

PINE VILLAGE, INC.,	: IN THE COURT OF COMMON PLEAS OF
	: LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:
	:
vs.	: NO. 02-00,732
	:
H. GENE FEERRAR,	: CIVIL ACTION – IN EQUITY
	: NON-JURY TRIAL ADJUDICATION
Defendant	: AND DECREE NISI

Date: June 4, 2004

ADJUDICATION

Background

Plaintiff, Pine Village, Inc. (hereafter “Pine Village”) has instituted this equity action for the purpose of establishing its right to the use of a roadway easement that crosses the lands of Defendant, H. Gene Feerrar (hereafter “Feerrar”). Pine Village asserts that it has an easement to use the right-of-way over Feerrar’s property by express grant in a deed. Pine Village seeks injunctive relief requiring Feerrar to remove a gate from the roadway, as well as, a garage and concrete pad said to infringe upon the right-of-way. Pine Village further seeks removal of a wooden storage shed, part of which admittedly encroaches upon Pine Village’s property. In addition, Pine Village seeks damages arising out of what they contend is Feerrar’s unlawful placement of the gate. Feerrar has counterclaimed that he is entitled to use the roadway as it crosses the land of Pine Village.

By Order entered April 30, 2003, this Court granted in part a Motion of Pine Village for partial summary judgment, stating as follows:

. . . [S]ummary judgment is entered as to the easement rights of Pine Village, Inc. Pine Village has easement rights for ingress, egress and regress, in perpetuity, in and to the private roadway that crosses the real estate of H. Gene Feerrar and provides access to

the state highway. The width or location of the right-of-way is not determined by this order.

In August 2003, the Court conducted a site view of the property and land area in question. The Court then held a non-jury trial receiving two days of live testimony from multiple witnesses on November 13 and 14, 2003. The parties also submitted testimony of additional witnesses taken by deposition. This Court's factual decision has been delayed an inordinately and improperly long time as it wrestled with finding sufficient time to research and draft this adjudication, giving full consideration to the lengthy post-trial submissions in the way of suggested findings of fact and legal arguments submitted by each party. The last such filing being made on December 9, 2003, in the way of Defendant's and Plaintiff's respective responses to the other's post-trial filings.

Facts

Upon consideration of all the evidence and exhibits submitted, the Court makes the following findings of fact:

1. The Pine Village property lies north of the Feerrar property in Cummings Township, Lycoming County, Pennsylvania along Little Pine Creek in the area between Waterville and English Center.

2. The properties lie along a state road, L.R. 41021, a relatively narrow two-lane blacktop highway that runs northerly from Waterville to Little Pine Creek State Park and beyond to English Center. Waterville is approximately one mile south of the properties and Little Pine Creek State Park is approximately one mile north of the properties. The state highway, L.R. 41021, borders the property of Defendant Feerrar on the west and bisects the Pine Village parcel of ground.

3. The private roadway in question is referred to as Elder Lane. Elder Lane intersects L.R. 41021 at a point south of both parties' properties. It passes through or borders four other properties before it reaches Feerrar's property (*See*, Plaintiffs' Exhibit #10). The southern intersection of L.R. 41021 and Elder Lane is a "V" type. Elder Lane leaves L.R. 41021 in a northeasterly direction at a rather gradual angle (approximately 20°) traversing down a side hill until it is separated from the highway a distance of several hundred feet and then becomes basically level, paralleling L.R. 41021 in a northerly direction. Approximately 1,000 feet from L.R. 41021, Feerrar's property adjoins the western line of Elder Lane (*See*, Plaintiff's Exhibit #13). Feerrar's property to the east of Elder Lane, which also encompasses the entire width of the right-of-way, begins at a point approximately 1,800 feet north of the southern intersection with L.R. 41021. (Defendant's Exhibit #4). The roadway is then bounded by Feerrar on both east and west sides, a distance of 157 feet until it reaches the property of Pine Village. It is not clear if the roadway thereafter has a name, however, the roadway continues northerly across Pine Village property, approximately a quarter of a mile until it reaches cabins and structures on the Pine Village land. It crosses a small bridge and then swings in a northwesterly direction up a steep incline intersecting L.R. 41021, again at a "V"-type intersection at a gradual angle of approximately 20°. This re-entry is approximately ¾ of a mile from where the southern terminus of Elder Lane intersects L.R. 41021.

4. Charles A. Apple acquired title to the entire tract of land on which the roadway exists in 1941. The tract of land was 122 acres. The deed was recorded in Lycoming County Deed Book 314, page 266. The present lands of Pine Village and Feerrar were derived

from this tract. No roads or right-of-ways are referenced in this deed. (*See* Defendant's Exhibits #1 and #2.)

5. In 1951, Apple (joined by his wife, Iva B. Apple) conveyed the southern portion of the 122-acre tract to Charles H. Elder and Emily J. Elder, his wife, by deed dated November 6, 1951 and recorded in Lycoming County Deed Book 379, page 94. Feerrar's tract of land eventually was subdivided from this tract of ground sold to Elder. The conveyance to Elder consisted of 54.1 acres. A survey map dated November 3, 1951 recorded with the Apple to Elder deed in map book 46, page 58 depicts the Waterville to English Center state highway, L.R. 41021, in its present location. (*See* Defendant's Exhibits #1 and #2.) The map also shows the private road in question and indicates that on the boundary line between Elder and Apple a wild cherry tree stood just to the east of the private road. That boundary line is now the boundary line between Feerrar and Pine Village.

6. In the conveyance from Apple to Elder, Apple expressly reserved a right-of-way in the following language:

ALSO EXCEPTING AND RESERVING unto the said Charles A. Apple, his heirs and assigns, a right-of-way over the above described premises, from the State Highway leading from Waterville to English Centre to other lands of the said Charles A. Apple, said right-of-way to consist of the present private road existing on the ground, which the said Charles A. Apple shall have the right to maintain, together with the slopes and embankments thereof, and to make necessary repairs to the same, said right-of-way to run with the title to said other lands of the said Charles A. Apple and to be for the use and benefit of the said Charles A. Apple, his heirs and assigns, as well as patrons and others who may have occasion to travel said road to the other land of the said Charles A. Apple. (emphasis added)

Deed Book 379, p. 99 (part of Defendant's Exhibits #1 and #2).

7. This right-of-way is now the roadway referred to as Elder Lane. After the Apple to Elder conveyance this right-of-way, over the Elder property was used by Apple, Elder, and others as the primary access from L.R. 41021 north to the Apple property. The roadway (*see*, Findings of Fact #3, *supra*) north of the Elder tract was only used by Apple.

8. In 1956, Apple, by a deed recorded in Deed Book 414, page 576, conveyed to Arthur Nestlerode a then newly surveyed tract of 51 acres, being the land immediately north of the tract conveyed from Apple to Elder, with the exception of a 1.76 acre tract along little Pine Creek, east of the private road and north of Elder. Apple had sold this tract to Nancy Welliver in 1952 by a deed recorded in Deed Book 385, page 407. In 1960, Nestlerode also acquired that tract by a deed from Nancy Welliver, Deed Book 468, page 256. (*See* Defendant's Exhibit #7.)

9. On October 28, 1985, Helen Nestlerode, then a widow, conveyed all of the lands her husband had acquired from Apple and Welliver to Pine Village, by a deed recorded in Deed Book 1128, page 228.

10. Mr. Nestlerode and his wife, Helen, were the parents of the three principles of Pine Village, Daniel Nestlerode, James Nestlerode and Mary Jane Nestlerode.

11. The Nestlerode family and tenants use a number of cabins and other structures located on the Pine Village property. Additional tenants reside on the property on a seasonal basis in travel trailers. At least nineteen persons reside on the property on a seasonal basis. Sometimes more than fifty persons use and access the property at any one point in time. Access to the Pine Village property by these people has primarily been achieved by using the southern intersection of L.R. 42021 onto Elder Lane and traveling Elder Lane across Ferrar's

property until reaching the Pine Village property. Occasionally, the part of the private road that comes off of the northern intersection with L.R. 41021 has been used as an alternate access.

12. The Feerrar property consists of two adjoining lots, which have been subdivided from the 51 acres, Apple had conveyed to Elder in 1951.

13. From the southern intersection of L.R. 41021 Elder Lane crosses through or along four properties before it reaches Feerrar's home. One of the four other properties appears to be a one-acre exception to the 122 acres acquired by Apple; the other three properties Elder created through subdivision and subsequently conveyed those properties to other parties.

