

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---



APPEAL NO.: 21-0776

---

**THE CITY OF CHARLESTON,**  
**Defendant Below, Petitioner,**

v.

**ROBERT ROMAINE,**  
**Plaintiff Below, Respondent.**

DO NOT REMOVE  
FROM FILE

FILE COPY

**(Appeal from the Circuit Court of Kanawha County, West Virginia; Civil Action No. 18-C-1495; The Honorable Tera L. Salango)**

---

**PETITIONER'S BRIEF**

---

**KAREN T. McELHINNY**  
W.Va. State Bar # 7517  
Shuman McCuskey Slicer PLLC  
1411 Virginia Street, East, Suite 200  
Charleston, WV 25301  
(304) 345-1400  
[kmcelhinny@shumanlaw.com](mailto:kmcelhinny@shumanlaw.com)

**MICHAEL D. DUNHAM**  
W.Va. State Bar # 12533  
Shuman McCuskey Slicer PLLC  
116 South Stewart Street, First Floor  
Winchester, VA 22601  
(540) 486-4195  
[mdunham@shumanlaw.com](mailto:mdunham@shumanlaw.com)

*Counsel for Petitioner City of Charleston*

## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF THE CASE.....	1
III.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION.....	7
IV.	SUMMARY OF ARGUMENT.....	7
V.	ARGUMENT.....	10
	A. Standard.....	10
	B. The circuit court erred when it held that the City is responsible for maintaining a road outside of its jurisdictional limits.....	10
	C. The circuit court erred when it held that Shannon Place is a public road.....	15
	D. The circuit court erred by failing to respect the property interests of the owner(s) of the road and by failing to join all necessary parties to the proceeding.....	19
VI.	CONCLUSION.....	21

## TABLE OF AUTHORITIES

### Cases

<i>Baker v. Hamilton</i> , 144 W.Va. 575, 109 S.E.2d 27 (1959).....	17, 18
<i>Blamble v. Harsh</i> , 163 W. Va. 733, 260 S.E.2d 273 (1979).....	17
<i>Broun v. Charleston</i> , 116 W. Va. 51, 178 S.E. 514 (1935).....	13,14
<i>Cavender v. Charleston</i> , 62 W.Va. 654, 59 S.E.732 (1907).....	13,14
<i>Coffman v. Nicholas Cty. Comm'n</i> , 238 W. Va. 482 796 S.E.2d 591(2017).....	13
<i>Cox v. Amick</i> , 195 W.Va. 608, 466 S.E.2d 459 (1995).....	10
<i>Cramer v. West Va. Dep't of Highways</i> , 180 W. Va. 97, 375 S.E.2d 568, (1988).....	18
<i>CSX Transportation Inc. v. Madison Group, Inc.</i> , 42 F. Supp. 2d 624 (S.D. W.Va. 1999).....	17
<i>Ex parte Dickey</i> , 76 W. Va. 576, 85 S.E. 781 (1915).....	13
<i>Ford v. Dickerson</i> , 222 W.Va. 61, 662 S.E.2d 503 (2008).....	16,17
<i>Miller v. Hoskinson</i> , 189 W.Va. 189, 429 S.E.2d 76 (1993).....	16
<i>MacCorkle v. Charleston</i> , 105 W.Va. 395, 142 S.E. 841 (1928).....	17
<i>Motorists Mut. Ins. Co. v. Zukoff</i> , 244 W. Va. 33, 851 S.E.2d 112 (2020).....	10
<i>O'Daniels v. City of Charleston</i> , 200 W. Va. 711, 490 S.E.2d 800 (1997).....	20
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994).....	10
<i>Reger v. Wiest</i> , 172 W.Va. 738, 310 S.E.2d 499 (1983).....	17
<i>Wilson v. Seminole Coal, Inc.</i> , 175 W. Va. 518, 336 S.E.2d 30 (1985).....	16,17
<i>W.Va. Department of Transportation vs. Contractor Enters.</i> , 223 W.Va. 98, 672 S.E.2d 234 (2008).....	19

### Statutes

W.Va. Code 8-2-1.....	12
-----------------------	----

W.Va. Code 8-2-2.....	12
W.Va. Code 8-6-2.....	12
W.Va. Code 8-6-3.....	12
W.Va. Code 8-6-4.....	12
W.Va. Code 8-6-4a.....	12
W.Va. Code 8-6-5.....	12
W.Va. Code 8-12-1.....	13
W.Va. Code 8-12-2.....	13
W.Va. Code 8-12-5.....	13
W.Va. Code 8-18-1.....	13
<i>W. Va. Code 17-1-3</i> .....	1,3,6,8,10,12,14,15,16,17,18
W.Va. Code 55-11-13.....	9

**Other Authorities**

U.S. Const. amend. XIV.....	19
W.Va. Const. Art 3 §10.....	19

## I. ASSIGNMENTS OF ERROR

- (1) The circuit court erred in finding that a municipality is responsible for maintaining and repairing a section of road outside the jurisdictional limits of the municipality.
- (2) The circuit court erred in finding that the portion of Shannon Place outside of the jurisdictional limits of the City of Charleston is a public road that is the responsibility of the City of Charleston to maintain.
- (3) The circuit court's ruling violates the rights of the individuals or entities who own an interest in the property upon which the subject road lies.

