IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 21-0776
(Circuit Court of Kanawha County, West Virginia
Civil Action No. 18-C-1495

THE CITY OF CHARLESTON,

Petitioner,

v.

ROBERT ROMAINE,

Respondent.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

The Circuit Court correctly interpreted and applied W.Va. Code §17-1-3 when it granted summary judgment in Respondent's favor and held that Petitioner "is and should be responsible for the much-needed repairs to the entirety of Shannon Place." JA 283.

Respondent Robert Romaine ("Romaine") purchased a home in the City of Charleston on a roadway known as Shannon Place located in the Shadow Hills subdivision. JA 196-197. The purchase occurred on or about January 15, 2016 by Deed from Kathy Toma on record with the Kanawha County Clerk at Deed Book 2930, Page 819. JA 196-197. The property description contained in the deed prepared by Attorney Robert P. Howell specifically references a "Final Map Showing Shadow Hills Subdivision. . ." in Photostatic Map Book 47. JA 198. It appears from the property description in the deed that the subdivision was created in or around 1992, a fact no party here disputes.

Since Romaine purchased the home at 16 Shannon Place from Kathy Toma in 2016, he and his wife and children have continuously lived there. JA 199-201. They have voted in various city elections. JA 199-201. The road has been open to the public and used by various delivery and service providers. JA 199-201. Romaine receives monthly bills for City of Charleston Fees and Petitioner provides a myriad of services

to Romaine including sewage, refuse collection, recycling, road maintenance including snow removal, salt application and leaf collection, street sweeping, yard waste removal and Christmas tree removal. JA 199-202. Further, on one occasion when Romaine's home security system was inadvertently activated, Charleston Police Department promptly responded. JA 199-201.

This litigation was instituted because Shannon Place is in need of repair and, despite years of providing maintenance and upkeep to Shannon Place, Petitioner refused to make the needed repairs citing that Shannon Place is not a city street. JA 277-278. Photographs depicting conditions in or around August of 2018 showed deterioration that has only worsened with time and continues to be a hazard to vehicles, pedestrians and the children of the neighborhood who bicycle and play there. To date, no repairs have been made. JA 203-212. When Romaine brought the street's condition to the attention of Petitioner, he was told that it was not a city street and that it could only be considered a city street after it was repaired at his expense of over $43,000.00 and subsequently annexed. JA 213, 278.

Petitioner relies upon an aerial photograph with various markings prepared by Corey Maynard, City of Charleston Engineering, which shows Romaine's home circled and

the city boundary running along the front of his property such that his house is in the City but Shannon Place, at least in front of his house, is outside the City. JA 214. Of course, the area in blue on JA 214 that is outside the city limits is the area in need of repair in front of Romaine's home. Importantly, W.Va. Code §17-1-3 does not require a road to be within any certain geographical limits in order to be conclusively established as a public road. Petitioner's reliance on this map is erroneous under the law and their argument that the Circuit Court erred because the portion of Shannon Place in need of repair is outside the city limits is misplaced.

Despite Petitioner's denial of responsibility for maintenance of Shannon Place, not only have the Romaines received various city services, but so have other residents of Shannon Place, including the former owner of Romaine's home, Kathy Toma. Ms. Toma resided at 16 Shannon Place from 2006 through 2016. JA 215-216. She voted in City elections. JA 215-216. She, too, received monthly invoices for City of Charleston Fees. JA 215-216. And she also received services such as sewer, refuse collection, recycling and seasonal road maintenance from Petitioner. JA 215-216.

Other residents adjacent to Romaine have had the same experience of City services on Shannon Place. David A. and

Janet J. Clayman reside at 14 Shannon Place and have resided there continuously since 1991. JA 217-219. Clark D. and Robin S. Adkins have resided continuously at 20 Shannon Place since 1998, and prior to that, resided at 8 Shannon Place for 4 years. JA 220-222. Similar to Toma and Romaine, the Claymans and Adkins have experienced many years of various city services while residing on Shannon Place, including voting, sewer, refuse collection, seasonal road maintenance, street sweeping and so on. JA 217-222.

