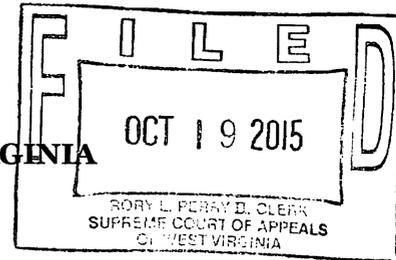


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

DOCKET NO. 15-0694



Timberlake Estates Homeowner's  
association, Inc., Petitioner

vs.

Terry S. Mangold, and Charles A.  
Sticker, Defendants Below,  
Respondents

Appeal from a final order

of the Circuit Court of Mineral  
County Case No.: 15-C-13

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**BRIEF**

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**Counsel for Petitioner**

Agnieszka Collins (WV Bar #11092)  
PO Box 631  
Keyser, WV 26726  
(304)-788-2582  
angiecollinsesq@gmail.com

**TABLE OF CONTENTS**

Assignments of Error.....3  
Statement of the Case.....3  
Summary of Argument.....7  
Statement Regarding Oral Argument and Decision.....7  
Argument.....7-16  
Conclusion.....16

**TABLE OF APPENDIX**

1) Complaint for Declaratory Judgment and Permanent Injunctive Relief .....	1-30
2) Motion to Dismiss with Prejudice and Memorandum in Support Thereof .....	31-62
3) Defendant Sticker Motion to Dismiss with Prejudice and Memorandum in Support Thereof.....	62-63
4) Order Granting Defendants Motion to Dismiss with Prejudice.....	65-66
5) Docket Sheet.....	67

## **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED BY FINDING THAT A THROUGHWAY ROAD ERRECTED ON A LOT IN A PLANNED COMMUNITY DID NOT VIOLATE ITS RESTRICTIVE COVENANTS AND ENCUMBRANCES, CONSTRUCTIVE NOTICE OF THE NATURE OF THE COMMUNITY, OR OVERBURDEN THE PRIVATE ROADS OF THE PLANNED COMMUNITY.

## **STATEMENT OF THE CASE**

Timberlake Estates Homeowner's Association is a planned community located in New Creek, West Virginia. (A.R. pp 1) It was originally established by R Michael and Joann T. Haywood; the planned community was established with specific restrictive covenants and encumbrances, which are recorded in the Officer of the Clerk of the County Commission of Mineral County, West Virginia. (A.R pp 1) The entire real-estate property, including any and all roads that exist on the property, which are of the nature of common use land for the residents of Timberlake Estates, is private property. (A.R. pp 1) The lot owners of Timberlake Estates pay yearly fees, which in part cover the maintenance of the roads and right of ways inside the Timberlake Estates planned community. The Timberlake Estates Homeowner's association has approximately 45 developed residential lots, and undeveloped lots.

Charles Sticker is a resident of West Virginia, Mineral county and an owner and resident of Timberlake Estates planned community. Mr. Sticker owned three separately deeded Lots, being Lots 13, 14 ,and 15 from Section III of the development. Although his house was placed upon one of the lots, the other two lots remained undeveloped. (A.R.

pp 47). Mr. Sticker's Lots lay on the outer upper end of the planned community, and border private lands. On the 13th day of August, 2014, Mr. Stickler conveyed to Terry S. Mangold, not a resident of Timberlake Estates planned community, a right of way over the aforementioned Lots to the bordering property outside the planned community. (A.R. pp 45-47) A side note in the Plat Survey filed by the Respondent reads that the right-of-way "shall be used exclusively for the purposed of constructing a road or driveway for access to the adjoining 539.77 acre parcel...and that the lot shall not be used for any other purposes" (A.R. pp 47) Thereafter Mr. Mangold began using the roads contained within the Timberlake Estates planned community to access the 539.77 acre parcel. (A.R. pp 2) In the only responsive pleading submitted to the Court that was made by Mr. Mangold, Mr. Mangold acknowledged that he obtained the right-of-way to access his hunting grounds that are located to the northwest of Timberlake Estates Subdivision. (A.R. pp 32) He also admits that Mr. Mangold purchased the right-of-way to shorten his travel time to his hunting ground, as absent this right of way through the private roads belonging to Timberlake Estates, his travel time would be increased greatly-adding fifty (50) minutes drive to his hunting grounds. (A.R. pp 32) Mr. Mangold purchased the right-of-way to use the extensive private roadways of the Timberlake Estate planned community to access his private lands, and essentially make Timberlake Estates a throughway for traffic to his lands. After purchase of the property, Mr. Mangold began developing the right of way. (A.R. pp 33) The development included bringing heavy road machinery through the private property and roads of Timberlake Estates, and caused extensive road damage to the roads of Timberlake Estates planned community. Due to the disruption in the community by the heavy equipment and Mr. Mangold's general entry, the Timberlake Estates Association took action to prevent Mr.