14. Elder's first subdivision of a tract of ground subsequently acquired by Feerrar occurred in 1972 when Elder conveyed a lot to Adolf F. Zelm, Jr., and his wife, Jean E. Zelm (a daughter of the Elders), by Deed of December 29, 1972 recorded in Lycoming County Deed Book 656, page 122. (Defendant's Exhibit #2.) This deed describes the lot as, "Beginning at a point on the southeastern line of the private road leading from the Pennsylvania State Highway between Waterville and English Center through the land of the grantors herein (Elder) and to the land now or formerly of Charles A. Apple. . . ." (emphasis added.) The lot fronts 110 feet along the private road. The northern line of this lot is said to run easterly (S 70° 57' E) from the road along the south line of the Apple land to a wild cherry tree and continues along the Apple tract (S 68° 27' E) 350 feet to the west bank of Little Pine Creek. Pine Village is now the owner of the land along the northern line. This lot comprises the ground where Feerrar's home is located, with the home being just east of the private roadway. The shed in question is erected on this tract along the northern boundary, east of the cherry tree.

15. The Elder to Zelm deed references the 1951 survey recorded with the Apple to Elder deed. (*See* Fact #5 above.) It then further specifically includes a conveyance of:

. . .[T]he right of ingress, egress and regress over the private road leading from the Pennsylvania State Highway which leads from Waterville to English Center and beyond as designated in the aforesaid plot of survey.

16. The Elder tract was further subdivided in accordance with a June 3, 1977 survey. (*See*, Defendant's Exhibit #5/Plaintiffs' Exhibit #9.) Elder Lane was referred to as "a private road" on the subdivision and deeds related thereto. The western line of the private road was a dividing line between three lots to its east (which bordered Little Pine Creek) and a 26-acre piece of side hill ground to its west. The subdivision was recorded in Lycoming County Deed Book 855, page 77, on October 26, 1977. The Lycoming County Planning Commission had approved it on September 15, 1977. That subdivision plan referenced the private roadway as being 50 feet in width excepting prior adverse lots. The subdivision map plan states, "Building setback lines to be a minimum 50 feet from the centerline of all roads." A small lot referenced as Lot #4 in the 1977 subdivision plan of Elder was immediately south of the Zelm tract of ground and was added to the first Zelm lot by an Elder to Zelm deed dated October 28, 1977, recorded in Deed Book 835, page 88. This deed also corrected the prior deed to Zelm from Elder to describe Zelm's first lot in accordance with the 1977 subdivision plan and as being .96 acre. The correction to the description also relocated the west line of Zelm's first lot from the east side of Elder Lane (referenced as the southeastern line of a private road) to the west side of Elder Lane (referenced as the northwestern side of a private road). This 1977 deed stated its intent was to unify Zelm's two lots as one parcel.

17. In 1980, by an additional subdivision, an 0.83-acre tract, referenced as lot No. 6, having a frontage on Elder Lane of 35 feet, being south of and adjoining Zelm's other lot of ground, was added to the Zelm lot. This was approved by the Planning Commission on September 9, 1980 and recorded in Lycoming County Deed Book 955, page 335 as an addition to the prior Zelm tract. (See Defendant's Exhibits #2 and #4.)

18. Altogether, these three parcels of ground having been merged into a single lot constitute what is now Feerrar's residential lot east of Elder Lane. The western line of Feerrar's residential lot is the western line of Elder Lane, and it is bordered on the east by Little Pine Creek. The total frontage of this Feerrar lot along Elder Lane is approximately 157 feet. The lot depth extends 365 feet easterly to Little Pine Creek on its north line along Pine Village property and 485 feet along its south line. The lot has a creek frontage of 260 feet.

19. This residential lot is flat just east of Elder Lane for about 75 feet then slopes downward dropping about 30 feet in elevation over the next 100 feet, with the remaining distance to Little Pine Creek being flat and yard-like with numerous trees.

20. Zelm sold this lot to Nicholas J. Fantanarosa and Kathryn Fantanarosa in 1984. Fantanarosa sold this lot to Feerrar by deed dated May 12, 1993, recorded in Lycoming County Deed Book 2050, page 211. Both deeds included the conveyance of the right of ingress as set forth in the first Elder to Zelm deed (*see* fact #14 above). Both deeds also contained an encumbrance clause stating, "Under and subject to all covenants, restrictions, easements and rights-of-way contained in the chain of title."

21. Also on May 12, 1993, Feerrar acquired his plot of ground on the west side of Elder Lane, from Fantanarosa's son, Nicholas Fantanarosa, Jr. This land, which lies

between Elder Lane and L.R. 41021, had been initially subdivided from the Elder tract in the 1977 subdivision as a 26-acre parcel. A 1988 revision further subdivided the lot, creating a 5.65-acre tract between Elder Lane and the State Highway. (*See* Defendant's Exhibit #6.) The 1988 revision was approved by the county planning commission on August 23, 1989 and was recorded on August 25, 1989 in Deed Book 1450, Map Book 47, page 552. The subdivision map states, "Building setback line 50 feet from centerline of road. Required right-of-way line 25' from centerline of road." The 5.65-acre tract is bounded on the north by Pine Village land. The northern boundary of the 5.65-acre tract extends from the Elder Lane on the east to L.R. 41021 on the west, a distance of 348.68 feet, along the southern line of the Pine Village property. The eastern boundary extends southerly on the west side of Elder Lane approximately 800 feet, to a point which is approximately 643 feet south, of the southern line of Feerrar's other lot. The 5.65-acre tract's southern line runs westerly (N 58° 9' W), 298.6 feet from Elder Lane to the centerline of L.R. 41021. It has a western boundary along the centerline of L.R. 41021 measuring 717 feet.

22. The deed to Feerrar for this 5.65-acre tract specifically states it is:

UNDER AND SUBJECT to a fifty (50) foot building setback line from the centerline of the road as shown on the aforesaid subdivision map.

ALSO UNDER AND SUBJECT to the required right-of-way line of twenty-five (25) feet from the centerline of the road.

23. This tract is mostly wooded and side hill, sloping upward from the western line of Elder Lane to the State Highway.

24. It is on this 5.65-acre tract of ground that Feerrar has erected a garage, the location of which is at issue in this litigation. The garage is located at the northeast corner of

the tract, just to the west of Elder Lane and just south of the Pine Village property line. This tract of ground is depicted in a survey introduced as Defendant's Exhibit #3/Plaintiff's Exhibit #13.

25. Feerrar's two tracts are both subject to the subdivision-imposed restriction that the private right-of-way serving the properties is 50 feet in width, 25 feet on each side of the roadway centerline. Both lots are also subject to a building setback line of 50 feet from the centerline of the roadway.

26. Pine Village's property is not part of the Elder subdivision, which established a 50-foot right-of-way for, and requires a 25-foot set back from, Elder Lane.

27. Feerrar has easement rights pursuant to the subdivision of Elder, which expressly includes an easement in Elder Lane for right-of-way purposes, which is 50 feet in width, leading southerly from his property to L.R. 41021.

28. When exiting his property by means of Elder Lane, it is difficult for Feerrar or anyone to turn to the right and to proceed in a northerly direction on L.R. 41021.

29. Feerrar and others could more readily travel in a northerly direction on L.R. 41021 by using the private driveway of Pine Village.

30. No document in the chain of title to the real estate of Feerrar suggests that Feerrar has easement rights in the driveway of Pine Village, which leads north to L.R. 41021. There is no testimony or evidence supporting the use of the Pine Village driveway for the benefit of the Feerrar tract when the initial severance of title occurred in 1951 of what is now the Feerrar tract from the Pine Village tract.

31. When Feerrar acquired his properties, Pine Village had a locked metal gate across the roadway on its property, 10-20 feet north of the Feerrar property line. The gate had been erected in 1988. The gate to Pine Village was visible and obvious to Feerrar when he inspected and purchased his real estate. This gate was clearly north of the cherry tree, which has been recognized as a boundary monument since at least 1951. The gate, when closed, effectively blocks the roadway and in conjunction with the terrain prevents vehicular access north of the gate. The gate is approximately ¼ mile south of any Pine Village structures.

32. By letter dated March 25, 1997, Pine Village requested that Feerrar refrain from trespassing upon the real estate of Pine Village. (See Plaintiffs' Exhibit #19.)

33. Subsequent to receipt of the March 25, 1997, letter Feerrar met with Dan Nestlerode, President of Pine Village. Feerrar also wrote to Pine Village, on June 3, 1997, seeking to obtain permission to operate snowmobiles and all-terrain vehicles on Pine Village property. In this letter, he also requested a key to the Pine Village gate "for emergency purposes only." (See Plaintiffs' Exhibit #20.)

