that apply to the existing PHE. Likely, that explains why the HOA offered no evidence at trial that shows the covenants of PHE apply to the undeveloped land, since no such evidence exists.

Also, the section of the original conveyance language upon which the HOA's argument rests states explicitly that "nothing contained herein shall operate

to impose and apply the restrictive covenants and conditions hereinabove set forth upon those areas with Patrick Henry Estates Subdivision which have not been developed prior to the date hereof,” (J.A. 1167) consequently, the covenants do not apply to undeveloped land.

Further, 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. *See Declaration, Article VI, § 14.* (J.A. 185)

The Court in *Teays Farms Owners Association, Inc. v. Cottrill*, 188 W. Va. 555, 425 S.E.2d 231 (1992), did not apply restrictive covenants of a subdivision to a tract of land that had not been subjected to the covenants. Despite the HOA’s attempt to explain away and distinguish *Teays*, the *Teays* Court explained the rationale behind its analysis, when it 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 Dr. Millers 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.

*Teays* is illustrative in a number of ways. First, the Court in *Teays* was placed in the unenviable position of attempting to discern whether covenants

applied to a certain property, located within a subdivision, when the documents were unclear as to which property the covenants applied.

Unlike *Teays*, the documents in the instant case are extremely clear as to whether the covenants apply to the undeveloped property – in fact, the provision in the documents upon which the HOA bases its argument in favor of applying the covenants to block Miller’s use of the streets explicitly states that the covenants do not apply to undeveloped land. So, in this case, the Court does not have to look beyond the words of the documents themselves to decide the issue – since the covenants say they do not apply, and the declaration grants an unlimited easement, Miller should be granted the right to use the streets to develop his property.

However, in *Teays*, because the documents were unclear, the Court looked to the intent of the developer, Mr. Phillips. And, when Mr. Phillips testified about his original intent, the *Teays* court listened to him, noting that Phillips was “perhaps in the best position to explain the original conception of the subdivision” *id.* at 234 S.E.2d since Phillips created the subdivision. Further, the Court noted that Phillips testimony was reinforced because the plats did not apply the covenants to the tract in question.

In Miller’s case, the plats by their explicit terms do not apply the covenants or restrictions to adjacent sections. Even if this Court were to attempt to discern the intent of the parties, the result should be to allow Dr. Miller to develop the

undeveloped 42 acres (the “village” site) and Sloan Square, for this simple reason. The intent of the parties is unquestionably to develop the remaining property, and to use the PHE streets to do so, as revealed by the following:

The underlying documents specifically state that easements may be reserved when the streets are conveyed to the HOA, and place no restrictions on the easements.

The cover sheet, (J.A. 1275), shows additional development or states that the property is for future development.<sup>7</sup>

The testimony at the bench trial shows that the streets in PHE were constructed to extend into the 42 acres so it could be developed. Consider the following testimony:

Robert Pratt (the contractor who built a good portion of PHE and several of the streets) testified:

Q. Why did you extend the road in there?

A. It's normal construction ethics and practice to do that. You can't just run a stone truck up and stop it on a straight line. You can't do that with a paver. Not only that, you had your infrastructure in the streets, which is the water and the sewer. You run those pipes on past so you don't have to come back when you add on to them to dig up the street. It costs a lot of money to do that. The streets were going to be run on through eventually some day. Otherwise in my opinion

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<sup>7</sup> The document at J.A. 1275 is not an official plat, but is only a cover sheet showing a potential development concept.

there would have been a cul-de-sac at the end of those roads going into that back section.

(J.A. 1035)

Richard Klein testified that the streets extended into the 42 acres:

Q. Sir, do the roads in Patrick Henry Estates actually extend into that area now?

A. Yes, sir.

Q. Well, which ones?

A. Well, Patrick Henry Way itself extends into the property. Beauregard extends into the property. And then the two side streets -- I can't read from here. The two side streets in D. and B. also -- or in Section D, this street right above the arrowhead here. There we go. Georgia Avenue extends into the Village, and Beauregard and Green and Patrick Henry. So there's four streets that actually extend into the section.

THE COURT: When you say they extend into the property?

THE WITNESS: They are paved into the property.

THE COURT: They are paved onto the -- outside the existing subdivision?

THE WITNESS: Yes, sir.