Most striking is that the street sign demarking Shannon Place bears the City of Charleston seal. JA 223-224. Presumably, this sign was erected by Petitioner. Further illustration of Petitioner's activities along the portion of Shannon Place that is not within the City are seen in photographs taken of a City street sweeper in front of Romaine's house, a City recycling truck entering Shannon Place, and a City truck coming to make repairs to the sewage system. JA 225-227.

Contrary to Petitioner's assertion, precedent has been set for Petitioner to spend money on roads that are not city roads. In 2019, Petitioner agreed to expend funds on Oakwood Road, part of which unquestionably is a state road as the project is also funded by the West Virginia Division of Highways ("WVDOH"). JA 231-234. On July 15, 2019, City Council

introduced Resolution No. 222-19 for the Petitioner to expend funds on the Oakwood Road project and to seek 50% reimbursement from the WVDOH. Councilmember Minardi astutely observed that the resolution would set the precedent of the City paying to pave State roads. JA 235-237. Not only did that resolution set that precedent, but it sets a precedent defeating Petitioner's argument that it cannot expend funds to repair a street that is not located within the city limits or is not a city road. If Petitioner can expend funds to repair a State road, it can certainly expend funds to repair a street that is conclusively established as a city street by operation of statute based on Petitioner's conduct for the past twenty-five years.

Petitioner asserts that Rodger Dale Monk Builders, Inc. ("Monk") is the owner of Shannon Place, having acquired the same by deed in 1991. Monk developed the neighborhood and was to have deeded the common areas to Petitioner upon completion of the development. He failed to do so. Rodger Dale Monk passed away on July 29, 2018 and Monk has been terminated as a business by the West Virginia Secretary of State. JA 238-243. It would appear that no one currently owns that portion of Shannon Place that lies outside the city limits, but that fact is not relevant under W.Va. Code §17-1-3 as it is the Petitioner's conduct over the last twenty-five years that conclusively establishes Shannon Place as a city street requiring Petitioner to maintain it,

regardless of who owns it or where it lies relative to Petitioner's boundaries.

To summarize, if Shannon Place can be given a street sign with Petitioner's seal the same as any other city street in Charleston, if Shannon Place can receive routine street-related maintenance such as sweeping, snow removal and salt application with the same regularity as any other city street in Charleston, and certainly if the owners of the homes along the street vote in city elections, pay city taxes and receive other city services for a period of over twenty-five years, then Petitioner can pay for much needed and overdue repairs to the street. That is what the statute states and the Circuit Court properly agreed.

The parties to this case filed cross-motions for summary judgment. JA 117-243. By Order entered on August 30, 2021, the Circuit Court correctly denied Petitioner's Motion for Summary Judgment and granted Respondent's Cross-Motion for Summary Judgment finding that pursuant to W.Va. Code §17-1-3 and the facts established of record before it, Shannon Place was conclusively established as a City road and therefore, Petitioner was responsible for its maintenance and upkeep. JA 276-284.

II. SUMMARY OF ARGUMENT

Petitioner expended public funds towards maintaining non-City portions of an otherwise City street for many years. To deny Respondent relief consistent with those prior actions and required by statute would be a miscarriage of justice and contrary to the rightful benefits owed to City residents.

The Circuit Court correctly interpreted W.Va. Code §17-1-3, in particular, the section that reads:

> "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.**" (Emphasis added).

The Circuit Court then properly applied the facts in the record before it (which were undisputed) to conclude that Shannon Place has been conclusively established as a city road. Petitioner's arguments attempt to muddy the waters with arguments not germane to the statute. Petitioner's arguments regarding Shannon Place being outside the jurisdictional limits of the City of Charleston and that the Circuit Court's Order violates the rights of owners of the road inject elements that are not contained within the applicable statute.