34. Pine Village refused to allow Feerrar to use its real estate for recreational purposes or to give Feerrar a key to its gate. Feerrar's predecessor, Mr. Fantanarosa, did have a key for emergency purposes. Mr. Fantanarosa did not find the use of the Pine Village road to the north to be necessary for the enjoyment of his property.

35. On May 3, 1999, Feerrar wrote to Pine Village stating he was going to install a locked security gate on his property and that he was not going to give keys to neighbors for emergencies "just like the way you use your two security gates." (See Plaintiffs' Exhibit #21.) This letter also advised Pine Village they would need to use other entrances to

their property. Feerrar also cited as his reasons, damage from outsiders, harassment by the Pine Village security guards, people driving too fast creating dirt and dust, insurance and liability, and upkeep of road expenses.

36. Feerrar's wooden-frame storage shed is approximately 12 feet wide by 20 feet long. (*See*, Defendant's Exhibits #15A and 15B.) It was built on site by Mr. Fantanarosa but it is similar in design to a typical movable prefab structure. The beam-supported floor appears to be set on piers. The shed extends onto the property of Pine Village a distance of 9.12 feet at its northeast corner and 4.66 feet at its northwest corner. A roofed lean-to storage area is attached to the east side of the shed. This lean-to encroaches further onto the Pine Village property, approximately 20 feet at its northeast corner. A 6-foot long wooden ramp on the north end of the shed also encroaches upon Pine Village.

37. The shed was placed near its present location by Nicholas Fantanarosa, Sr. between 1984 and 1988. He and Arthur Nestlerode believed the boundary line to be north of the shed location. The shed was placed in its present location to avoid high water from Little Pine Creek. The northwest corner of the shed appears to be in line with the cherry tree boundary marker. (*See*, Plaintiffs' Exhibit #27.)

38. Nicholas Fantanarosa acknowledges that when he placed the shed at its current location he did not know that it encroached onto Pine Village. He testified that he would have voluntarily moved the shed if he had been requested to do so by Arthur Nestlerode or Pine Village.

39. As originally constructed, the shed rested upon the ground and could readily have been moved back onto the property of Feerrar.

40. The extent of the shed encroachment has changed since its original placement. Feerrar has moved the shed changing the angle at which the shed sets in relation to the boundary line. Feerrar has constructed a lean-to addition to the eastern side of the shed under which he stores canoes and other items. The lean-to addition is the same size as the shed itself. Feerrar placed doors on the northern wall of the shed, which open onto the Pine Village property. Feerrar also placed a wooden ramp extending from those doors north onto Pine Village property at the south end of the shed. The ramp encroaches 6 feet deeper into the property of Pine Village than does the shed. Whenever he uses the northern doors of the shed, Feerrar trespasses onto the real estate of Pine Village. Feerrar has recently put a concrete ramp at the south end of the shed on his own property.

41. Feerrar's enlargement of the shed and increasing the extent of its encroachment were done without first having made any effort to determine the location of the common boundary line with Pine Village.

42. The shed interferes with Pine Village's property rights in two substantial ways. The shed's present location hampers Pine Village's intended removal of trees from its property. Feerrar has also requested Pine Village to remove overhanging limbs, which may threaten the shed. (See, Plaintiffs' Exhibit #34.)

43. Feerrar's shed can readily be relocated onto the real estate of Feerrar by pulling it southerly. It can also be rotated. The shed's construction would permit a relatively easy relocation. In addition to moving the shed structure itself, Feerrar would have to remove and relocate the posts to the lean-to that he installed and relocate or replace the concrete ramp that he installed to the south of the shed.

44. On November 2, 1996, Feerrar applied to Cummings Township for a building permit to construct a garage having dimensions of 30 feet by 40 feet. (Plaintiffs' Exhibit #18.) In the Building/Zoning permit application, Feerrar represented that: the garage side yards were 100 feet from any adjoining property; the front yard was 400 feet from center of road or right-of-way; and that there was a 300 foot rear yard to Little Pine Creek.

45. Feerrar made no effort to determine the correct location of his boundary line prior to applying for the issuance of the building permit. Feerrar made no effort to determine the correct location of his boundary line prior to constructing the garage.

46. Feerrar constructed the garage at a location which obviously was within close proximity to the boundary line with Pine Village. The garage is within 5 feet of the line of the cherry tree boundary monument. It is within 10-20 feet of the line established by the Pine Village gate.

47. The northwest corner of the garage is a distance of only 4.62 feet from Pine Village's southern property line encroaching into the ten-foot side yard setback required by the Cummings Township Zoning Ordinance.

48. Approximately half of the width of the garage is within the 50-foot right-of-way of Elder Lane established by the Elder subdivision plans. The entire garage is within the fifty foot set back from the centerline of Elder Lane requirement of those subdivision plans.

49. The southeast corner of the concrete pad of the garage extends approximately three feet into the area that had formed the cartway of Elder Lane.

50. Feerrar failed to make the contractor who constructed the garage and the building official who approved the permit application aware of several facts, including: that

the proposed location of the garage was only 4.62 feet from the Pine Village property; a portion of the garage pad would extend several feet into the cartway of Elder Lane; that Feerrar intended to construct the garage within both the mandated setback distance from the centerline of Elder Lane and within the actual right-of-way (Elder Lane).

51. The encroachment by Feerrar's shed onto the real estate of Pine Village, the encroachment by Feerrar's garage into the ten foot property line setback mandated by the Cummings Township Zoning Ordinance, the encroachment by Feerrar's garage into the fifty foot setback area from the centerline of Elder Lane, and encroachment by Feerrar's garage into the fifty-foot right-of-way for Elder Lane are all accurately depicted on the boundary line survey sketch of Daniel A. Vassallo, P.E., P.L.S., dated 02/12/03. (Plaintiffs' Exhibit #11, 12) as well as the Hilling Land Surveying survey map dated 4/20/2000 (Defendant's Exhibit #3).

52. If Feerrar had truthfully disclosed the location at which he intended to construct his garage, the proximity of that location to the real estate of Pine Village, or the proximity of that location to the centerline of Elder Lane, his request for a building permit would have been denied and the garage would not have been built at its current location.

53. Feerrar's building permit is inaccurate, but Cummings Township has not taken any building code or zoning code violation action and no Township violation is pending.

54. Feerrar could have constructed his garage at many locations on his property, which would have neither infringed into nor obstructed any required setback area or easement area. For instance, the garage could have been constructed west of its present location by further excavation of the side hill.

55. The garage is a wood-frame structure erected on a concrete slab. It is a permanent type structure built at a cost of approximately \$25,000; there are appurtenant structures, including a retaining wall and concrete driveway pad. The garage can not readily be moved from the slab and placed at another location. To move the garage would first require dismantling it at a significant expense.

56. Feerrar parks one fiberglass boat, one aluminum boat, one four-wheel all terrain vehicle, one six-wheel all terrain vehicle, and other vehicles and implements in his garage.

57. The western line of Elder Lane corresponds to the property line designated on the relevant survey of Hilling and Vassallo (Plaintiffs' Exhibits #11, #12 and Defendant's Exhibit #3) as the dividing line between Feerrar's east residential lot and western garage lot.

58. At the Feerrar's house and garage location, Elder Lane is a cartway of at least 16 feet in width.

59. The southeast portion of Feerrar's concrete pad encroaches upon the cartway of Elder Lane.

60. The garage and concrete pad encroachment does not prevent nor significantly impede vehicle travel along Elder Lane. The encroachment of the concrete pad onto Elder Lane starts 6 inches west of the northeast corner of the pad and extends southerly at a diagonal line to the south end of the pad, at a point three and one-half feet west of the pad's southeast corner. This point on the south edge of the pad is essentially in line with the eastern

garage wall line if it would be extended southerly. This encroachment can be visualized from the various photos when they are coordinated with the survey maps.

61. The encroachment of the pad and the garage onto Elder Lane is best visualized in Exhibits #1 and #2 to the Deposition of Cindy Huff Walters, Plaintiffs' Exhibit #39 and also photographs, Plaintiffs' Exhibits #28 and #31 and Defendant's Exhibit #17C.

62. Feerrar's construction of the garage and pad has narrowed the Elder Lane cartway by approximately 6 feet for a distance of about 100 feet.

63. The location of Feerrar's garage has a minimum adverse effect upon Pine Village's use and enjoyment of its right-of-way or property. The adverse effect consists mostly of not being able to drive around vehicles Feerrar parks in the right-of-way without having to drive over the pad. The pad's elevation above the roadway necessitates a slow speed to drive over it, but overcoming it is as difficult as if a large bump in the road were present. Also, it is difficult for two vehicles to pass by each other when traveling in opposite directions. The cartway has on occasion become muddier in the area of the garage and the Pine Village gate, and is more subject to erosion from storm water runoff.