## II. STATEMENT OF THE CASE

This is an appeal of an August 30, 2021, order entered by the Circuit Court of Kanawha County granting Robert Romaine (“Romaine”) summary judgment and declaratory relief and denying the City of Charleston (“City”) summary judgment. The circuit court held that portions of a dead-end road, constructed by private parties and located outside the jurisdictional limits of the City, qualifies as a public road, and the City is responsible for maintaining and repairing it. [JA00276-00284.] Despite recognizing that the road is outside of the jurisdictional limits of the City, the circuit court essentially expanded the City's boundaries when it concluded that the road “has been conclusively established as a City street[.]”<sup>1</sup> [JA00281, JA00283.]

On December 3, 2018, Romaine filed a complaint against the City seeking a declaratory judgment that the City is responsible for the maintenance and repair of a portion of a road known

---

<sup>1</sup> The circuit court stated in its order that the evidence demonstrates that the road has been established as a “City street” and later stated that the road has been established as a “city road” under *W. Va. Code § 17-1-3*. [JA00281; JA00283.] The circuit court did not define the terms, “City street” or “city road,” but it appears to use the terms interchangeably. It is unclear whether the circuit court meant “public road,” which is a term used in *W. Va. Code § 17-1-3*. Additionally, the circuit court is not entirely clear in its order whether it is unilaterally extending the jurisdictional limits of the City, but the practical effect of the circuit court's decision certainly forces the City to expand its geographical boundaries so it can provide the maintenance and repairs ordered by the circuit court.

as Shannon Place.<sup>2</sup> [JA00001-00004.] Romaine owns a home in the Shadow Hills Subdivision located on a road named Shannon Place, which is a dead-end road constructed by private parties. [JA00002, JA00034, JA00135-00139, JA00140-00141.] Romaine’s home is located within the jurisdictional limits of the City, but the portion of Shannon Place located adjacent to Romaine’s home is located outside of the City’s jurisdictional limits. [JA00002, JA00140-00143, JA00171, JA00277.] Romaine claims that the portion of Shannon Place adjacent to his home has fallen into a state of disrepair, and he seeks to have the City pay for the maintenance and repair of the road. [JA00001-00004.] Romaine admits that he was aware that the portion of Shannon Place adjacent to his home was not within the jurisdictional limits of the City at the time he filed his complaint.<sup>3</sup> [JA00143.]

Furthermore, the City has not even accepted the portion of Shannon Place inside of its limits as a public road. Shannon Place is not a through road and is only used by residents of Shadow Hills Subdivision and invitees of Shadow Hill residents or for the benefit of Shadow Hill residents. The City provides services such as removing refuse, recycling, yard waste, and Christmas trees from homes along Shannon Place, and several homes along Shannon Place are located within the City’s jurisdictional limits. [JA00199-00200.] City employees have sporadically provided snow removal, salt application, and street sweeping services to the portion of Shannon Place outside of the City’s jurisdictional limits, but such services were not authorized by the City and were not in

---

<sup>2</sup> Romaine originally named the West Virginia Divisions of Highways (“WVDOH”) as a defendant in this lawsuit but subsequently voluntarily dismissed it leaving the City as the only remaining defendant in the underlying civil action. [JA00120-00121, JA00285-00286.]

<sup>3</sup> The circuit court erred by not granting the City summary judgment based upon this admission alone. In his complaint, Romaine acknowledges the City’s primary argument in this case: the City is not responsible for maintaining and repairing a road that is outside of its jurisdictional limits. In his complaint, Romaine declared that “[t]he only issue it would appear to be decided here it whether the roadway known as Shannon Place is located within the city limits or outside said city limits in order to determine [who] has the legal duty to maintain and repair said roadway.” [JA00003.]

agreement with the City's longstanding practice of not plowing the portion of Shannon Place outside of the jurisdictional limits of the City. [JA00135-00139, JA00169.] The City has a history of refusing to provide stormwater drainage improvements or maintenance to Shannon Place where it lies outside of municipal limits. [JA00170.]

On May 7, 1996, a City resident living on Shannon Place made a request for the City to repair a storm drain that was not located on the City portion of Shannon Place. [JA00170] The City denied the request noting that Shannon Place "has not yet been accepted" and the City was not responsible for the drainage.<sup>4</sup> [JA00170.] On January 8, 1997, David Alvis, Planning Director for the City, prepared a memorandum to Mark Holstine, Public Works Director for the City, regarding private streets for recently annexed areas. [JA00169.] The purpose of the memorandum was for use during anticipated snow removal requests from citizens. [JA00169.] In the memorandum, Alvis notes that, in regard to Shannon Place, the "last 350' of street down to the turning area is outside the City, even though all the houses on the left side of the street are in the City."<sup>5</sup> [JA00169.]

The City of Charleston has continued to take the position that it will not authorize maintenance, snow removal or street sweeping in the section of Shannon Place outside of its

---

<sup>4</sup> The circuit court takes the position that this refused work request was only three years after the acquisition of the subject property by the builder, and it fails to account for the City's "actions in providing consistent services to Shannon Place from 1996 to the present[.]" [JA00283.] The circuit court holds that this period of twenty-five years is "sufficient to conclusively establish a City road under *W. Va. Code §17-1-3*" despite the lack of any language in *W. Va. Code §17-1-3* authorizing a court (or any other person or entity) to expand the jurisdictional limits of a municipality or otherwise establish a "City road." The refused work request shows that, historically, the City did not consider the portion of Shannon Place adjacent to the Romaine home to be within its limits. The affidavits of City employees, which the circuit court also ignores, establish that the City did not take the portion of Shannon Place adjacent to the Romaine home into its limits. [JA00135-00139.]