The term "jurisdictional limits" appears nowhere in W.Va. Code §17-1-3. Nor does the statute make any reference to

the property rights of owners of the road. The statute does not purport to cause a road that is outside the city limits to suddenly and judicially be placed within the city limits. Nor does the statute purport to take a road away from one property owner and give it to another. The statute merely establishes any road as a city road under the conditions set forth making that road the responsibility of Petitioner to maintain as it has for a period of more than ten years. That's all. And consistent with that, the Circuit Court's Order merely caused Petitioner to be responsible for the repairs and maintenance to Shannon Place; the Order does not convey any property to the city, whether inside or outside of its limits or whether owned by anyone else. JA 276-284.

Petitioner also deflects attention away from the correct application of W.Va. Code §17-1-3 by arguing that Shannon Place is not used by the public. Petitioner suggests that a dead-end street like Shannon Place cannot reasonably be a public road. This is patently false and misleading, as there are many reasons vehicles travel on Shannon Place. Also, if a dead-end street is not worthy of becoming a public road, then it is inconsistent that the City already recognizes countless other cul-de-sacs and dead-end residential streets within City limits, including other cul-de-sacs in the Shadow Hills neighborhood where Shannon Place lies.

Finally, Petitioner insists that because the maintenance to Shannon Place was never authorized the conditions of the statute have not been met. Over twenty-five years have passed since a City Engineering Department Inspection and Work Request prohibited any maintenance of an unrelated backyard storm drain to another residence on Shannon Place. JA 170. The focus of the statute is a ten-year period, so Petitioner's reliance on the 1996 Work Request, well more than ten years ago, is misplaced. And, the Alvis memo that addresses the out-of-city portion of Shannon Place makes no express statement that maintenance is not authorized as Petitioner suggests. JA 169. Yet, in those twenty-five years Petitioner provided services to Shannon Place, its residents had no reason to know these services were not authorized. Petitioner's continuous provision of street services to the entirety of Shannon Place renders the argument that they were never authorized irrelevant pursuant to W.Va. Code §17-1-3. Accordingly, this Court should affirm the Order of the Circuit Court.

Finally, Petitioner argues the Circuit Court's Order results in an unlawful taking of property by the City. Petitioner ignores that the Circuit Court did not Order Shannon Place be deeded to the City. The Circuit Court only Ordered that Petitioner be responsible for continued maintenance and repair of Shannon Place. There has been no taking.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes that the decisional process would be aided by oral argument. Respondent suggests that this petition involves assignments of error in the application of well settled law and, therefore, the matter would be appropriate for memorandum decision and argument under Rule 19 of the *West Virginia Rules of Appellate Procedure*.

IV. ARGUMENT

1. Standard of Review

This appeal involves the application of W.Va. Code §17-1-3. The case is before this Court after the Circuit Court granted Respondent's Cross-Motion for Summary Judgment. JA 276-284. Therefore, the standard of review is *de novo*. *See, Cox v. Amick,* 466 S.E.2d 459 (W.Va. 1995) citing *Syl. Pt. 1, Painter v. Peavy,* 451 S.E.2d 755 (W.Va. 1994). The parties are entitled here to *de novo* review of the Circuit Court's Order.

2. The Circuit Court Correctly Ruled that Petitioner is Responsible for Maintaining and Repairing Shannon Place as the Fact that a Portion of it is Outside the Jurisdictional Limits of the Municipality is Irrelevant Under W.Va. Code §17-1-3

In this matter the Circuit Court was asked to make a declaratory judgment of whether W.Va. Code §17-1-3 applied to the underlying facts. In particular, the relevant portion of the statute reads:

> "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.**" (Emphasis added).

The primary focus of Petitioner's appeal lies in the argument that it should not be held responsible for maintaining a road outside of its "jurisdictional limits." Yet, nothing in this code section references a requirement that a city road or street must first lie within the city limits before it can be conclusively established as the city's responsibility. The code is silent as to this element upon which Petitioner insists is necessary to a Court's determination of whether the Circuit Court correctly applied W.Va. Code §17-1-3.