(J.A. 959-960)

It is ludicrous to think that the developer intended to create an isolated enclave, and leave the remaining land to lie fallow, especially when the trial testimony and related documents show that the developer's intent was to develop that property. The fact that many years have passed since the development began, and the fact that the changing times and changing needs of the development have required a change in the details of the development, is beside the point.

Consequently, the HOA's attempt to distinguish *Teays* fails. The case was not "mistakenly" cited, as the HOA alleges. (*Response Brief* at 40) *Teays* was cited because, as the HOA admits in its opposition, after looking at the documents and evidence, the *Teays* court concluded that ". . . the covenants did not apply to the residue in *Teays*." (*Response Brief* at 40) And, like *Teays*, the covenants do not apply to the undeveloped Village property, by the covenants very terms. Therefore, *Teays* is instructive, (even if not on all fours) since the West Virginia Supreme Court did not apply covenants to a tract of land that had not been subjected to the covenants.

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. As a result, this Court should overturn the district Court and allow Dr. Miller to proceed with his development.

**C. The Court's ruling effectively precludes the development of the Village property since the local ordinance requires two entrances and the Court's ruling closes one of the entrances**

The HOA seems fixated on Miller's statements that the local government ordinance requires two entrances into the proposed Village property to approve the project. Playing on this fixation, the HOA makes frequent accusations that Dr. Miller is somehow falsifying or dreaming up the two entrance requirement for the Village property. The HOA's Response Brief is replete with accusations that there is no evidence to support the two entrance requirement.

However, (although Jefferson County Ordinances do require two entrances into a subdivision), the HOA seems to miss the point that the Jefferson County Subdivision Ordinance requirements are irrelevant since the property has been annexed into Ranson. Miller proposes to use the additional lot he purchased in the neighboring Shenandoah Springs development as one entrance into the Village property, and Patrick Henry Way as the second entrance. And Dr. Miller's engineer, Richard Klein, testified as an un rebutted expert that Ranson requires two entrances into the proposed Village, and that the two entrances of the Shenandoah Springs subdivision would not suffice to meet those requirements.<sup>8</sup>

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<sup>8</sup> In the face of this un rebutted testimony, the HOA nonetheless asserts that Miller can develop the property without the two entrances. For example, *see Response Brief* at FN 6 where the HOA insinuates that Miller is lying to this Court and opines that "... What Miller does not disclose, is that he still has the additional option to develop the 42 acres using the right of way which he lawfully obtained

Engineer Richard Klein testified:

Q. Okay. And Shenandoah Springs, which is a partially built development in Ranson, has two entrances, doesn't it?

A. It currently has one. I believe it has a second one planned in the future.

Q. And would you disagree with me that if Doctor Miller approaches Ranson and says, I want to expand Shenandoah Springs -- I have got a deal with that developer for the expansion of Shenandoah Springs into another section, we'll call this the Village of Shenandoah Springs, section of Shenandoah Springs, would you agree with me that he could bring himself within technical compliance of the Planning Commission rules of the City of Ranson?

A. No. As regards to entrances?

Q. Right, that he would have two entrances?

A. I do not agree with that.

Q. You don't agree with that?

A. No, sir.

(J.A. 982-983)

Richard Klein testified that Patrick Henry way would be one entrance into the Village, and the Ranson city street to be built over the additional lot Miller purchased in the Shenandoah Springs development would be another:

Q. So you're not aware that Doctor Miller has an agreement with Shenandoah Springs to use a lot and convert it to a road?

A. He bought a lot.

Q. So you --

A. At the request of Ranson approved that. There would be a sale of a lot to extend the boulevard in Shenandoah Springs.

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through the adjacent development of Shenandoah Springs. . . ." and goes on to state that Miller can piggyback onto the two entrances that Shenandoah Springs may one day construct. Contrary to the HOA's statement, Klein directly testified as an expert that Miller cannot use Shenandoah Springs' entrances to fulfill Ranson's two entrance requirement for the Village, and the HOA offered no evidence to rebut Klein's testimony.

Q. And you don't believe --

A. Into our property to create two entrances to our property.

(J.A. 983-984)

Richard Klein testified:

Q. Mr. Klein, the -- this plan that has been entered as Document Number 77 for the Village of Shenandoah Springs to which you have previously testified, was this the concept presented to Ranson in the process of annexation?

A. Yes, sir.

Q. And it is the one that they approved as part of the --it was a concept presented to them when it was annexed?

A. Yes, sir.

Q. Okay. And does this particular design show two entrances into this section?

A. The -- this actually shows three. One from Shenandoah -- well, actually, no. It officially shows two. Patrick Henry Estates is an entrance, and then -- and then the connection to the boulevard.