<sup>5</sup> Not only does the memorandum confirm what Romaine considers to be "the only issue" to be decided in this case, it is also evidence that the City did not authorize snowplowing of the portion of Shannon Place outside of its jurisdictional limits.

jurisdictional limits; the City's Director of Public Works and Deputy Director of the Street Department confirm that the City has not authorized maintenance, snow removal, salt application or street sweeping of the section of Shannon Place that lies outside its jurisdictional limits. The current Director of Public Works for the City of Charleston, Brent Webster, testified that any maintenance, snow plowing, salt application, or street sweeping on Shannon Place outside the City limits was not authorized by the City of Charleston. [JA00134-135.] William "Bill" Tate, the current Deputy Director of the Street Department who has been employed with the City of Charleston for more than 15 years, testified that any snow removal, salt application, or street sweeping services on Shannon Place outside of the limits of the City of Charleston was unauthorized. [JA00137-138.]

On May 21, 2021, the City filed its motion for summary judgment and memorandum of law in support. [JA00117-00171.] The City requested that the circuit court grant summary judgment in its favor because the City could not be responsible for maintenance of roads outside of its jurisdictional limits. [JA00124-00126.] In further support of its argument for summary judgment, the City explained that it could not be held responsible for maintenance of an unestablished, private road. [JA00127-00131.] On June 1, 2021, Romaine filed his response to the City's motion for summary judgment and a cross motion for summary judgment. [JA00172-00243.] Romaine argued that he is entitled to summary judgment in his favor because the City has treated Shannon Place as a public city road; therefore, the City is responsible for maintaining Shannon Place, despite the fact that the relevant section of Shannon Place falls outside of the municipal limits of the City.

On August 3, 2021, the circuit court held a hearing on the *City's Motion for Summary Judgment* and *Romaine's Cross-Motion for Summary Judgment*. During the hearing, the

Honorable Tera L. Salango, Judge, stated the circuit court’s belief that Romaine “has proven that [Shannon Place] is a city street” before granting Romaine’s motion for summary judgment and denying the City’s motion for summary judgment. [JA Vol. 2, Aug. 3, 2021, Hearing Tr., 34:14-15]. Judge Salango acknowledged that she was “willing to take a chance and create new precedent” in this matter because she did not “see how the City can argue that this roadway has not been conclusively established as a city street.” [JA Vol. 2, Aug. 3, 2021, Hearing Tr., 33:18-21]. Judge Salango found compelling evidence presented that the City, for at least 25 years, “snowplowed [Shannon Place] . . . maintained [Shannon Place] . . . whether that’s authorized or not authorized . . .” [JA Vol. 2, Aug. 3, 2021, Hearing Tr., 33:21-34 – 33:1:2.]

In its subsequent order, the circuit court accepted that “it is not disputed that the portion of Shannon Place in front of [Romaine’s] home is outside the city limits, leaving at least part of the area in need of repair outside the city limits.” [JA00278.] The circuit court further found that various Shannon Place residents had received various services from the City over the years, including the former owner of Romaine’s home. [JA00278.] The circuit court does not explain how this factual determination is relevant to whether the City is responsible for maintaining the portion of Shannon Place outside its jurisdictional limits. The circuit court noted that affidavits were presented that demonstrated that the City has never authorized snowplowing, street sweeping, salt application, or other road maintenance on any portion of Shannon Place located outside of the City’s jurisdiction but held that the affidavits “conflict[ ] with [Romaine’s] evidence showing such services have been provided for a number of years.” [JA00277.] The circuit court also considered a real estate listing by Old Colony Property. [JA00279.] Finally, the circuit court appeared to rely on the City’s partnership with the West Virginia Division of Highways on another project where the City voted to expend funds on a project to pave a portion of a road that fell within the City’s

jurisdiction.<sup>6</sup> [JA00279.] The circuit court did not articulate how these factors are relevant to whether the City is responsible for maintaining the portion of Shannon Place outside its jurisdictional limits.

Seemingly conflating its analysis regarding whether Shannon Place is within the jurisdictional limits of the City and whether Shannon Place is a private or public road, the circuit court misconstrued the City’s argument to be that the City “contends that the road is outside of [its] limits, and therefore an unestablished road pursuant to *W. Va. Code 17-1-3*.”<sup>7</sup> [JA00280.] The circuit court then concluded that Shannon Place is a public roadway and “[t]herefore, under West Virginia law, it is either a City street or State road.” [JA00280.] Observing that the City is responsible for public streets within its jurisdiction, the circuit court found that “the evidence demonstrates that Shannon Place has been conclusively established as a City street by virtue of its usage and the provision of City services of the course of its 30-year existence.” [JA00281.] The circuit court concluded the City has treated Shannon Place as a “City street” for nearly 30 years and the evidence establishes Shannon Place as a “city road” and the City “should be and is responsible for the much-needed repairs to the entirety of Shannon Place.” [JA00283.]

The City appealed to this Court seeking review of the circuit court’s order because the circuit court misconstrued *W. Va. Code § 17-1-3*, conflating the analysis of whether a road is a public or private road and whether a road is within the jurisdictional limits of the City, and

---

<sup>6</sup> The circuit court states, erroneously, that “[i]n 2019, Defendant City of Charleston partnered with the West Virginia Division of Highways to pave Oakwood Road, which all parties agree lies both without and within the City of Charleston.” Contrary to this statement, counsel for the City stated during oral argument, “Oakwood Road is a public road but it is a State Highways system road **within the city limits**. The City wasn’t paying money to help pave and fix a road outside its city limits by agreeing to pay part of, not all of, part of the share of that.” [JA Vol. 2, Aug. 3, 2021, Hearing Tr.,20:15-19; emphasis added.]