Mangold from entering its property by issuing a no trespassing notice. To get around the problem of being an invitee, Mr. Mangold then purchased Lot 13 from Mr. Stickler, and became a Lot owner in Timberlake Estates planned community. (A.R. pp 45); however, the right of way still exists through Lot 13 and Lots 14 and 15 which are still owned by Mr. Stickler.

Being a planned community, Timberlake Estates lots are subject to restrictive covenants and encumbrances. Each lot of Timberlake Estate Subdivision is subject to a yearly road maintenance fee of two hundredth (\$200.00) dollars per year for an improved lot and (\$100.00) dollars per year for an unimproved lot (A.R. pp 5) In addition to the yearly fees for roadway maintenance, each lot owner is also subject to assessment of fees for community electric, dam and lake maintenance. (A.R. pp 5) The restrictive covenants and encumbrances were filed along with the initial complaint, and are contained in the appendix. (A.R. pp 18) Among others, the Restrictive Covenants and Encumbrances apply to all heirs, executors, administrators, and assign (A.R. pp 18) Condition two of the Restrictive Covenants and Encumbrances restricts each lot to residential use only. (A.R. pp 18) Restriction three mandates that any dwelling erected must contain at least 1,700 square feet of living space, and makes further restriction in disallowing temporary foundations. (A.R. pp 18) Restriction four states that "no structure shall be erected, constructed or maintained upon any lot in this addition within fifteen (15) feet of the side lines of said lot or within forty (40) feet from the front line of said lot." (A.R. pp 19) Restriction fifteen (15) mandates that the "Grantor reserves unto itself, its successors and assigns, the right to erect (but not the obligation) and maintain all utility and electric lines, or to grant easements or right of ways therefore, under the right of ingress and egress for the purpose of installing or

maintaining the same on, over or under a strip of land ten (10) feet wide along the rear lines of any lot and twenty (20) feet wide along the front of any lot and thirty (30) feet wide along the perimeter of the subdivision. Such utility easements include but are not limited to telephone or electric light poles, conduits, equipment, sewer, gas and water lines. Within these easements, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of these utilities. (A. R. pp 20) Restriction twenty (20) assigns all rights of the original Grantor to the now Timberlake Estates Homeowner's Association. (A.R. pp 21); Restriction seventeen (17) mandates that "one residence shall be constructed upon said lot..." (A.R. pp 60)

Subsequently, but before being made aware that Mr. Mangold purchased Lot 13 from Mr. Stickler, the Plaintiff filed suit for declaratory judgment in the Circuit Court of Mineral County, West Virginia. Upon a hearing, the plaintiff relied on an opinion in the case of *Patrick Henry Estates Homeowner's Association v. Gerald Miller*, 462 Fed. Appx. 339, 2012, heard in the United States Court of Appeals for the Fourth Circuit, where the facts of the case indicated a similar scenario where a right-of-way/ thruway was sought through the private roads of a planned community to access a land outside of the planned community. The Circuit Court of Mineral County, did not agree with the Plaintiff and stated the *Patrick Henry Estates Homeowner's Association v. Gerald Miller* case was distinguishable, but did not state on what grounds it was distinguished. (A.R. pp 65) The Plaintiff appeals to this Court for relief.

### **SUMMARY OF ARGUMENT**

The Petitioner argues that the Restrictive Covenants and Encumbrances that attach to the private community of Timberlake Estates prohibit the use of any lot as a

throughway, so that other lands outside of the community are accessed. Additionally, the Petitioner argues that such use is directly in controversy with the spirit of a planned community, and divest the community owner of their investment and peaceful family living. Additionally, the Petitioner argues that a throughway to lands outside of a planned community is prohibited because it results in an excessive burden upon a planned community

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument in this matter is not necessary pursuant to the criteria in Rule (18) of the Rules of Appellate Procedure and that this case may be disposed by memorandum decision.