Q. And under the Ranson ordinance, does this design require two entrances?

A. Yes, sir.

(J.A. 993-994)

So, Miller's position that two entrances are required by Ranson to complete the Village development is clearly proven true -- and stands un rebutted, since the HOA offered no testimony in opposition. The HOA's numerous allegations otherwise are incorrect.

It is also apparent that Miller believed that Jefferson County also required two entrances, and that is why he annexed the 42 acre proposed Village property into Ranson.

Miller testified:

A. Well, at that particular time I was looking for a way to have a second exit. It was my understanding after meeting with Mr. Raco, along with Mr. Pratt, and in Mr. Raco's office that further development would not be approved as far as extending -- extending the development further up Patrick Henry Way unless there was a second entrance. So I was looking for another party that I could get a second entrance to. Something that either would give me an easement or would give me an opportunity to purchase a portion of someone's land so that I could get a second entrance. And so at that particular point I was informed that the area that now is called Shenandoah Springs was being developed into a residential development and that they were willing to sell me a lot that would give me a second entrance. And they made this offer to myself and to at least one other developer that I know because they were apparently doing that in order to get capital to complete their development.

Q. Did you buy a lot that gave you a second entrance into the Village of Shenandoah Springs?

A. I did.

(J.A. 1058)

In an attempt to resolve the Jefferson County two entrance requirement,

Miller went to Ranson.

Miller testified:

Q. I said, the agreement that you had with the other developer where you bought the lot, allowed you to access the Village of Shenandoah Springs?

A. Yes.

Q. And use the roadways in the other subdivision to reach a state road, right?

A. Yes. Yes.

Q. So that gave you, in your mind, the second entrance that you thought you needed to develop the property; is that right?

A. That is correct. But I also went to Ranson and asked them whether that was a situation that was something that they would approve, and

that they would agree would give me that second entrance -- that would give me an entrance into Shenandoah Springs. And they said yes.

(J.A. 1059-1060)

Raco further testified that (as the former Director of Planning and Zoning in Jefferson County) he believed the reason the undeveloped 42 acres was never developed into a part of Patrick Henry Estates is that the Jefferson County subdivision ordinance applied to the undeveloped 42 acre property and that two entrances were required under the ordinance.

Raco testified:

But I notified Mr. Pratt and Doctor Miller that indeed because of the sections weren't recorded, that he would have to upgrade all the roads in Patrick Henry leading to Patrick Henry Way state portion to county grade standards. And I would assume that's what stopped the development back in 1995.

Q. There was no further development of those sections after?

A. After I made that decision, there was no further development in Patrick Henry.

(J.A. 1015-1016)

So it is my opinion on that case that I indicated, Fourth Circuit decision in 1993, it was actually the final, I guess, disposition of that case. My opinion was that there should be no vested subdivision rights that was afforded at Patrick Henry thereafter.

Q. And they would have to proceed under the new development ordinances; is that correct?

A. That's the position that I took.

Q. Is there a two entrance requirement under the new development ordinance?

A. Yes.

(Portions omitted for length considerations) (J.A. 1017-1018)

While Paul Raco did testify that it may not have been a “hard requirement” for every subdivision in Jefferson County to have two entrances in 1995, he also testified that “generally two subdivision entrances are required.” (J.A. 1018-1019)

So Miller and Raco (the then Director of Planning and Zoning in Jefferson County) both believed that two entrances were required for Dr. Miller to develop the 42 acres, and that is why the property was never developed – until Miller obtained the Ranson access in an attempt to develop the property.

Most important, the issue as to whether Jefferson County required two entrances is irrelevant for the purposes of this case. The bottom line is that the property cannot be developed as currently proposed if the District Court’s order is upheld, since Ranson will require the second entrance to the Village property.

Consequently, the HOA’s frequent hostile and personally insulting accusations – that Miller is somehow falsifying or dreaming up the two entrance requirement for the Village Property – are demonstrably wrong. The District Court’s Order effectively precludes the development of the 42 acre village property, just as Miller stated in his opening brief.

### **III. ADDITIONAL ISSUES WITH THE RESPONSE BRIEF**

Miller will respond to some additional allegations<sup>9</sup> in the HOA Response Brief in capsule form due to length limitations and to save the Court's time:

**A. The annexation of the Village property into Ranson was a public process**

The Ranson annexation of the 42 acres was a public process; public notice was given of the annexation and its hearings in accord with the law.<sup>10</sup> If the Homeowners did not know about the annexation, as they now claim, it was not Miller's fault.