<sup>7</sup> Whether a road is a public road under *W. Va. Code § 17-1-3* matters not to whether a road is within a municipality’s jurisdictional limits. Assuming *arguendo* that Shannon Place is a public road, the City still is not responsible for maintenance of the portion of Shannon Place that falls outside of its jurisdiction.

therefore created new law in which a circuit court can unilaterally expand the boundaries of a municipality and force a municipality to maintain and repair roads outside of its jurisdictional limits. Additionally, the circuit court's erroneous order has troubling ramifications for the interests of private property owners insofar as it constitutes an unconstitutional taking by judicial mandate.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument under Rule 20 is appropriate because this appeal involves issues of fundamental public importance – whether a circuit court can unilaterally expand the boundaries of a municipality and whether a municipality can be forced by a circuit court to maintain and repair a road outside of its jurisdictional limits.

### **IV. SUMMARY OF ARGUMENT**

The circuit court made three fundamental errors in its order denying the City and granting Romaine summary judgment. First, the circuit court erred in finding that the City, a political subdivision, is responsible for repairs and maintenance to a section of road outside its jurisdictional limits. The circuit court effectively expanded the geographical boundaries of the City without any authority to do so. Second, the circuit court erred in finding that the portion of the road outside of the jurisdictional limits of the City is a public road when the road is not used by the public, and there has not been authorized public money expended on the maintenance of the road. Third, the circuit court erred because its order impacts the rights of the individuals or entities who own an interest in the property upon which the subject road lies, and those individuals or entities were not made parties to the proceedings below.

No authority exists requiring a municipality to maintain or repair a road outside of its jurisdictional limits. It is undisputed that the portion of Shannon Place adjacent to Romaine's home is outside of the jurisdictional limits of the City. [JA00002, JA00140-00143, JA00171, JA00277.] Despite this lack of authority, the circuit court created new law requiring that the City maintain and repair the road adjacent to Romaine's home and outside of the jurisdictional limits of the City. The circuit court conflates the issue of whether the City is responsible for maintenance of a road outside of its geographical boundaries with the issue of whether Shannon Place is a public or private road. Whether Shannon Place is a public or private road has no bearing on whether the City must maintain a road outside of its geographical boundaries. Even if Shannon Place were declared a public road, the City should not be responsible for maintaining any portion of Shannon Place that falls outside of its jurisdictional limits.

Further, in determining that Shannon Place is a public road, the circuit court erred in its conclusion that Shannon Place, a private, dead-end road used only by or for the benefit of its residents, had been used by the public for a period of ten years. Equally as fatal to its analysis under *West Virginia Code §17-1-3*, the circuit court erred in its conclusion that sporadic activities by City employees, which were not authorized by the City, such as plowing snow or sweeping the street, are enough to establish that public money or labor has been expended on Shannon Place. The circuit court ignored the requirement that the expenditure of public money must be authorized by the municipality in order to establish a public road. Thus, the portion of Shannon Place adjacent to Romaine's property, and outside of the City's jurisdictional limits, is a private road and has not been established or made public and is therefore controlled by the individual who owns the road.

Finally, the circuit court's ruling violates the rights of individuals or entities who own an interest in the property upon which Shannon Place lies because those individuals or entities were

not made parties to the proceedings below. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. W.Va. Code § 55-11-13.

The parties in this matter have agreed that the original tract of land was purchased and placed into trust by Keith O. Bryant. Following Mr. Bryant's death, Roger Dale Monk Builders, Incorporated acquired the property and developed the subdivision. There is no evidence that the road or right-of-way was ever condemned by or transferred to the City. There is no record that anyone other than Roger Dale Monk Builders, Incorporated owned the road in question. If the circuit court's ruling is that the private road is now a public road within the jurisdictional limits of the City, then all impacted parties should have been made parties to the proceedings below.

Reversal of the circuit court's order denying the City and granting Romaine summary judgment is necessary for several reasons. There is no precedent, legal or otherwise, for mandating that a municipality maintain and repair a road outside of its municipal limits. There is no precedent, legal or otherwise, for determining that a road outside of a municipality's jurisdictional limits is a "city road" or "city street." There is no precedent, legal or otherwise, that a privately controlled road can be "conclusively established" as a public road where a municipality never authorized the expenditure of public money on the maintenance of the road. Finally, reversal of the circuit court's order is necessary because the circuit court's ruling directly affected and determined the scope of rights in property of persons and entities who claimed an interest in the property but were not made parties to the proceeding. Thus, any order or decree issued in the absence of those parties is null and void. Furthermore, the circuit court's erroneous order presents dangerous public policy

precedent insofar as it could be used to usurp private property owners' rights without even making them a party to the action.

## V. ARGUMENT

### A. Standard

Romaine sought a declaratory judgment, and the circuit court entered summary judgment in Romaine's favor. "The standard of review for entry of a declaratory judgment is the same as that for entry of summary judgment – *de novo*." *Motorists Mut. Ins. Co. v. Zukoff*, 244 W. Va. 33, 36, 851 S.E.2d 112, 115 (2020). *See also* Syllabus Point 3, *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995); Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Thus, this Court's review in this matter is *de novo*.

### B. The circuit court erred when it held that the City is responsible for maintaining a road outside of its jurisdictional limits.