Since the standard of review is *de novo,* the facts established of record here are important to the resolution of this appeal. As established by the totality of the affidavits, Shannon Place is not a private road. JA 199-201 and 215-222. Under West Virginia law, Shannon Place can be either a City street or State road. There is no dispute that the West Virginia Division of Highways is not responsible for Shannon Place. JA 115-116. Here, the evidence demonstrates that Shannon Place has been conclusively established as a City street by virtue of the public having used the street for a period of over ten years and Petitioner expending public moneys and labor

to maintain the street and provide services to the residents along the street- just as W. Va. Code §17-1-3 requires. JA 283. Per the statute, it matters not whether there has been a formal conveyance or dedication of Shannon Place. Specifically, the statute says "...whether there be any record of its conveyance, dedication or appropriation to public use or not." W.Va. Code §17-1-3. Therefore, Petitioner's insistence that the Circuit Court should have considered jurisdictional limits or improperly expanded geographical boundaries is misplaced.

This is not a case about municipality boundaries. It is a case about a city treating the entirety of a roadway as if it is a city road for many years and then acting contradictory to its prior actions when it is not what the city desires. Respondent is not asking Petitioner to arbitrarily repair a road that has been closed off or rarely used by anyone in the public, or for which the Petitioner never had any connection. Instead, Respondent is asking the City to repair a roadway consistent with how it has provided other street maintenance services to Shannon Place for many years. Accordingly, Petitioner is and should be responsible for the much-needed repairs to Shannon Place. The Circuit Court's ruling was correct and should be affirmed by this Honorable Court.

Respondent wishes to address the "Brief on Behalf of Amicus Curiae of the West Virginia Municipal League in support of Defendant City of Charleston's Appeal of the Circuit Court of Kanawha County's Order Granting Plaintiff's Cross-Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment." Absent from this brief is any discussion of W. Va. Code §17-1-3, the very statute at issue in this lawsuit. The West Virginia Municipal League ("the League") alleges that the Circuit Court's Order incorrectly applies the doctrine of equitable estoppel as the basis for its ruling because equitable estoppel cannot be applied to municipalities in West Virginia. [the League brief, p. 10]. This assertion is wrong and misleading. The Circuit Court's decision was based upon black letter law created by the West Virginia legislature (W. Va. Code §17-1-3) and not equitable estoppel. Instead of addressing the statute, the League focuses on the same misplaced arguments made by Petitioner regarding municipality control of boundary determinations and fiscal affairs and separation of powers. Just as the League fails to offer any analysis of the facts supporting the Circuit Court's application of W. Va. Code §17-1-3, none of the cases cited by Petitioner addressing the application of W. Va. Code §17-1-3 contain any of the extensive discussions of jurisdictional limits, geographical boundaries or

municipalities' rights of control set forth by Petitioner and the League.

Citing the very words of the League, it is well established that a statute's plain language should not be construed but should be applied as it is written. *See* Syl. Pt. 3, *West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 472 S.E.2d 411 (W.Va. 1996) ("If the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery.") [the League's brief, pp. 5-6]. Therefore, it is contrary to the language of W. Va. Code §17-1-3 to allow any considerations beyond public use and expenditure of public funds to determine whether a roadway may be established as public.

Respondent also notes the League's position that the Circuit Court's Order overrules municipal control over fiscal affairs. In its explanation of this position, the League argues that City taxpayers have no recourse to disagree with the Circuit Court's decision regarding an area outside municipal boundaries. The League is reminded that Respondent <u>is</u> a City resident and taxpayer. Hence, the beleaguered taxpayers whom the League fears will be disadvantaged by the enforcement of the Circuit Court's ruling is one in the same of the taxpaying, City

resident Respondent who has been disadvantaged and treated unfairly by his City. Moreover, those beleaguered taxpayers residing outside of the city are free to financially support candidates for city offices who might disagree with the Court's decision.