64. Feerrar's garage location has changed the natural course of water flow and has added to the water run-off onto Elder Lane. Its downspouts and the re-grading of a steep bank leading from the south side of the garage have concentrated the water flow and increased the impact of water run-off onto Elder Lane and the Pine Village driveway.

65. Pine Village was aware of Feerrar's garage construction and location since the spring of 1997. Pine Village took no issue with the location until at least one year after Feerrar erected a gate across Elder Lane in September 2000.

66. Feerrar erected his gate in September of 2000. The gate is located near the southern line of Feerrar's house lot, the tract that is to the east of Elder Lane. It is approximately 50 feet south from his home and 100 feet south from his garage. Feerrar kept the gate locked and denied Pine Village the opportunity to exercise its easement rights in Elder Lane. This continued until Feerrar was ordered to provide keys to Pine Village by Order entered June 10, 2003. This Court required Feerrar to provide the keys in order for him to obtain a continuance of the trial, which Pine Village had opposed due to its lack of access.

67. In paragraph 13 of his Answer to the Complaint, Feerrar averred that he "erected said gate only in response to Pine Villages erection of a gate blocking Feerrar's access in a northerly direction along said right-of-way and Feerrar has offered to an exchange of keys to said gates". Feerrar expressed the same position in his answer to Pine Village's Motion for Summary Judgment.

68. Feerrar erected his gate in an effort to force Pine Village to permit him to use the private drive across Pine Village's real estate for purposes of ingress and egress and to permit Feerrar to operate recreational vehicles on its real estate. The Feerrar gate location obstructed Elder Lane, and Feerrar thus prevented Pine Village from being able to exercise its easement rights in Elder Lane.

69. The gate that Feerrar erected is approximately 180 feet south of the gate Pine Village maintains across the roadway.

70. Feerrar's gate, as positioned, is heavy to lift off of or onto its lock post, requiring at least a lift force of at least 25 pounds. When the gate is removed from the post on which it is locked, the gate drops several inches in elevation, and it must then be lifted onto a

retaining post, which holds the gate in an open position. It requires at least a 10-pound effort to lift the gate onto the retaining post. To close the gate, the gate must be swung back to the lock post, and the gate must be lifted onto the lock post. The weight and physical characteristics of the gate are such that some of the persons who frequent the real estate of Pine Village are physically unable to operate the gate. Others must use a great amount of physical effort to operate it. This is especially true for older persons and smaller women. Most men have to exert but a mild physical effort to open and close the gate.

71. Feerrar's gate can be manually operated by an adult male in a total time of about 2 minutes. A longer time is required by most females or elderly adults due to the heavy lifting and also the complicated lock access. The lock access is difficult to see at night.

72. Feerrar's gate interferes with Pine Village's use of its easement. Every person who enters or leaves Pine Village's real estate must first stop his or her vehicle, exit the vehicle, unlock and open the gate, enter the vehicle, move the vehicle beyond the gate, exit the vehicle, close and relock the gate, re-enter the vehicle and then drive on. This process typically consumed at least two minutes; more time is required at night due to the lighting. The lock mechanism is difficult to see and operate even in daylight.

73. The Feerrar gate does not advance any substantial security interest of Feerrar. Feerrar uses his garage to provide security for his vehicles, ATVs and boats. When he is not home the garage is locked. Feerrar can provide security for his boats by purchasing trailer locks at \$15 per lock. Feerrar has a security system for his residence.

74. Feerrar has previously been the victim of malicious mischief when air had been let out of his vehicle tire and a screen door had been damaged.

75. The Feerrar gate will not deter vandalism of the type described by Feerrar, because any thief or vandal could simply walk or drive around the gate to access the home or garage of Feerrar. The physical features of Feerrar's real estate are such that persons could drive an ATV or pick-up size vehicles around the gate or through the more eastern portion of Feerrar's property.

76. Feerrar's gate does not provide any substantial security. At best, it deters an ill-intentioned person from quickly driving a vehicle directly to Feerrar's house or garage so as to enable a thief to load stolen goods from either building directly into his vehicle. The gate could possibly lessen the distance an evil one would travel by foot 50 to 100 feet or else increase the vandal's vehicle travel time a minute or two. Normally that would not be a deterrent to a seriously planned threat, but may slightly deter temptation in a casual passer-by who might do harm on the spur of the moment.

77. Feerrar's testimony that vehicles going to the real estate of Pine Village travel at an excessive rate of speed within 100 feet of the gate is vague and found not credible.

78. Feerrar can control the speed of vehicles on Elder Lane by installing a reasonable speed bump at his gate location without the unreasonable infringement of Pine Village's easement rights.

79. On November 13, 2001, the attorney for Pine Village wrote to Feerrar setting forth the right of Pine Village to use Elder Lane. The attorney stated Pine Village must have an unrestricted right-of-way and that such was prevented by Feerrar's gate. The letter warned Feerrar that Pine Village would institute an equity action to enjoin Feerrar's interference with the right of Pine Village to use the right-of-way.

80. During 2001, 2002 and until June 10, 2003, Pine Village and its tenants and others traveling to their property used the Pine Village northern access. This was difficult, but as with Feerrar's southern access, not impossible.

81. During 2001-2003, those owning and visiting Pine Village carried on most all of their normal uses of recreation, construction and timber harvesting.

82. Pine Village did not lose any income due to its loss of the right of passage over Feerrar's land.

83. At about the time of or after commencing this litigation, Pine Village improved its northern driveway leading to L.R. 41021. Pine Village paid \$230.56 to P. Stone Inc. for stone and gravel on May 11, 2002 (Plaintiffs' Exhibit #15), which it spread on the northern drive improving its condition. On December 13, 2002, Pine Village paid \$1,175 to Marden's, Inc. for bulldozer work done in October of 2002 in completing its widening and improvement of the northern drive.

84. Daniel Nestlerode and Mary Jo Nestlerode operated a skid steer machine to improve the northern drive in 2002.

85. Feerrar could somewhat improve the southern terminus of Elder Lane by placing fill and gravel thereby make it easier to make a right-hand turn and to proceed in a northerly direction on L.R. 41021 from Elder Lane.

86. Feerrar's property has several hundred feet of frontage on L.R. 41021. Feerrar can construct a driveway entirely upon his own real estate, much as the Pine Village north access road is built to provide a northerly direction access to L.R. 41021.

Discussion

Pine Village's request for relief centers on the removal of the Feerrar gate, garage, pad and shed and the entitlement of Pine Village to damages. It also seeks a determination of issues that were not resolved in the Court's summary judgment ruling, specifically the width and location of its right-of-way over the Feerrar tract. Feerrar requests that he be given an easement over the Pine Village tract to L.R. 41021. The Court will address each claim for relief separately, beginning with an examination as to each parties' easement rights.

**Feerrar's Request for an Easement Over the Pine Village Driveway
Northerly to L.R. 41021.**

Feerrar claims an easement over the land of Pine Village across the roadway, which extends from Feerrar's northern property line through the Pine Village property and enters onto L.R. 41021 between ¼ and ½ mile north of Feerrar's property. Feerrar essentially argues that this is merely an extension of the right-of-way that is now known as Elder Lane and that his right to the use of this Pine Village roadway is based upon the words of the easement reservation which created the Elder Lane right-of-way in the deed of Charles A. Apple to Elder on November 6, 1951 (*see* Findings of Fact 5 and 6). Alternately, Feerrar asserts that he has obtained this right through implication arising out of the Apple to Elder conveyance which severed the tracts creating a way of necessity across the Apple (now Pine Village) property in favor of the lands conveyed to Elder (now Feerrar). In addition to these two main contentions, Feerrar also advances theories that: he has a right of passage over Pine Village because the road is an abandoned state highway in which the private right of travel still exists under *Lamb v. Allegheny Cty. Institutional District*, 69 A.2d 1710 (1949); the road right-of-way is created

because of the rights that a purchaser from a plan or map has in the streets or roads shown on the plan or map; and, the rights of purchaser under a deed to the roads or driveways shown as boundaries regardless as to whether they are a highway or dedicated to public use. This Court concludes that Feerrar has not introduced sufficient evidence to establish his claim to a right-of-way over Pine Village under any theory.

When Apple sold to Elder in 1951, the exception and reservation of a right-of-way across Elder by Apple did not imply from the words used in the reservation that Apple was giving to Elder any right to cross the remaining Apple land. Instead, the words of the right-of-way reservation specifically state that the right-of-way is over the road that was then presently a private road existing on the ground going to “other lands of the said Charles A. Apple.” Findings of Fact, 6 *supra*. The exception language also stated that this right-of-way was to be for the benefit of Apple, his heirs and assigns as well as patrons and others who may “have occasion to travel said road to the other land of the said Charles A. Apple.” *Ibid*. These specific references make it clear there was no intent to describe a right-of-way that crossed Apple’s retained land leading to a state highway running between Waterville and English Center, that is, L.R. 41021. It is also clear that the road that is reserved runs to the other Apple land and is for the benefit of the retained Apple tract.