The circuit court acknowledges that the portion of Shannon Place adjacent to the Romaine home is outside of the City's jurisdictional limits but holds that the City's actions "conclusively establish" Shannon Place "as a city road under *W. Va. Code § 17-1-3*." [JA00283.] The circuit court does not explain how or cite authority in support of its holding that *W. Va. Code § 17-1-3* gives it authority to effectively expand the City's boundary by forcing it to maintain portions of a road outside its jurisdictional limits.

The text of *West Virginia Code § 17-1-3* does not provide a mechanism for expanding a municipality's geographical boundaries or forcing a municipality to maintain roads outside of its boundaries. The text of the statute does not establish a procedure by which a road outside of a municipality's jurisdictional limits can be "conclusively established" as a "city road." The statute

does not define or even mention the term “city road” anywhere in its text. Instead, it provides definitions and methods for establishing a “road,” “public road,” and/or “highway.”<sup>8</sup> See *W. Va.*

---

<sup>8</sup> In its entirety, *W. Va. Code § 17-1-3* provides:

The words or terms “road”, “public road” or “highway” shall be deemed to include, but shall not be limited to, the right-of-way, roadbed and all necessary culverts, sluices, drains, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts necessary for the maintenance of travel, dispatch of freight and communication between individuals and communities; and such public road or highway shall be taken to include any road to which the public has access and which it is not denied the right to use, or any road or way leading from any other public road over the land of another person, and which shall have been established pursuant to law. Any road shall be conclusively presumed to have been established when it has been used by the public for a period of ten years or more, and public moneys or labor have been expended thereon, whether there be any record of its conveyance, dedication or appropriation to public use or not. In the absence of any other mark or record, the center of the traveled way shall be taken as the center of the road and the right-of-way shall be designated therefrom an equal distance on each side, but a road may be constructed on any part of the located right-of-way when it is deemed advisable so to do.

The Legislature notes that there are public highways that run over the surface of this land, over and through the navigable streams, rivers and waterways on this earth and above the surface of this earth in the form of highways in the sky, commonly known as airways. The Legislature finds that each of these types of public highways are essential to the development of this state and that the health and safety of each of the citizens of this state are affected daily by the availability of each of these three types of public highways, and that it is the best interests of the people of this state that each of these be recognized and included within the meaning of public highways. The Legislature further recognizes that airports are an important and integral part of the public highways existing above the surface of this state, and that airports are necessary to access such highways, and therefore airports, including runways, taxiways, parking ramps, access roads and air traffic control facilities located at airports, are hereby declared to be part of the public highway system of this state.

The Legislature finds that a courtesy patrol program providing assistance to motorists on the state’s highways is one of a most beneficial public safety service to residents of the state using public highways and serves as a showing of the state’s hospitality and good will to tourists visiting the state. For that reason, on July 1, 2015:

- (1) The administration of the courtesy patrol program shall be transferred to the Division of Highways and expenditures made by the division to fund the courtesy patrol program providing assistance to motorists on the state’s highways shall be made pursuant to appropriation of the Legislature from the State Road Fund or as otherwise provided by law; and
- (2) The administration of the special revenue account in the State Treasury known as the Courtesy Patrol Fund shall be transferred to the Division of Highways: Provided, That any balances remaining in the Courtesy Patrol Fund at the end of fiscal year 2015 shall be transferred and deposited into the Tourism Promotion Fund. After the June 30, 2015, expenditures from the Courtesy Patrol Fund shall

*Code § 17-1-3*. The circuit court goes far beyond the purview of *West Virginia Code § 17-1-3* by relying on it as a basis to extend the geographical boundaries of the City and to force the City to maintain a road outside of its boundaries.

A municipality's geographical boundaries are set by the municipality when it petitions for incorporation. See *W.Va. Code §§ 8-2-1(a)(5), 8-2-2*.<sup>9</sup> A municipality may expand its boundaries under certain circumstances, such as annexation or petitioning the county commission for a boundary adjustment,<sup>10</sup> but nowhere is a circuit court permitted to unilaterally expand the

---

be used solely to fund the courtesy patrol program providing assistance to motorists on the state's highways. Amounts collected in the Courtesy Patrol Fund which are found, from time to time, to exceed funds needed for the purposes set forth in this subdivision may be transferred to other accounts or funds and redesignated for other purposes by appropriation of the Legislature. Moneys paid into the fund may be derived from the following sources:

- (A) Any gifts, grants, bequests, transfers, appropriations or other donations which may be received from any governmental entity or unit or any person, firm, foundation, corporation or other private entity;
- (B) Any appropriations by the Legislature which may be made for the purposes of this section; and
- (C) All interest or other return accruing to the fund.

Any moneys remaining in the fund at the end of a fiscal year shall remain in the fund and be available for expenditure during the ensuing fiscal year.

<sup>9</sup> Specifically, the relevant portions of the statute provide that

[t]he proponents of incorporation shall provide to the county commission a proposal which shall include:

- (A) A map or maps of the area to be incorporated showing the following information:
  - (i) The present boundaries of nearby municipalities and the proposed boundaries of the area to be incorporated; and
  - (ii) The proposed extensions of water mains and sewer outfalls to serve the incorporated area, if such utilities are to be operated by the municipality. The water and sewer map must bear the seal of a registered professional engineer or a licensed surveyor.
- (B) A statement that the area to be incorporated meets the applicable requirements of this article.

*W.Va. Code § 8-2-1(a)(5)*.