**ARGUMENT**

**-applicable law**

The standard of review in this matter is *de novo*; "A circuit court's entry of summary **judgment** is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)." Syl. pt. 1; "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

**-argument**

In the specific case at hand, the question that the Petitioner seeks for this Court to answer is whether the Defendant's, in light of existing Restrictions and Encumbrances, and constructive knowledge of a planned community, can defeat the expressed intent and the spirit of intent of a private planned community.

The Petitioner argues that Mr. Mangold's use of the roads of Timberlake Estates planned community is prohibited as follows:

**1.) Increase of Traffic and Burden upon the Homeowner's Association private lands (constructive notice from character of neighborhood) :** The Plaintiff relies on a similar case heard in 2012 in the United States Court of Appeals for the Fourth Circuit, being *Patrick Henry Estates Homeowner's Association v. Gerald Miller*, 462 Fed. Appx. 339, 2012; although the case is an unpublished opinion, the case was on point in the circumstances surrounding this matter. In that case the developer of the planned community retained ownership of one lot. The Developer later attempted to convert the lot and erect upon it a road to service lands that laid outside of the planned community. The developer intended to build a new development and use the roads of the planned community as access to the new development. The Homeowner's Association appealed and asserted that such use was prohibited as it directly encroached on its exclusive right to buffer easements and overburdened the intended use of the planned communities private roads. In that case, the Court agreed with the Homeowner's Association stating that the ['developer' "may not use 'the Association roads', as this would cause the roadway to become a "through way, greatly increasing the traffic and extending the easement to other lands owned by the 'developer'] *Patrick Henry Estates Homeowner's Association v. Gerald Miller*, 462 Fed. Appx. 339, 342, 2012 (AP pp 13)

In this case the facts change very slightly from that of Patrick Henry Estates case, instead of a developer there is an individual who obtained ownership of a residential Lot for the purpose of erecting a roadway, and making it a throughway to lands that are not

part of the planned community. Mr. Mangold, just like the developer in the aforementioned case, owns a substantial amount (over 500 acres ) of land that would be now connected by the roadway in question. That land could at any time be developed by Mr. Mangold, and increase the burden of traffic for the planned community. Mr. Mangold stated in his responsive pleading that he has no intention of allowing others to use the road; however his statement is purely gratuitous and does not bind on him, his heir, or assigns in changing their mind and increasing the use. If anything, the sheer size of the land, being over five-hundredth acres indicates that Mr. Mangold purported future use as "personal hunting grounds", is understated. The petitioner argues, that the Court in *Patrick Henry Estates v. Miller* made a finding of impermissible use of a lot made into a throughway without necessarily considering the volume of traffic, but on the basis that such road constructed to access lands beyond the planned community becomes a throughway road--and overburdens the planned community road regardless of a finding of use. In this case, the Circuit Court in Mineral County is believed to have distinguished this case from the Patrick Henry Estates case on the basis of purported future use--reasoning that building a subdivision would increase the burden significantly for the private roads of the association, but that since Mr. Mangold intends to use the road for his shortcut to hunting lands, it would not cause a great burden. The Petitioner argues that the degree of burden should not be of consideration as it is a factor that can change at any time. Rather, the Petitioner argues that the Courts in Patrick Henry Estates found that the nature of the resulting use is prohibited, not the degree. The resulting use being a throughway road that essentially gives access to foreign land owners to use private roads of a community for their convince and

pleasure, and binds a private community making it an extension of a right-of-way to a foreign land.

Additionally, Mr. Mangold and Mr. Sticker were both aware for a very long time before any transfers of land were made of the nature and spirit of the planned community of Timberlake Estates. They were aware that close to fifty (50) families invested in the community and build single family homes to raise their families there. They were aware that the community has limited access and traffic as there is no ingress or egress other than one entrance into the community. They were aware that, although the community is not gated, that it is a private community that maintains its own road for the benefit of the families that invested in the community. Yet, both Mr. Mangold and Mr. Sticker, violated the very spirit of the planned community by exposing and burdening it with potential traffic of non-residents, who will use the private planned community as a shortcut to many acres beyond the community.