The West Virginia Municipal League's efforts are a valiant attempt to prevent negative precedent for other municipalities that result from the careless inattentiveness to detail of Petitioner for twenty-five years. These same concerns of establishing precedent are also a cornerstone of Petitioner's refusal to repair Shannon Place. Yet, Respondent's case would not exist but for the precedent established by Petitioner through its twenty-five years of providing services and maintenance along Shannon Place. Without this precedent, there would be no basis to satisfy the criteria of W. Va. Code §17-1-3, and the Circuit Court would not have made its correct ruling.

3. The Circuit Court did not Err when it held that Shannon Place is a Public Road.

Contrary to Petitioner's assertions, W.Va. Code §17-1-3 dictates that Shannon Place is an established public road and Respondent did show evidence of more than ten years of public, consistent use and expenditure of public money through the affidavits provided by him, Toma, the Claymans and the Adkins. JA 199-201, 215-222. Petitioner cites other matters where this

Court ruled various roadways were private when they were disputed to be public, however, each of those matters are distinguishable from Respondent's case.

In *Wilson v. Seminole Coal, Inc.*, 336 S.E.2d 30 (W.Va. 1985), although the Court found the road at issue was private, the facts of that matter are different in that other than a one-time resurfacing project, there was no evidence of any public maintenance over a period of forty-two years. In contrast, the entirety of Shannon Place has continuously received regular street maintenance for over twenty-five years. JA 231. In *Miller v. Hoskinson,* 429 S.E.2d 76 (W.Va. 1993), the Court ruled in favor of the Appellants who wanted to prevent a private road from becoming public. The Court's determination hinged upon whether the roadway at issue "used primarily for recreational purposes such as riding all-terrain vehicles, riding horses, or gaining access to hunting areas" was abandoned as a public road in 1933 when the state failed to incorporate that roadway into the state road system. *Id.* at 78. In *Miller*, "no public funds [were] expended for the maintenance or upkeep of the [road], and no state-owned equipment has been used to repair or maintain the road." *Id.* The Court also noted how "[t]he general public has not used or maintained the [road] since 1933." *Id.* at 79-80. The Court ultimately concluded that "the limited uses of the road since 1933 and the lack of expenditure of state funds

indicate that the road can no longer be characterized as a public road." *Id.* at 80. Here, Respondent has shown that Shannon Place has been routinely used for nearly thirty years by both public and private vehicles and that city funds have been routinely expended upon the road for sweeping, ice removal and salt application. JA 282. Finally, in *Ford v. Dickerson,* 662 S.E.2d 503 (W.Va. 2008), the Court's decision turned upon whether the subject roads were properly dedicated as public roads. *Id.,* at 506. The factual background in *Ford* did not address expenditure of public funds or how the roadway was used. In fact, the Court found that "the appellants provided no evidence to the trial court that the streets in question were either used by the public for ten or more years or that public monies or labor had been provided for the maintenance of the streets." *Id.* at 508. None of the underlying facts in these cases have any similarities to this matter, therefore, they cannot be instructive to this Court.

Next, Petitioner's insistence that the street services provided to Shannon Place for the past quarter of a century are irrelevant because they were not duly authorized by the city is misplaced. Petitioner cites to *Baker v. Hamilton,* 109 S.E.2d 27 (W.Va. 1959) for the premise that public expenditures on a roadway must be authorized and more than sporadic or occasional use. Petitioner's Brief at 17-18. Just like the other cases,

there is no parallel between the facts in *Baker* and the history of Shannon Place. In *Baker,* the plaintiff sought an injunction against defendants for hauling coal in trucks along a private road located on plaintiff's land. *Id.,* 109 S.E.2d at 28. At issue was whether the State Road Commission's occasional filling and repairing of holes in the roadway, created when the state used the road to retrieve and haul rock to another site, established the road as public. *Id.* at 30-31. In holding that the road was private, the Court noted how "[t]he acts of the persons who used the machines on the [road] were merely acts of gratuitous accommodation to the residents of that section" and "were for the purpose of obtaining material for use on a recognized public highway and were not for the purpose of repairing and maintaining the [road]." *Id.* On Shannon Place, the continuous street sweeping, snow removal and salt application of over twenty-five years was precisely for the purpose of maintaining the road. Such maintenance is on par with services consistently provided to other City roads and therefore distinguishable from the private road in *Baker.*