<sup>10</sup> *W.Va. Code §§ 8-6-2 and 8-6-3* provide for a mechanism for annexation via election. *W.Va. Code §§ 8-6-4 and 8-6-4a* provide for a mechanism for annexation without an election. *W.Va. Code § 8-6-5* allows for

boundaries of a municipality. See *Coffman v. Nicholas Cty. Comm'n*, 238 W. Va. 482, 490, 796 S.E.2d 591, 599 (2017) (“It is well-settled that the determination as to geographic boundaries is essentially a legislative function into which the courts generally should not intrude unless the process is unconstitutional or invalid.”).

The legislative branch also commits authority to municipalities to control portions of roadways within their municipal jurisdictional limits but has not given municipalities authority to control roadways outside of their jurisdictional boundaries. See *Ex parte Dickey*, 76 W. Va. 576, 583, 85 S.E. 781, 784 (1915). A city has plenary power and authority to provide for the government, regulation, and control of its municipal affairs, including, but not limited to, the “acquisition, care, management and use of *the city's streets*, avenues, roads, alleys, ways and property . . .” *W. Va. Code § 8-12-2(a)(5)* (emphasis added). See also *W. Va. Code § 8-12-5* (every municipality has plenary power to maintain, repair, and regulate streets within its jurisdiction); *W. Va. Code § 8-18-1* (providing authority for a municipality to pave and improve streets within the municipality’s jurisdictional limits). A municipality does not have the power to govern, regulate, or control roadways that are outside of its jurisdiction. See *Cavender v. Charleston*, 62 W.Va. 654, 59 S.E.732 (1907); *Broun v. Charleston*, 116 W. Va. 51, 178 S.E. 514 (1935).

In *Cavender*, this Court found that the dispositive fact in a dispute about whether the City of Charleston could be liable for failure to maintain a bridge was whether the bridge was located within its municipal limits:

Therefore, the question is not one of ownership of the land or of the bridge, strictly speaking; it is only a question of where the liability for maintenance and repair rests, and **we say it rests upon the city because the bridge is within the city** and a part of its highways, and because the Legislature has expressly given it possession and control and commanded it to keep the bridge in repair.

---

a municipality to apply to the county commission for permission for annexation by a minor boundary adjustment. Nowhere in this statutory scheme exists a mechanism allowing a circuit court to unilaterally expand the jurisdictional limits and boundary lines of a municipality.

*Cavender*, 62 W. Va. at 664, 59 S.E. at 736 (emphasis added). *Broun* involved a proceeding in mandamus to require the City of Charleston to repair a bridge located within its limits. 116 W. Va. at 52, 178 S.E. at 514. Relying on *Cavender*, the dispositive fact for this Court in reaching its decision was that “the bridge was wholly within the city limits.” *Id.* at 52, 178 S.E. at 514-515. Specifically, the Court found that the “legislative grant of power to the city over its streets and avenues has been constant through its several charter revisions . . .[,] [and] [c]onsequently we are of opinion that the duty of maintaining the bridge rests upon the city.” *Id.* at 53-54, 178 S.E. at 515.

*West Virginia Code § 17-1-3* does not provide a circuit court with any authority to extend the boundaries of a municipality or to force a municipality to maintain and repair roads outside of its jurisdiction. Yet here the Circuit Court of Kanawha County purports to use *West Virginia Code § 17-1-3* to do just that. The circuit court provides no authority for this sweeping change in the law. Instead, all legal authority provides that the City only has a duty (and the power) to maintain public roads that are located within its jurisdictional limits. The circuit court erroneously extended the City’s duty to apply to roads not located within those limits. Focusing entirely on factors that might determine whether Shannon Place is a public road or private road, the circuit court completely ignored and failed to consider the jurisdictional question. No authority exists which allows a circuit court to convert a private road outside of a municipality’s boundaries into a public road within its boundaries because the municipality engaged in certain activities such as snowplowing or street sweeping the road. The circuit court does not cite any authority to the contrary because no such authority exists.

Even more concerning than its misapplication of *West Virginia Code § 17-1-3* is the fact that the circuit court chose to examine the statute at all given the circuit court's express acknowledgement that the relevant section of Shannon Place is located outside the jurisdictional limits of the City. [JA00277.] In his complaint, Romaine declared that "[t]he only issue it would appear to be decided here is whether the roadway known as Shannon Place is located within the city limits or outside said city limits in order to determine [who] has the legal duty to maintain and repair said roadway." [JA00003.] That question has been conclusively answered: the portion of Shannon Place located adjacent to Romaine's home is located outside of the City's jurisdictional limits. [JA00002, JA00140-00143, JA00171, JA00277.]

Municipalities have the plenary power to set or expand jurisdictional boundaries and to maintain or repair roads within their jurisdictional limits. Circuit courts enjoy no such power. The circuit court changes that dynamic in its order. The circuit court's order sets precedent to allow courts to operate outside the express criteria outlined by statute and to expand the boundaries of municipalities and force municipalities to maintain and repair roads or other property not within their jurisdictional limits. No such authority exists that allows such a sweeping change. Accordingly, this Court should reverse the circuit court's order.

**C. The circuit court erred when it held that Shannon Place is a public road.**

The City does not have a duty to maintain Shannon Place because Shannon Place is not an established public road; Romaine failed to show evidence of more than ten years of public, consistent use and authorized expenditure of public money. Maintenance is the responsibility of the road's private owner(s).