The intent of Apple is not only clear from words used in the deed, but as established by the testimony concerning the use of the road over Pine Village both at the time of severance and thereafter. Charles A. Apple, Jr., verified that his father, upon conveying the lands to Elder, did not permit other people to cross his retained lands. Mr. Fantanarosa, who succeeded to Elder, did not know of anyone using the road over Pine Village except the

Nestlerodes. Fantanarosa had no need for such a right-of-way. The evidence presented by Feerrar does not support any finding that either Elder nor anyone claiming under him up to the time of Feerrar's acquisition of his property ever utilized the Pine Village road to access L.R. 41021 except on occasion and with the permission of Mr. Apple. The heavy weight of the evidence in this case is that Apple and his successors excluded others from using the road over his land.

Feerrar acknowledges in his brief filed November 25, 2003, pp. 15 and 16, the correct standard of the law as it relates to finding of a right-of-way of necessity by implication. Feerrar, along with Pine Village, cite this Court to the case of *Phillippi v. Knotter*, 748 A.2d 757 (Pa. Super. 2000) for the proposition that the necessity for the right-of-way by implication across retained lands upon severance must exist both at the time of severance of title and at the time of exercise of the easement. Neither exists in this case. When the land was first conveyed to Elder, Elder obtained appropriate and necessary access to the state road over what is now Elder Lane. It was then a private road that existed on the ground. His conveyance also bordered the state road for nearly one-half mile. The necessity envisioned in *Phillippi* and other cases involving the creation of an easement by implication is the use must be much more than a convenience but is a matter of strict necessity and one that is not created by the party claiming the easement. *See, Graff v. Scanlan*, 673 A.2d 1028 (Pa. Cmwlth. 1996) (citing *Possessky v. Diem*, 665 A.2d 104 (1995)), *Merrill v. Mfrs. Light and Heat Co.*, 185 A.2d 573 (1962); *Ogden v. Grove*, 38 Pa. 407 (1861). There is no testimony to support a finding that up until Feerrar attempted to travel north using a vehicle pulling a boat and trailer that there was anything close to a necessity to use the road over Pine Village. Feerrar has created the situation where it would be convenient to him to

be able to exit his property northerly over Pine Village in order to travel to Little Pine Creek Dam with his trailer, but it is strictly a convenience. It is not clear how often Feerrar would intend to make such use but, when he does, traveling south to Waterville and then turning back north is not such a inconvenience as to create a necessity to use the Pine Village road. More significantly, however, is the fact that, just as Pine Village at some time either constructed or improved their roadway access to the north in order to more conveniently avoid a sharp turn onto L.R. 41021 going north, Feerrar has ample land and ability to construct a driveway from his property westerly from Elder Lane and angle it in such a way as to provide him with a convenient northbound access onto L.R. 41021.

Feerrar asserts that the maps, Defendant's Exhibits 4, 5 and 6 in particular, indicate that the roadway, known as Elder Lane, continues on north from his property across Pine Village to L.R. 41021 and substantiate his right to use that road. None of the maps in question involve any subdivision or mapping of the Pine Village property. All of the maps involve subdivision of the tract of land conveyed to Elder. None of them show a road crossing Pine Village and going to L.R. 41021. At most they show some roadway lines extending an undetermined but extremely short distance north of Feerrar's ground onto Pine Village merely as indications of where the roadway is on the ground, as a convenience, or perhaps *dicta*, by the surveyors. The closest that any of these exhibits come to showing a right-of-way going to L.R. 41021 is on Defendant's Exhibit 5. It shows a road going a few feet onto Pine Village land and adds the comment of "to L.R. 41021" with an arrow. That survey done of the Elder tract by Elder for subdivision purposes cannot impose any easement upon the Pine Village property and does not. More significantly, the map attached to the Apple to Elder deed, Deed Book 379, page

94 (*see*, Findings of Fact, pp. 5,6) and the map recorded therewith drawn on November 3, 1951 shows the centerline of a private road referenced in that deed and shows a very short extension (1/4" representing approximately 100 feet), onto Apple and significantly does not show that the road continues to cross Apple to rejoin the state highway nor does it even have a designation such as "to the state highway."

Finally in this regard, Feerrar has introduced insufficient testimony to establish that this road, now known as Elder Lane, was a state highway or how it ceased being a state highway. The only evidence in this regard was a verbal statement by one or more witnesses, particularly Daniel Nestlerode. On cross-examination Daniel Nestlerode stated that Elder Lane was an old "public road" that had been abandoned in 1941. This is not sufficient evidence to establish Feerrar's un-pleaded contention that through some manner he obtained and still enjoys a private right of passage over Pine Village. In 1941, there was unity of title of the Feerrar and Pine Village tracts. The Court does not believe the evidence is sufficient to establish that this was or was not a state highway, let alone a public road, nor does it prove the manner in which or the date on which it ceased being either a state highway or another type of public road.

The Width and Location of the Pine Village Easement Over Feerrar's Land

Pine Village asserts it is entitled to the benefit of a 50-foot right-of-way in the exercise of its easement over the Feerrar tract because of the subdivision plans and deed encumbrances in Feerrar's chain of title. This is incorrect.

Pine Village does not have any rights created by the subdivision since they do not claim under the subdivision in any way. Subdivisions create rights only for those who purchase from or in reliance upon the subdivision plan, which Pine Village has not. The rights created by

the subdivisions are private rights only. The plans and deeds do not indicate the roadways were dedicated to the public or made public roadways. Therefore, Pine Village's right of travel over Elder Lane is as it existed at the time of the easement creation across the Feerrar tract in 1951, or, appropriately altered since that time.

The uncontradicted evidence, which is verified by a view of the premises, indicates that Elder Lane was, and is, for most of its length, a typical one-vehicle wide cartway road with a clearly distinguishable travel lane on its gravel surface, with sometimes a little bit of grass growing in its center. The testimony and view also established that the road could accommodate two vehicles passing each other in opposite directions with each putting their left tire or wheel close to the centerline and the southbound car's right wheel toward the ditch or embankment. The testimony also established there was a wide spot at the location where the Feerrar property is now located where two vehicles could easily pass by one another without any significant side-to-side movement. The appearance of this wide area is easily ascertained upon view when one visits the property. It is also factually demonstrated through the various photographs which indicate that the steep bank on the left when one travels north on Elder Lane (west side of Elder Lane) starts to come to an end at the Feerrar gate and therefore the terrain is much more level and wider than it is on the more southerly parts of Elder Lane. *See*, Plaintiff's Exhibits 21, 28; Defendant's Exhibits 18B, 18F, 18G. It is clear that the right-of-way was at least 16 feet along its length across Feerrar. This width of 16 feet in width is also in accordance with the testimony of Defendant Feerrar as well as Daniel Nestlerode and Mr. Fantanarosa. Feerrar concedes that the right-of-way width is 16 feet as it crosses his property. *See*, Defendant's Brief filed November 25, 2003, p. 3.

Although the width of the right-of-way is clear, there may be some discrepancy as to its original location. In this regard the Court finds controlling the references in the various deeds to the fact that the properties to the east of Elder Lane have the west side of that private road as their western boundary. The various survey maps introduced into evidence do not appear to be in dispute as to where the location of that western boundary of the lots would be. That western boundary therefore establishes a western line of the private right-of-way enjoyed by Pine Village and the right-of-way would extend 16 feet easterly therefrom.