The Petitioner not only argues that such use violates the intended use and the very spirit of planned communities, but that it also overburdens the intended use of roadways of the community, and that the Respondents were not without notice and full knowledge of the community and its very spirit. The Petitioner argues that the want of one non-resident for a short cut should not wrongfully divest the existing families, and their investment that they made into a residential community.

**1.) Restriction 2 of the Restrictive Covenants and Encumbrances restricts each lot to residential use only. (A.R. pp 18).** Under this particular covenant the Petitioner argues that this covenant is clear in conveying to a potential buyer the plan of the community. Furthermore, each and every other buyer who purchased Lots in the Community and developed residential dwellings in accordance

with Restrictive Covenants and Encumbrances relied on the Restrictive Covenant 2 that each lot will only be utilized for residential use. It does not have to be stated that Residential use in a planned community means use for erecting a home, and anything that is closely related to home living. So, although planting a garden or erecting a swing set on a Lot may be considered residential, erecting a roadway to hunting lands is certainly not the type of home life activity that is closely related to residential use, especially since Mr, Mangold's Lot does not even have a residence erected on it. Mr. Mangold's lot does not have a garden, or a swing set, but a roadway that may be used by any of Mr. Mangold's invitees to access over five hundredth acres of land, which land is outside of the planned community. Such use can hardly be classified as residential, as at the very least it is a very unusual use of a residential lot where a family home "shall" be erected, as demanded by the Restrictive Covenant and Encumbrances, Restriction 17. It can be argued, that the right of way essentially defeats not only Restrictive Covenant 15 but also 17, as erecting a throughway upon a lot to bordering land so decreased the potential value of a lot that it makes it unmark able to anyone who would wish to purchase a lot with the proper intent of building a residence upon it. However, such plan does greatly increase the value over five hundredth acres of the connected land.

Thus, the Respondent's use of Lot 13, 14, and 15, is in direct controversy with the Restrictive Covenants and Encumbrances, and thus, prohibited.

**1.) Restriction 15 of the Restrictive Covenants and Encumbrances:**  
**Restriction 15 states as follows :** Grantor reserves unto itself, its successors and assigns, the right to erect (but not the obligation) and maintain all utility and electric lines, or to grant easements or right of ways therefore, under the right of ingress and egress for the purpose of installing or maintaining the same on, over or under a strip of

land ten (10) feet wide along the rear lines of any lot and twenty (20) feet wide along the front of any lot and thirty (30) feet wide along the perimeter of the subdivision. Such utility easements include but are not limited to telephone or electric light poles, conduits, equipment, sewer, gas and water lines. Within these easements, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of these utilities. (A. R. pp 20)

Restriction twenty (20) assigns all rights of the original Grantor to the now Timberlake Estates Homeowner's Association. (A.R. pp 21)

Thus, the Petitioner argues that Restriction 15 of the Restrictive Covenants and Encumbrances that attach to each lot of the Timberlake Estates planned community protect the community from a throughway use of any lot in the community. Restriction fifteen (15), by clear language being "The Grantor reserves unto itself, its successors and assigns, right to erect (but not the obligation) and maintain all utility and electric lines, or to grant easements or right of ways therefore, Grantor reserves unto itself, its successors and assigns, the right to erect (but not the obligation) and maintain all utility and electric lines, or to grant easements or right of ways therefore, under the right of ingress and egress for the purpose of installing or maintaining the same on, over or under a strip of land ten (10) feet wide along the rear lines of any lot and twenty (20) feet wide along the front of any lot and thirty (30) feet wide along the perimeter of the subdivision. Such utility easements include but are not limited to telephone or electric light poles, conduits, equipment, sewer, gas and water lines. Within these easements, no structure, planting or other material shall be placed or permitted to remain which may damage or interfere with the installation and maintenance of these utilities.

Thus, the clear reading of Restriction fifteen (15) indicates that not only did the grantor establish a thirty (30) foot easement along the perimeter of subdivision, which affects the Lots in question here as they lay along the perimeter of the subdivision, but also a twenty (20) foot easement along the front of any lot and a ten (10) foot wide easement along the rear lines of any lot. Restriction 15 further states that no structure shall be allowed to be placed upon the easements if they are deemed to interfere with utility easements.