A road is controlled and maintained by the private individuals who own the road until the road is “established” in accordance with West Virginia law:

The words or terms “road”, “public road” or “highway” shall be deemed to include, but shall not be limited to, the right-of-way, roadbed and all necessary culverts, sluices, drains, ditches, waterways, embankments, slopes, retaining walls, bridges, tunnels and viaducts necessary for the maintenance of travel, dispatch of freight and communication between individuals and communities; and such public road or highway shall be taken to include any road to which the public has access and which it is not denied the right to use, or any road or way leading from any other public road over the land of another person, and which shall have been established pursuant to law. ***Any road shall be conclusively presumed to have been established when it has been used by the public for a period of ten years or more, and public moneys or labor have been expended thereon, whether there be any record of its conveyance, dedication or appropriation to public use or not.***

*W.Va. Code § 17-1-3.* (Emphasis added.) If the road has not been established or made public, it is a private road and is controlled by the individual who owns the road. *See Wilson v. Seminole Coal, Inc.*, 175 W. Va. 518, 336 S.E.2d 30 (1985) (finding that a road was a private road and therefore the owners of the land on which the road sat controlled the road); *Miller v. Hoskinson*, 189 W.Va. 189, 429 S.E.2d 76 (1993) (the appellant maintained that the road was never accepted into the state highway system and the Court determined that despite sporadic public use of the road, it was a private road and access could be restricted by the owner of the land on which the road was present); *Ford v. Dickerson*, 222 W.Va. 61, 662 S.E.2d 503 (2008) (concluding that Second Avenue and Fifth Street were not public roads and affirming the trial court’s ruling that the private owners had the right to determine who could access these roads.).

The circuit court erroneously found that the portion of Shannon Place outside the jurisdictional limits of the City is a public road. In order to be established as a public road, a road must (1) be used by the public for ten or more years and (2) have authorized public moneys

expended on its maintenance. Syl. Pt. 3, *Baker v. Hamilton* 144 W. Va. 575, 109 S.E.2d 27 (1959); *Ford*, 222 W.Va. at 64, 662 S.E.2d at 506. The circuit court did not identify consistent use by the public of the road. Sporadic or occasional use is not enough.<sup>11</sup> *Reger v. Wiest*, 172 W.Va. 738, 310 S.E.2d 499, 502 (1983).

The circuit court concluded that Shannon Place was a public road despite the fact that there was insufficient evidence to establish that the road has been used by the public for ten or more years. Shannon Place is a dead-end road, and the portion outside of the City is used only by or for those who live on the road. Use by a limited number of residents of the road or use for the benefit of the residents does not constitute public use. The fact that the public has access to the road and has not been denied the right to use it does not establish public use. *MacCorkle v. Charleston*, 105 W.Va. 395, 142 S.E. 841, 843 (1928). The circuit court erred in denying the City's motion for summary judgment and granting Romaine's motion for summary judgment when Romaine could not prove ten years of non-sporadic use by the public.

Public use alone is not enough to establish the public nature of a road under *West Virginia Code § 17-1-3*. There must be authorization for public expenditure on the subject road. “[P]ublic moneys or labor **duly authorized** by a public agency or official empowered to maintain, repair or accept such road must be expended on it.” *Wilson v. Seminole Coal, Inc.*, 175 W. Va. 518, 520, 336 S.E.2d 30, 32 (1985) (emphasis added). Consistent public maintenance is required; isolated and sporadic instances of public maintenance will not suffice to meet the requirements of *West Virginia Code §17-1-3*. See *Blamble v. Harsh*, 163 W. Va. 733, 260 S.E.2d 273 (1979). Performance of public labor on a road, if not authorized, does not satisfy the requirement of the

---

<sup>11</sup> A party seeking to establish public use cannot rely upon their own use to establish any rights. See *CSX Transportation Inc. v. Madison Group, Inc.*, 42 F. Supp. 2d 624, 628 (S.D. W.Va. 1999).

statute that public moneys or labor has been expended on the road. *Baker*, 144 W. Va. at 582-583, 109 S.E.2d at 31-32. As this Court has observed,

the occasional expenditure of public money or the occasional performance of public labor on such road, which is not so authorized, even though such road has been used by the public for ten years or more, does not satisfy the requirements of the statute or render effective the statutory presumption of its establishment as a public road. It would indeed be a strange and extremely dangerous doctrine if the occasional acts of employees of the State Road Commission, or of any other public authority, in performing labor on a private way without being authorized so to do, could convert a private way of a property owner, when coupled with mere user by the public, into a public road and in that manner deprive the owner of a vested property right without just compensation and obligate public authorities to maintain what in fact would be private roads as public roads beyond the limit of their ability to do so. The statute cannot be used for any such purpose and it is obvious that such was not the intention of the Legislature in enacting it.

*Id.* The circuit court ignored evidence produced by the City in the form of affidavits of City employees in charge of road maintenance. The affidavits establish that there was no City authorized maintenance of Shannon Place. [JA 00134-00135; JA00137-00138.] Nor has the City ever provided authority for employees to provide maintenance services outside of the City. [JA 00134-00135; JA00137-00138.]

This Court has “emphasized the lack of authorization by a public official responsible for making maintenance decisions” fails to satisfy the public moneys or labor requirement of *W. Va. Code, 17-1-3. Cramer v. West Va. Dep't of Highways*, 180 W. Va. 97, 100, 375 S.E.2d 568, 571 (1988). Romaine did not produce any evidence that alleged labor or expenditure of public money on Shannon Place was authorized by the City. The circuit court ignored the City’s evidence that any maintenance to the portion of Shannon Place outside of the City’s jurisdictional limits was

never authorized and concluded that Shannon Place is not only a public road, but a City road.<sup>12</sup> Accordingly, this Court should reverse the circuit court's decision.