Petitioner's reliance upon *Cramer v. West Va. Dep't of Highways,* 375 S.E.2d 568 (W.Va. 1988) is similarly misplaced. In finding there was insufficient evidence to establish the road in controversy as a public road, the Court held that "appellees failed to prove by clear and convincing evidence that the subject road

was used adversely by the public for a definite number of consecutive years, much less for the required period of ten consecutive years. Moreover, the evidence establishes only sporadic public maintenance, and only on a portion of the road not traversing the appellants' property." *Id.*, 375 S.E.2d 568 at 571. Again here, Respondent has shown public use for well over ten years and regular maintenance on the entirety of Shannon Place, not just a portion.

Interestingly, Petitioner relies on a Memo from David Alvis, Planning Director to Mark Holstine, Public Works Director dated January 8, 1997. JA 169. Petitioner asserts that this Memo is evidence that any maintenance or repairs to Shannon Place were not authorized. However, the Memo only identifies that portion of Shannon Place that is outside City limits. Nowhere in the Memo is anyone specifically directed not to provide City services to that portion of Shannon Place that lies outside the city limits, nor is there any reference to any "authorization" to provide street maintenance services.

Additionally, an Engineering Department Inspection and Work Request relied upon by Petitioner is not supportive of its position. JA 170. It is dated May 7, 1996 and relates to a storm drain issue in the backyard of the home on 8 Shannon Place. *Id.* Petitioner's refusal to repair a backyard storm drain in 1996 has no bearing upon its obligation to repair a

roadway for which it has provided street maintenance services for the past twenty-five years. Furthermore, pursuant to the deeds of record in this matter, Monk Builders did not acquire the land upon which the subdivision was built until 1993. JA 164-168. Refusing a work request only three years after the acquisition of the property by the builder fails to account for the Petitioner's actions in providing continuous and regular services to Shannon Place from 1996 to the present, a period of twenty-five years; a period sufficient to conclusively establish it as a city road under W.Va. Code §17-1-3. Critically, whether authorized or unauthorized, Petitioner has expended municipal funds on Shannon Place for a period over twenty-five years. This fact is not in dispute. JA 282. W.Va. Code §17-1-3 contains no reference to any requirement that the expenditure of public moneys be authorized. If the legislature had intended that distinction to be of significance, it would have added that language into the statute. ""A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 530 S.E.2d 676 (W.Va. 1999), Syl. Pt. 3, *Jackson v. Belcher*, 753 S.E.2d 11 (W. Va. 2013). The omission of a clause or word is as significant as its inclusion in a statute. Therefore, whether Petitioner's road maintenance activities upon Shannon Place were authorized

is of no consequence to the analysis under W.Va. Code §17-1-3 because authorization is not required per the statute, only that public moneys or labor have been expended thereon.

Petitioner also argues that its street-related expenditures upon Shannon Place were sporadic and not consistent. *See,* Petitioner's Brief, p. 17. Respondent takes exception. The City's insignia on the Shannon Place street sign is there all of the time. Its presence is not sporadic, it is constant. And the sign does not distinguish to the public at large that any portion of Shannon Place is not within the city limits. And to the extent certain services as leaf collection and snow removal and treatment are sporadic, they are so because we live in a climate where leaf collection and snow removal are not needed on a daily basis, but rather only seasonally, sporadically. However, Petitioner's services to the residents of Shannon Place are consistent and even constant to the extent that such services have been provided each and every time they have been needed for the past twenty-five years when it has snowed or a storm has required removal of tree limbs. JA 199-201, 215-222. So, to that extent, those services provided by the Petitioner have not been sporadic but rather quite consistent.

It is also important to note that no one disputes that Respondent's home is within the city limits. JA 199-201. It is

only the portion of Shannon Place in front of Respondent's home that is outside City limits. Accordingly, providing such services to Respondent does not require Petitioner to provide services to a person who is not a resident of the City of Charleston.