**B. Reserving easements when the streets are conveyed to the HOA is not a private condemnation of land**

Using the streets to develop the Village is not a "private condemnation" of streets owned by the PHE, (as the HOA states in Fn 12) since the documents that give the PHE the streets also give Miller an absolute right to reserve unrestricted easements to use the streets to develop the remainder of the property. One does not "condemn" a street by using a street pursuant to an easement; any more than one "condemns" a retail store by walking on the floor.

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<sup>9</sup> Miller states that not addressing a given issue in the HOA's brief in this reply brief does not imply acquiescence, merely that the accusations and innuendos contained in the HOA's brief are too numerous to address without numerous explanations that would waste the Court's time and exceed the brief's length limitation. Miller stands on the assertions made in the opening brief as to those issues.

<sup>10</sup> W. Va. Code § 8-6-2 requires that the notice be given and published in the newspaper.

**C. Miller does not contest that he is to convey the streets to the HOA, but rather contests the timing of the conveyance and what rights he has to use the streets**

Miller has never contested the concept that he was required to convey the streets to the PHE HOA at some point in time. Miller's entire basis for not conveying the streets to the HOA sooner was threefold. First, the development was not yet completed, which was the precondition for conveying the roads. Second, the HOA had informed Miller that if they obtained control of the roads, they would block his further development of the property. Third, Miller was initially just an investor and did not obtain full ownership of the property until December 30, 1986, and was unaware of the requirement to turn the streets over on January 1, 1987 until a good while after the deadline had passed. In any event, the deadline was mooted by the events described above. Further, Miller's position, based on the lack of clarity in the underlying documents, was always that the HOA was responsible to fund the road maintenance.

It is important for the Court to note that, although the HOA's Response Brief is filled with innuendos and negative assertions about Miller (and, presumably, his counsel) the District Court found no bad faith on Miller's part in failing to convey the streets, (J.A. 1164) stating that "Good cause existed in the past for delaying the transfer, but that cause no longer exists" and refusing to assess attorney fees against Miller. (J.A. 1172)

**D. The claim that the Sloan Square CIS did not require two entrances is not supported by evidence**

The HOA claims Miller is falsely claiming he needs two entrances into the Village property because of the purported lack of the two entrance requirement regarding Sloan Square. This is an astounding claim, since the whole point of Miller using lot C-1 as an entrance is to obtain a second entrance to Sloan Square.<sup>11</sup>

If Miller's plan had been approved, there would be two entrances into the proposed Sloan Square property; the first being Gates Way, and the proposed use of lot C-1 as a second entrance. Also, the Court should note that a Community Impact Statement, or CIS, is only a preliminary presentation of a concept to the Planning Commission to obtain their initial comments, and comes long before the preliminary or final plat or other documents that must be approved before Sloan Square could be constructed, and the entrances finalized. Third, it is a much smaller impact to have the 37 apartments proposed for Sloan Square than to have the hundreds of potential units in the Village, so the need for two entrances is greater with the 42 acres. Finally, the entire matter is irrelevant since it is the

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<sup>11</sup> Whether Sloan Square required two entrances was not a matter of contention in the trial, and the HOA seems to have raised it here on appeal for the first time. For this reason, Miller objects to the argument. However, the September 23, 2008 Planning Commission minutes show the Planning Commission excluding access through C-1 and recommending Miller seek an entrance through a realty company property, which was not feasible.

Ranson requirement that Miller must deal with, not the Jefferson County Planning Commission, with regard to the Village property.

**E. The HOA called no witnesses in rebuttal to Miller's case**

It is important to note that the HOA called no witnesses at all in rebuttal to Miller's case. The only expert witness the HOA called (in their case in chief) testified about the repair procedure and costs of the streets in Patrick Henry Estates. This means that the HOA did not rebut Paul Raco, Miller's expert, as to the land use procedures in Jefferson County. Other than the street repair costs,<sup>12</sup> the HOA did not offer (in their case in chief) expert evidence to contradict Miller's engineer, Richard Klein. This means that Klein's expert testimony concerning the Village layout and requirements is also uncontradicted.