Encroachment Upon Elder Lane by Feerrar's Garage and Concrete Pad

The decision in 1996 of Feerrar to build a garage west of Elder Lane was ill-advised. There is no question that his property through the restrictions imposed by deeds and the various subdivisions was subject to the requirement that any such building is to be set back a minimum of 50 feet from the centerline of all roads. The centerline of the 50-foot right-of-way for the private road, which enlarged Elder Lane as shown on the subdivision maps, corresponds with the exact centerline of the original Elder Lane (that is, on a line that is 8 feet east of the western boundary of the Feerrar tract). The subdivision maps clearly indicate, as do the deeds in Feerrar's chain of title, that the western property line of the lands east of Elder Lane, was the western line of the private road. *See*, Defendant's Exhibit 5, Subdivision Map of August 1977; Fantanarosa to Feerrar deed of 5/12/93, D.B. 2050 p.211, finding of fact #19, *supra*. The subdivision maps all indicate that the private road right-of-way centerline is east of the western line of the properties which lie to the east of Elder Lane, and corresponds to the centerline of Elder Lane. With Elder Lane originally being 16 feet in width, the 50-foot building set back for the centerline would extend a distance of 42 feet westerly from the west

line of Elder Lane. Regardless how measured, there is no contest that the garage wall closest to Elder Lane is within 18 feet of the centerline of the subdivision road. This places the entire garage within the building setback prohibited area. *See* Plaintiff's Exhibit 11, Survey Map of Vassallo, Engineering and Surveying, Inc., dated February 12, 2003 and the Survey Map of Defendant Feerrar's surveyor, Hilling Land Surveying, dated April 20, 2000, Plaintiff's Exhibit 13. At its northern end, the garage is within 10 feet of the right-of-way enjoyed by Pine Village in Elder Lane and, at its southeast corner, is within 2 feet or less of the Pine Village right-of-way.

Unfortunately, none of the survey drawings of either party depict the location of the garage by distance from the property line or west side of Elder Lane nor do they show the exact location of Feerrar's concrete pad, which is south of the garage. However, this Court, based upon the inspection of its premises and using a scale applied to the maps, has been able to determine that the original western line of Elder Lane did cross over the area where the concrete pad now exists. The concrete pad is several feet wider than the garage on both sides. The northeast corner of the pad also has a set of steps descending from the pad easterly into Elder Lane. The steps and 6 inches of the pad, measured at its northeast corner, clearly encroach upon Elder Lane. Several feet of the pad at the southern end also encroach into Elder Lane. The un-refuted testimony of many witnesses and the Court's view of the property establish that the construction of this pad south of the garage has caused a "jog" to occur in Elder Lane at that location compared to where Elder Lane was traveled before the garage was built. It is a jog easterly of several feet. This jog is apparent in the dotted line representing the traveled portion of Elder Lane on Plaintiff's Exhibit 11.

The Court was struck by the rather straight-forward testimony of Daniel Nestlerode, upon cross-examination, to the effect that despite his annoyance of the garage construction which he first observed in 1997, the garage in and of itself did not affect the Pine Village property and that the garage pad, although it extends into the road, does not “prevent” Pine Village from traveling the roadway. Daniel Nestlerode acknowledged that while the pad construction does cause a part of the roadway adjoining it to be sunk down, it was not a complete impediment to traveling upon the road nor did the 2-3 steps constitute an impediment to travel to Pine Village. The testimony of Daniel Nestlerode also acknowledged the lack of the garage interfering with Pine Village’s use of its property due to being constructed within ten feet of the boundary line.

The garage had been constructed late in the fall of 1996 and was completely finished at the time it was first noticed by Pine Village. It was not until the spring of 1997 that the Pine Village residents returned to their summer homes to find the garage had been constructed. The Court notes it is not exactly clear from the testimony as to when the concrete pad was installed, although there were indications it was sometime after the garage had been built, probably in 1997 or 1998.

Daniel Nestlerode was aware of the Feerrar garage construction on his first trip to Pine Village in early spring of 1997. The Court does not find particularly credible the reasons Pine Village delayed in seeking a removal of the obvious encroachment the garage and pad posed. Clearly, there was not any delay in Pine Village recognizing the potential harm to their easement by the garage and pad. This finding is supported by the testimony of James Nestlerode to the extent that he was “shocked” by the changes made to the right-of-way area

due to the garage construction. Nevertheless, Pine Village still took no action. Obviously, Pine Village should have pursued its rights without delaying.

Each parties' post-trial submissions include appropriate citations to and recitation of the law of laches as it applies to whether Pine Village's delay in taking action to seek removal of Feerrar's garage and pad provide Feerrar with a defense to their present request. In applying those principles, this Court finds that Feerrar cannot rely upon the doctrine of laches because he has suffered no harm from the delay. If required to now remove the garage and pad from encroaching upon the Pine Village roadway Feerrar would be put to the same trouble and same expense as if he were required to take that action in 1997 or 1998.

Pine Village claims to have the right to have the garage and pad removed because they actually do encroach upon the roadway and/or at least upon the slopes and embankments of the road to the detriment of Pine Village. In addition, Pine Village asserts it has the right to rely upon the 50-foot setback from the centerline of the roadway provisions contained in the Elder subdivisions and deed restrictions in Feerrar's chain of title. Pine Village also asserts a right to remove the garage because it violates a 10-foot setback from the property lines restriction under the Zoning Ordinance of Cummings Township. This latter action would be pursuant to the second-class Township Code, 53 P.S. §10617, that creates a private cause of action.

Pine Village cannot obtain relief because of the violation of the 50-foot setback from the roadway established in the subdivision and deed requirements. To the extent that this was a subdivision requirement imposed by Cummings Township, there is no private right of enforcement of such subdivision restrictions under the Planning and Development Code,

specifically under 53 P.S. §10515.1, Preventive Remedies and/or §10515.3, Enforcement Remedies. Unlike its counterpart in the Zoning Code, the Planning and Development Code does not have a private right of enforcement and specifically prohibits it. 53 P.S. §10515.3(c). Nor does Pine Village obtain any rights under the Elder subdivision restrictions. The subdivision of the Elder tract of land occurred only after the Pine Village tract had been severed from the Elder lands. The subdivision impositions by Elder made upon the Feerrar tract of land cannot inure to Pine Village, as it has not purchased under the subdivision or relied thereon in any way.

Pine Village does have a right to protect its right-of-way from encroachment. It also has the right to see that the property line setback of the Cummings Township Zoning Ordinance is enforced through removal of a structure built too close to its property line. In this case, however, Pine Village is not entitled to have Feerrar's garage and pad removed. This is because the cost of removing the garage and pad would far exceed the benefit to be obtained. This was made clear by the Court's site view and testimony.

Daniel Nestlerode's testimony gave support to this Court's own observations that the garage and pad have only a slight impact upon Pine Village's easement rights in Elder Lane. Elder Lane has been narrowed, shifted east slightly, and made subject to erosion and softening by water runoff from the garage and altering of the western embankment. Nevertheless, travel on Elder Lane is not impeded as Daniel Nestlerode conceded. Equity should not do more harm than good, particularly when the good can be accomplished through alternate less-expensive means.

The Zoning Code statutory right of action also requires that the Pine Village property restriction must be substantially affected by the impact of the 10-foot setback violation. Pine Village property rights in its lands are not substantially impacted, if at all, by the garage being within 10 feet of its property line.

In this situation, what Feerrar must do is to correct the harm he has caused by the construction his garage and pad. Feerrar must create a clearly defined, usable 16-foot roadway. This roadway must be stoned with at least 2 inches of gravel of a 2B or 1A type of limestone, for a width of 16 feet from the location from where Feerrar's gate now exists to the Pine Village gate. This 16-foot stoned cartway shall follow as close as possible the original line of Elder Lane, except that it should be offset at least 2 feet from the southeast corner of the concrete pad and follow the approximate line from that point, which would parallel the original line of Elder Lane, until it can be rejoined into the original line at or about the north line of Feerrar's tract of ground. The west line of this stone cartway should also be at least 2 feet east of the bottom of the steps that go down easterly from the concrete pad to Elder Lane.

In addition, Feerrar shall maintain appropriate mulch or vegetative cover on the embankment that is east of his garage sloping down to Elder Lane so as to prevent erosion and water run-off. Feerrar shall also cause the water draining from his storm gutters and other improvements to be diverted through piping to an appropriate ditch so that the water does not accumulate upon the Elder Lane cartway. The ditch water must be appropriately piped under Elder Lane at a point, which approximately corresponds to the Pine Village gate, where the water now turns and flows easterly across Elder Lane. A pipe of sufficient capacity, not less than 8 inches, shall be installed at that location by Feerrar to handle this water discharge.

Feerrar shall not park any vehicles, nor allow any other impediments or obstructions of any nature, even on a temporary basis, to be stopped, located or maintained within the 16-foot-wide stone cartway.

Feerrar's Gate

This Court finds that under the circumstances and facts of this case Feerrar's gate must be removed. The legal principles involved, which apply to the erection of a gate across the easement of a right-of-way, are easily stated:

It is well settled that the owner of a dominant estate has free and full use of the entire **easement** granted, and neither party may unreasonably interfere with the other's use. . . . **The subsequent purchaser of land, who has notice of an existing easement, takes land subject to that easement. . . .**

Kushner v. Butler County Airport Authority, 764 A.2d 600, 603 (Pa. Super. 2000) (citations omitted)

The erection of a gate should not be restrained unless it is an unreasonable interference with an easement, or completely denies the rights of the user. ***Taylor v. Heffner***, 359 Pa. 157, 164, 58 A.2d 450, 454 (1948). Gates or moveable bars, if not an unreasonable obstruction to the use of [an easement], are not an unlawful abridgment of the right of passage under easement. ***Haig Corporation v. Thomas S. Gassner Co.***, 163 Pa. Super 611, 615, 63 A.2d 433, 435 (1949).