The Petitioner argues that the language in Restrictive Covenant 15 offers it protection against any one owner creating a right-of-way through his property for the benefit of a non community property as the Restriction applies to any potential future use of the land-including possibly the erection of above ground pipe lines, fences, and poles. Thus, not only did the Grantor retain the exclusive right to grant right-of-ways, precluding other from doing so, but the easement buffers existing on the front and back lines of any lot, as well as along the perimeter of all lots positioned so in the community prevents any one person from granting a right of way to another that transverses the lots and exits upon the buffer zones.

In this instance, the Respondents are sure to argue that the right to grant a right of way does not exist exclusively within the Grantor. The Respondent's interpretation is incorrect as such position fails to acknowledge the remaining language of Restrictive Covenant 15, where the Grantor has an easement over the front and end lines of any lot, and along the entire perimeter of the community. Taken as a whole, it cannot be argued that the intent of the Grantor was nothing less than to reserve upon itself the exclusive right to control the front and end lines of each lot contained within the community, as well as the entire perimeter. Further, any person contemplating a purchase of any Lot

in the community, upon careful reading of Restrictive Covenant 15, would come away with the impression that the land within the buffer areas were subject to control of the Grantor, as a land owner was not even allowed to place any structures upon the land, including machinery.

In this case, the right-of-way is a structure, which was erected upon the land, including the buffer zones, without permission or request for permission. Although the Respondent Mangold argues that the structure is not permanent as he does not intent to pave the road, it is still a structure that may interfere with Restrictive Covenant 15, as even wanting to place a utility pole in the middle of a right of way would interfere with the double use the Respondent will surly argue to be acceptable. However, because the community of Timberlake Estates and its many residents will continue residing for many years and decades from now in the community, it is impossible to imagine all types of inventions not in existence yet that would properly be permitted to be erected upon the buffer easements, but since Restrictive Covenant refers to a future right as much as a present right, and structure placed upon the buffer easement must be left up to the Homeowner's association to determine whether it potentially interferes with future development. In this case, the Homeowner's Association does believe that it interferes with future development, and the Petitioner does not want to establish a situation where the Respondent's would be able, under the doctrine of detrimental reliance, to claim that their right-of-way, and actions should preempt the Restrictive Covenants and Encumbrances because the Association let go a right to take action in a future.

Thus, the Petitioner argues that the buffer easement right granted to the Grantor by Restrictive Covenant 15 in the Restrictive Covenant and Encumbrances that run with

the land of each Lot contained in the planned community, prevent any other person from erecting any structure, even a gravel road, upon the buffer easement zones as they are reserved for future development, that may still be unplanned. Furthermore, the language of Restrictive Covenant 15, in its clear meaning, when the Covenant is read as a whole, states that the grantor has a what can only by an exclusive right to grant right-of-ways, making the conveyance of a right of way by Mr. Sticker to Mr. Mangold void.

Thus, even if there was no deeded right-of-way, and even if a particular lot owner created a physical throughway on his lot, such would be prohibited as the Restrictive Covenant specifically intended to have the ability to exercise future control over the easement buffer zones.

### **CONCLUSION**

The Restrictive Covenants and Encumbrances prohibit Respondent Mangold from having a right of way through the lots contained in the Timberlake Estates planned community, and in essence creating an extension of easement to burden the private roads of private community property. Additionally, the Respondent's are prohibited from burdening the roads of community property as it is clear that Timberlake Estates and its residents invested into the community to maintain the quiet and private spirit of the community. That Mr. Mangold's right of way violates the community's restrictive covenants and encumbrances and overburdens private roads and extends an easement for the benefit of Mr. Mangold's foreign property of over five hundred acres of land.

Thus, Mr. Mangold's right of way should be declared invalid, and his intended use prohibited.

**Signed:**  \_\_\_\_\_

Angie Collins Attorney (WV Bar #11092 )  
Counsel of Record for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of November, 2015 I delivered true and accurate copies of the foregoing **Petitioner's Brief** to:

John D. Athey  
149 Armstrong St.  
Keyser, WV 26726

Signed:  \_\_\_\_\_

Angie Collins (WV Bar 11092)  
Counsel of Record for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that prior to filing the appeal I conferred with parties regarding the content of appendix submitted in this matter.

Signed:  \_\_\_\_\_

Angie Collins (WV Bar 11092)  
Counsel of Record for Petitioner