Petitioner also argues that Shannon Place is a small road with few residents and is not a through street to any particular destination. Petitioner also argues that ". . . the portion outside of the City is used only by those who live on the road." Petitioner's brief at p. 17. In short, the Petitioner argues that Shannon Place is of no significance to the City. That is a shameful and disparaging argument to residents of Shannon Place, particularly City residents.

Simply because Shannon Place does not lead to any business, school, park or other public place makes it of no less significance to the residents thereof, and the many members of the public that make use of Shannon Place to visit and provide services to the residents of Shannon Place.[1] Such persons and entities include mail and package delivery services, taxis and ride-sharing services, food delivery, babysitters and home healthcare, construction, home repair and lawncare services, delivery drivers for local hardware and home furnishing

[1] As eligible voters in city elections (JA 199), campaign activity has occurred on Shannon Place by candidates for office.

establishments, newspaper delivery, dry cleaning delivery services, and the list goes on. Each of these types of businesses are vital to the local economy. Those businesses within the City's limits that provide services to Shannon Place pay Business and Occupation Tax to the City for goods and services delivered to the residents of Shannon Place. Respondent's and other Shannon Place residents' interactions with and support of these individuals and businesses help ensure a vibrant community. Just because Shannon Place does not lead to any place of significance to Petitioner does not make its state of ill repair any less significant to the individuals and businesses who rely on the use of Shannon Place for their benefit and livelihoods. Petitioner's argument that the portion of Shannon Place that is outside City limits is used only by residents on Shannon Place is false and misleading.

Accordingly, Petitioner has failed to rebut the evidence that Shannon Place has been conclusively established as a city road based upon its conduct over a twenty-five year period, well more than the time required under W.Va. Code §17-1-3. Therefore, Respondent was entitled to a Declaratory Judgment in his favor that recognized Shannon Place as a city road such that Petitioner be required to repair and maintain that portion of Shannon Place in front of Respondent's residence. The Circuit Court ruled correctly and should be affirmed.

4. The Circuit Court Did not Violate the Rights of Any Individual or Entity Who Owns an Interest in the Property on Which Shannon Place Lies

Petitioner's final assignment of error similarly relies upon an analysis irrelevant to W.Va. Code §17-1-3 which again states in pertinent part:

> "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.**" (Emphasis added).

Nowhere in this code section does the West Virginia Legislature articulate that it matters who owns a portion of a road if it has been used by the public for a period of ten years or more. Additionally, and as stated earlier, it appears that no one currently owns that portion of Shannon Place that lies outside the city limits. Rodger Dale Monk, owner of Rodger Dale Monk Builders, Inc. who owned, developed and constructed the homes along Shannon Place passed away on July 29, 2018. The business has also been terminated by the West Virginia Secretary of State. JA 238-243. Therefore, Petitioner is not unlawfully taking anyone's property by the establishment of the entirety of Shannon Place as a City road.

If there is any contemplated unlawful taking in this action, it is from the perspective of Shannon Place residents

who will suffer by the removal of City services if the Circuit Court's decision is reversed. Throughout this litigation, Petitioner has suggested it will remove all City services and maintenance from all residents of Shannon Place if there is a ruling in Petitioner's favor. This sudden removal of services will deprive City residents from services that are lawfully and rightfully theirs through the payment of taxes and fees over many years. Petitioner will then be unjustly enriched for receiving funds that it does not return to City residents in the form of services that are readily available and provided to all other City residents outside of Shannon Place.

V. CONCLUSION

Respondent respectfully requests that this Court issue a decision affirming the Circuit Court's Order of August 30, 2021 granting Respondent's Cross-Motion for Summary Judgment and denying Petitioner's Cross-Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I, Scott H. Kaminski, counsel for Robert Romaine, certify that I served a true and correct copy of the foregoing ***"Respondent's Brief"*** by U.S. Mail, postage prepaid on this 17TH day of February, 2022:

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