**F. Lot C1 and the buffer area behind Lot C1 should be allowed to be used as an entrance into the proposed Sloan Square Residential Apartment Complex**

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)

Miller and Robert Pratt (the general contractor who built Section C of PHE) both testified that it was always the intent to use lot C-1 as an access point to Sloan Square.

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<sup>12</sup> With regard to street repair costs, both Miller's expert and the HOA's expert came to very similar conclusions about the costs of basic road repair, although they approached the nature of the repair differently.

Miller testified:

Q. Now was it your intent when you developed C. 1 to retain C. 1 as an access point into the remaining property behind Sloan Square?

A. Always.

Q. Always?

A. Always.

(J.A. 1063)

Robert Pratt testified:

Now -- can you go to 93? I want to draw -- excuse me, did somebody say something? I want to draw your attention to Lot C. 1. Can you give me that? Give me Section C.

first. Are you familiar with Lot C. 1?

A. Yes, sir.

Q. You never constructed a house on Lot C. 1, did you?

A. No, I didn't.

Q. Why not?

A. I figured I would need a road into the acreage that Mr. Miller owned in behind C. 1, 2, 3, 4, 5, and 7. I figured he would need another entrance beside Gates Way for whatever was going to be built later on down the pike.

(J.A. 1037-1038)

Paul Raco's following testimony was unrebutted:

Q. Based upon your education, training and experience, in your opinion, is Lot C. 1 suitable for an entrance into the Sloan Square Apartment Complex as proposed by Doctor Miller according to the Jefferson County Planning Commission Subdivision Regulations?

A. At that time when it was -- the subdivision was approved, there was no notes added to the plat that would prohibit that. No notes.

Q. So in other words, it would be available to use as an entrance in your opinion?

A. Yes.

(J.A. 1009)

The use of Lot C-1 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.” Also, the *Foster v. Orchard Development Co., LLC*, 227 W. Va. 119, 705 S.E.2d 816 (2010) case stands for the proposition that a developer can change the emphasis of the makeup of a development to meet changing conditions, as more fully stated in Miller’s opening brief.

And, the HOA is wrong in their contention that Miller’s brief did not request this Court to overturn the District Court’s Order that the “buffer areas” behind lot C-1 be handed over to the HOA. Contrary to the HOA’s contention, Miller requested this Court to allow Miller to have access to the Sloan square lot through Lot C1 and over a part of the so-called “buffer area” behind lot C-1 in the following places in Miller’s opening brief: page 49, and page 59, paragraph 2.

Finally, the HOA accuses Miller of bordering on committing “fraud on the reader” (*Response Brief* at 43) based on Miller quoting only a part of a declaration section. The HOA then quotes the remainder of the section, which changes absolutely nothing of the meaning of what Miller stated originally (and, in fact, supports Miller’s argument that the covenants do not apply to the undeveloped property). This is but another of the frequent examples of unwarranted attacks made in the HOA’s response brief, however, Miller only states that nothing was

hidden or misquoted to this Court and the HOA's insertion does not change the meaning of the quote Miller used.

### **G. Damages**

As with other portions of the brief, the HOA attempts to divert this Court's attention by personal attacks and misstatements of the evidence. Miller has proven in prior sections of this brief that the District Court's blocking Miller's second entrance precludes the development of the property as planned and approved by Ranson. The HOA is wrong to assert otherwise.

The fact that Miller challenged the District Court's ruling stopping Miller from reserving easements to use the streets without commercial restrictions is enough to raise the issue on appeal, contrary to the HOA's assertions otherwise. (*Response Brief* at 46)

Miller does not contest that he is to convey the streets to the HOA at some point, but rather contests the timing of the conveyance and what rights he has to use the streets, as more fully stated above and in Miller's opening brief.

As to mitigation, the HOA could easily have reduced its "damages" to nothing had it allowed the State to maintain the streets. Although Miller was able to secure the opportunity for the streets 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.

As to the cases which the HOA attempts to distinguish, Miller restates the principles espoused in his opening brief and is confident that the Court can correctly apply those principles to this case.

#### IV. CONCLUSION

For the reasons stated herein, and in his opening brief, Miller respectfully requests that this Court reverse the District Court's order as requested in his opening brief.

Respectfully submitted,

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Dated: October 3, 2011

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/s/ Nathan P. Cochran  
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### CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 3rd day of October, 2011, I caused this Reply 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 3rd day of October, 2011, I caused the required number of bound copies of the Reply Brief of Appellant to be hand-filed with the Clerk of the Court.

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