Matakitis v. Woodman, 667 A.2d 228, 232-33 (Pa. Super. 1995).

The application of these principles to a particular fact situation is not easily accomplished, as seen here, for each party argues these cases support their respective positions under the facts of this case. The historical evolution of these principles enunciated in ***Kushner*** and ***Matakitis*** establishes that the correct application is controlled by the peculiar factual circumstances of a given case. Therefore, an analysis of the facts of the cases from ***Matakitis***

that developed these “black letter” principles will provide guidance for the determination of the present dispute.

The Pennsylvania Supreme Court, in 1873, in overturned a trial court’s directed verdict entered in favor of the defendant/owner of the servient estate who had erected a gate across a passageway over which the plaintiff had the right of travel stating:

Whether the gate in this case amounted to a wrongful obstruction was, therefore, a question of fact for the jury. If it was not a practical hindrance, and, under the circumstances, an unreasonable obstruction to the plaintiff’s use of the passageway, then it was not a wrongful or illegal obstruction for which an action will lie.

Connery v. Brooke, 73 Pa. 80, 84 (1873).

The passageway involved a lane, which led from the property of the plaintiff to the Bustleton and Somerton Turnpike. The Supreme Court rejected the contention, accepted by the trial court, that a grant of the right of the passageway, which included the terms, “the free use, right and privilege of a passageway,” could only mean that there would be no obstruction whatsoever and that a gate hung across the way was always wrongful. The Supreme Court instead said that circumstances surrounding the intention of the parties at the time the grant was made should be taken into consideration in order to understand the words of the grant in their ordinary and natural sense. In *Connery*, at the time the grant was created, a gate did exist across the passageway where the lane intersected the Turnpike and continued there until the lawsuit was instituted. In our case, there was no gate where Feerrar placed his when the easement was created by Apple and it remained un-gated for 19 years.

Hartman v. Fick, 31 A. 342 (Pa. 1895), relying upon *Connery*, *supra* upheld the right of a property owner to erect a gate across a right-of-way, regardless that a gate did not

exist when the easement was created. The servient property owner conceded that his land was subject to a right-of-way that had been in existence and un-gated for 11 years. He had enclosed the passageway, including erecting gates across it, in order to enclose the field over which the right-of-way passed. The lands involved were adjoining farms. The right-of-way had originally been created through unenclosed woodland. The servient property owner cleared the land for cultivation. In order to keep neighbors' cattle and other cattle properly in or out of his cultivated fields, the servient property owner erected fences along the way, with ordinary swinging gates at the entrances to it. In those circumstances the Supreme Court stated:

The land remained the property of the plaintiff (servient owner) and he had a right to use it for any purpose that did not interfere with the easement. To do this it might be necessary under some circumstances to enclose the way with the field over which it passes, and if this is done with a reasonable regard to the convenience to the owner of the easement, it affords him no just ground of complaint.”

Id., at 343. In our case, there has been the change in the circumstances from the time the easement was created in the form of the house and garage erected on Feerrar's property.

Applying *Hartman*, *supra* and *Connery*, *supra* in *Kohler v. Smith*, 3 Pa. Super. 176 (1896), the Superior Court upheld the lower court's directed verdict in favor of a landowner whose property was subject to a right-of-way of 132 feet. Based upon the evidence presented in the court below the Superior Court noted that

There was apparent necessity by the owner of the servient tenement (defendant)...to use bars at the entrance to this so-called lane, through and over which the plaintiff claimed the right to pass, so as to restrain his cattle whenever necessary...(T)he defendant and those under whom he claimed used the bars whenever it became necessary for him to do so for his own convenience and protection. The present defendant erected a swinging gate at the

point at which the posts and bars had been previously erected and maintained. (emphasis added)

Id., at 178. The Superior Court acknowledged there was some evidence that plaintiff, the owner of the right-of-way, was inconvenienced by having to open the gate and in this regard stated:

[B]ut his explanation shows that it is only the usual and necessary inconvenience, which was caused by descending from his wagon, opening the gate, driving through, and closing it again. This we think, under all the authorities, cannot be considered in any sense as an unreasonable obstruction nor hindrance to the free use of the way by the owner of the easement.

Ibid. The length of the easement over Feerrar's property and the inconvenience to Pine Village is similar to the facts found significant in *Kohler*. In contrast to the servient property owner in *Kohler*, Feerrar cannot point to a necessity, convenience, or danger that would be addressed by his gate.

Based upon this evidence, the Superior Court upheld the directed verdict although it acknowledged the principles of *Hartman, supra*, and *Connery, supra*, to the effect that whether the gate would amount to wrongful obstruction is normally a question of fact for the jury. In doing so, the Superior Court accepted the reasoning of the trial court which stated, the owner of ground subject to a passageway can make any use of the ground that is consistent with the enjoyment of the right-of-way by the other party; a servient owner has a perfect right to put up swinging gates, provided there are not an unreasonable obstruction with enjoyment of the right-of-way by those who are entitled to use it. *Id.* at 179. The Superior Court also cited the treatise Washburn's American Law of Easement and Servitude, 3rd Edition 1873, page 264, which said,

It seems to be now settled that, if the landowner is not restrained by the terms of the grant of a right-of-way across his lands for agricultural

purposes, he may maintain fences across such way, if provided with suitable bars or gates for the convenience of the owner of the way. He is not obliged to leave it as an open way or to provide swinging gates, if a reasonably convenient mode of passage is furnished.

Ibid The Superior Court found this statement to be consistent with Pennsylvania law as stated in the *Hartman* and *Connery* decisions.

The Superior Court again ruled that where a gate was put up across a right-of-way by the servient landowner in order to prevent his livestock from wandering onto an adjacent public road that such was within his right to use the servient property in any way that did not interfere with the easement of the right-of-way. *Helwig v. Miller*, 47 Pa. Super. 171 (1911). In *Helwig*, the trial court had found that the gate in question was “an ordinary swinging gate, opening either way, easily operated, and not an unreasonable obstruction to the free use by the defendant by his private right-of-way,” relying upon *Hartman v. Fick*, *supra*, *Connery v. Brooke*, *supra* and *Kohler v. Smith*, *supra*. *Id.*, at 174.

The *Helwig* court specifically rejected the owner of the right-of-way’s contention that those cases were distinguishable because the right-of-way was not just used by the owner of the farmland to enable him to reach a highway as in the prior cases, but instead, was used by those who would visit the lands of the owner of the right-of-way for the purpose of business or pleasure. The *Helwig* court, noting that such persons who lawfully used the right-of-way could have no greater right than the owner of the right-of-way for their necessary and reasonable enjoyment of it, stated, the cited authorities established a firm doctrine that the gate over the right-of-way was permitted because the owner of ground subject to a right-of-way could use the ground as the owner chose, so long as he did not interfere with the proper and reasonable use of a right-of-way by those entitled to use it. 47 Pa. Super. At 175.

Pine Village correctly asserts that unlike the situation in *Helwig* Feerrar's gate cannot claim the ease of operation that existed in *Helwig* and also correctly assert that Feerrar's property does not enjoy any convenience or protection from his gate. Also, unlike the easement in *Helwig*, the reservation which established the Pine Village right-of-way specifically states it is to be used for and by the "patrons and others" who wish to travel to the Pine Village land. Therefore, if the gate interferes with those individuals, it is the same as interfering with the owners of the Pine Village property.

In 1921, the Superior Court again upheld the erection of a swinging gate across a right-of-way, which traversed a 70-acre farm. In *Zeigler v. Hoffman*, a right-of-way of a lane or road had been reserved over a 70-acre farm, "upon severance of an adjoining parcel as always had been used" by the prior owner. 78 Pa. Super. 115, 116 (1921). This is similar to the reservation made by Apple in the case at bar of a right-of-way that consisted of the "present private road existing on the ground." (*See*, Finding of Fact, #6, above.) In sustaining the trial court's holding that the erection of the gate across the right-of-way was necessary to keep the cattle of the servient landowner in the pasture field, *Zeigler* stated:

It would be unreasonable to require the owner of the 70-acre farm to fence off the way across his farm from east to west, or in the alternative, take the risk of damage to his property by cattle straying either from appellant's (owner of the right-of-way) farm or from the public road, or perhaps risk the escape of his own cattle, when such consequences may easily be prevented by the construction of proper gates at suitable places.