**D. The circuit court erred by failing to respect the property interests of the owner(s) of the road and by failing to join all necessary parties to the proceeding.**

The circuit court's order should be overturned because it deprives the private property owners of Shannon Place of their property interests without joining them as parties to the declaratory judgment action. The United States Constitution and West Virginia Constitution guarantee that no person shall be deprived of life, liberty, or property without due process of law. W.Va. Const. Art 3 §10, U.S. Const. amend. XIV. The Framers believed that being deprived of property was equally as reprehensible and odious as being deprived of life or liberty. *See W.Va. Department of Transportation vs. Contractor Enters.*, 223 W.Va. 98, 104, 672 S.E.2d 234, 240 (2008) (J. Maynard, Dissent).

The City does not own Shannon Place. The original tract of land was purchased and placed into trust by Keith O. Bryant. [JA00145-JA00168.] Following Mr. Bryant's death, Roger Dale Monk Builders, Incorporated acquired the property and developed the subdivision where Romaine's home and Shannon Place are located. [JA00145-JA00168.] There is no evidence that the road or right-of-way was ever condemned by or transferred to the City. Indeed, Romaine admits that Monk failed to deed "common areas," i.e. Shannon Place, to the City after completion of the

---

<sup>12</sup> The circuit court mistakenly relies upon Romaine's argument that the City's removal of refuse, recycling, yard waste, and Christmas trees from the homes along Shannon Place and provision of services such as police and sewer constitute public maintenance of the roadway. This is not true. Such services have nothing to do with maintaining or repairing roadways. Moreover, as a resident of the City, Romaine can reasonably expect such services to be offered. Such services do not convert otherwise private roads to public roads. The relevant inquiry, which the circuit court ignores, is whether the City authorized expenditures or labor on the road.

development. [JA00179.] There is no record that anyone other than Roger Dale Monk Builders, Incorporated owns the road in question.

The circuit court order effectively confers ownership of (and the duty to maintain) Shannon Place to the City without concern for the owner of the property. The circuit court's order would have the City enter onto private property located outside its jurisdictional boundary with heavy equipment, jackhammering through the cement and moving soil on property owned by persons who were never made parties to this declaratory judgment action. To do so is a direct violation of the West Virginia Constitution and the property rights of the owner of the road and the right-of-way. *See* Syllabus Point 2, *O'Daniels v. City of Charleston*, 200 W. Va. 711, 490 S.E.2d 800 (1997) (“When a court proceeding directly affects or determines the scope of rights or interests in real property, any persons who claims an interest in the real property at issue are indispensable parties to the proceeding. Any order or decree issued in the absence of those parties is null and void.”).

The City cannot repair or take ownership of Shannon Place without destroying the property rights of its lawful owner. The circuit court was therefore required to include its lawful owner, and any other persons who claim an interest in the property, as parties to the underlying proceeding. It was reversible error for it to fail to do so.

It is also important to consider the potential future ramifications of the circuit court's order for other private property owners. It is not difficult to imagine other litigants using the circuit court's ruling in this case as precedent seeking their own judicial orders forcing municipalities to enter onto private property outside of jurisdictional boundaries to make repairs or modifications to property that may not be desired by the true owners of the property. Thus, it is appropriate for this

Court to reverse the lower court's order to prevent the erosion of private property owners' rights without appropriate due process and statutory authority.

## VI. CONCLUSION

For the reasons discussed herein, the City of Charleston requests that this Court reverse the circuit court's *Order Granting Plaintiff's Cross-Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment* and remand the matter to the circuit court with direction to grant the City of Charleston's summary judgment motion.

**CITY OF CHARLESTON**  
By Counsel



---

Karen Tracy McElhinny  
W.Va. State Bar # 7517  
Shuman McCuskey Slicer PLLC  
1411 Virginia Street, East, Suite 200  
Charleston, WV 25301  
(304) 345-1400  
[kmcelhinny@shumanlaw.com](mailto:kmcelhinny@shumanlaw.com)

Michael D. Dunham  
W.Va. State Bar # 12533  
Shuman McCuskey Slicer PLLC  
116 South Stewart Street, First Floor  
Winchester, Virginia 22601  
(540) 486-4195  
[mdunham@shumanlaw.com](mailto:mdunham@shumanlaw.com)

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

APPEAL NO.: 21-0776

---

THE CITY OF CHARLESTON,

Defendant Below, Petitioner,

v.

ROBERT ROMAINE,

Plaintiff Below, Respondent.

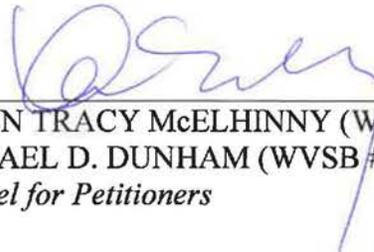
(Appeal from the Circuit Court of Kanawha County, West Virginia; Civil Action No. 18-C-1495; The Honorable Tera L. Salango)

---

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December 2021, I served the foregoing "*Petitioner's Brief*" on the following counsel of record via United States mail, with first-class postage prepaid, in an envelope addressed as follows:

Scott H. Kaminski, Esq.  
Ray, Winton & Kelley, PLLC  
109 Capitol Street  
Suite 700  
Charleston WV 25301  
*Counsel for Respondent*

  
KAREN TRACY McELHINNY (WVSB #7517)  
MICHAEL D. DUNHAM (WVSB #12533)  
*Counsel for Petitioners*