What is reasonable varies with the circumstances; the character of the land, or of the way, or of the use of the easement may affect the determination of what is reasonable; but it is a question of fact to be determined when alleged interference arises. (emphasis supplied)

Id., at 119, (citing *Ellis v. Academy of Music*, 120 Pa. 608, 622 (1888); *Helwig, supra.*; *Kohler, supra.*).

In Feerrar’s situation he can prevent the threatened consequence of harm from intruders in ways which do not interfere with Pine Village’s use of the easement. Contrary to the factual structure of *Zeigler*, the consequences of malicious mischief and theft, which Feerrar seeks to avoid, will not be easily prevented by his gate, if, in fact, the gate prevents their occurrence in any way.

In *Ellis supra*, cited by *Zeigler*, the Pennsylvania Supreme Court upheld the award of damages for maintaining a nuisance based upon a trial court finding that a gate closing an alleyway was a nuisance. The *Ellis* court held that a gate may or may not be an obstruction depending upon circumstances, which in that case properly had been left to the jury to decide. *Id.*, at 628. *Ellis* distinguished *Connery, supra*, on the basis that the gate in question there did exist at the time that the grant of the right-of-way was made.

The Supreme Court continued to rely on *Hartman, supra*, and *Zeigler, supra* in *Taylor v. Heffner*, 359 Pa. 157; 58 A.2d 450 (1948), which recognized that the servient owner’s right to use his property must be exercised in a manner consistent with the easement; while the servient owner could use the property as it would choose it may not interfere with the proper and reasonable use of the right-of-way. The Court in *Taylor* went on to state that the erection of a fence along and gates across a right-of-way could not be restrained, however, that right could not be exercised in such a way as to:

“...[C]ompletely deny the right of the user. In the circumstances of this case, we hold that the erection of the gates, which are kept locked or closed during the time when the appellants (owners of the right-of-way) are using the road, does constitute an

unreasonable interference with the easement. Appellee's (servient property owners) contention that a key was given to appellant's predecessors in title we deem immaterial in view of the complete denial of any rights in appellants as regards the use of the road in question. (emphasis added)

Id., at 454. The gate key involved in *Taylor* had been given to the owner of the commercial user of the right-of-way. The holding in *Taylor* found that despite the giving of this key maintaining a locked gate was an unreasonable interference, as the right-of-way was being used for commercial purposes involving the hauling of coal by truck over the right-of-way.

The mere giving of a key to Pine Village does not in and of itself cure the unreasonable nature of the blockage because, similar to *Taylor*, the easement is frequently used by a large number of people. Because of the frequent use, the unreasonableness of the interference with the easement rights of Pine Village is magnified by the weight and inconvenience of opening Feerrar's gate. Therefore, Feerrar's locking of the gate was an unreasonable interference with Pine Village's use of the easement.

Taylor was soon distinguished by the Superior Court in the case of *Haig Corp. v. Thomas S. Gassner Company, Inc.*, 63 A.2d 433, 435 (Pa. Super. 1949), with the Superior Court determining that, "under the circumstances of this case, a locked gate is not an unreasonable interference with plaintiffs' right to the use of the alley in question." In *Haig*, the property subject to the right-of-way was a commercial building used for the manufacturing of furniture. The commercial owner had erected a metal-padlocked gate to protect his establishment from fire, theft and nuisance committed by trespassers. The gate was closed when not in use and locked from 5:30 p.m. to 8:00 a.m. daily and over weekends when the manufacturing plant was not in operation. The lower court found, as an undisputed fact, that the

property owner had offered to furnish the adjoining owner who had use of their passage and alleyway, as well as, its tenants and other authorized persons with keys to the lock. In reaching its decision, the *Haig* court took note that the owners of the right of passage had not used or attempted to use it for a prolonged period of time, specifically since 1931, which coincided with time that the alleyway was first gated.

The non-use by the dominant owners in *Haig* is in sharp contrast to the frequent use of Elder Lane by Pine Village. Therefore, *Haig* does not sustain Feerrar's position that he can maintain a locked gate across Elder Lane.

Nevertheless, the *Haig* court went on to point out that a gate which divided such a private alley from a public street was not a legal obstruction of the right to the reasonable enjoyment of the easement relying upon a Superior Court case, *Nichols v. Cornet Band, (No. 1)* 52 Pa. Super. 145, 151, (1912) quoted the following language:

Because the alleyway is subject to the free and unobstructed use by the owners or tenants of the...lots, the law does not, under all circumstances, require that it should be absolutely thrown open to be used by everybody and thus probably become a place which could easily be converted into a nuisance for all concerned. If for the protection of their common rights, one or more of the parties, should erect across the opening a swinging gate that would permit the free entrance or exit of vehicles and that would be so constructed as to be easily operated, we are not prepared to say that such a gate would be an obstruction to the legal right of anyone of the lot owners. (emphasis added)

63 A.2d at 435. The freedom of use envisioned by an easily operated gate recognized in *Nichols* does not exist in our case due to the difficulty many who use Feerrar's gate experience in its operation.

The Pennsylvania Superior Court ruled in *Matakitis v. Woodmansee*, 446 Pa. Super. 433; 667 A.2d 228 (Pa. Super. 1995), that a gate erected across a 15-foot wide right-of-way utilized by motor vehicles, which crossed and served four residential/recreational properties near a lake, could not be restrained under the doctrines recognized in *Taylor, supra* and *Haig, supra*. In *Matakitis*, the keys to the gate in question had been provided to those who had the right to use the right-of-way. A user of the right-of-way, who had been given a key, was not satisfied with that and unilaterally removed the gate. The court's ruling in *Matakitis* required the gate to be restored by the party who had removed it finding that there was a minimal inconvenience caused by the locked gate and that it afforded protection to all four parties who had the benefit of the right-of-way. See, 667 A.2d at 233. Feerrar cannot rely on *Matakitis* due to its facts being limited to that of no serious inconvenience to three other persons as well as the mutual benefit derived therefrom. In addition, the facts referenced in *Matakitis* do not include a frequently used right-of-way by a large number of different people nor a gate that is difficult to operate.

Our analysis of the cases to which we have been referred and which have been argued on behalf of the parties concludes with the 2000 Pennsylvania Superior Court decision in *Kushner v. Butler County Airport Auth., supra*. The *Kushner* decision directed that the airport authority, as property owner who had erected a gate across a right-of-way used by airplanes, was required to make the gate automated and wide enough for airplanes to pass through. In reaching that conclusion, the court rejected the utilization of a manual gate because it required two men to operate it and airplanes using it had to be turned off and on while the gate was opened and closed. The court specified:

While operation of the manual gate may be viewed as a mere inconvenience to some adjacent property owners, it represents a complete denial of access to others since some of the pilots were women who were physically incapable of opening the manual gate. Moreover, a pilot operating his plane alone may also be denied reasonable use of this easement by the manual gate...

(G)iven the fact that affirmative action by the Authority has obstructed the easement...it is required to render the gate useable for all easement holders. Specifically the Authority must provide unobstructed ease of access to the easement for all easement holders. (emphasis added)

764 A.2d at 604. The *Kushner* court determined that the manual gate, which could not be operated by a single pilot, was a substantial interference with the easement that effectively prevented the use of the easement. *Id.*, at 604-05. Similarly, Feerrar's gate has the effect of preventing many of the Pine Village authorized users from being able to travel Elder Lane because they are physically incapable of operating the gate. It is to them an unreasonable obstruction. Feerrar must provide to all who use the easement an ease of access free of any unreasonable obstructions.

The analysis applied in the foregoing cases recognize many significant factors are to be considered in determining whether or not a gate can be erected across a right-of-way, including:

1. The words and terms used in creating the easement as to the parties' intent.
2. The character and use of the land and the easement at the time the easement was created and changes which have since evolved.
3. The protection or benefit enjoyed by the landowner who erects the gate across the right-of-way.

4. The inconvenience and obstruction the gate causes to the users of the easement.
5. The ease of use of the gate.
6. The extent of use of the right-of-way that has been made by those entitled to use it.
7. The practicality of keys being provided if the gate is to be locked and the times that the gate is to be locked.

In applying those principles of law to the circumstances of this case, it is clear to the Court that the Feerrar gate does constitute an unreasonable obstruction of the Pine Village easement. This conclusion is not based simply upon the maliciousness that may have, and no doubt did, prompt Feerrar to erect the gate inasmuch as it has long been decided that a lawful act cannot be rendered unlawful merely because of malicious motive. *See, Nallin-Jennings Park Company v. Sterling*, 73 A.2d 390, 392 (Pa. 1950). The important finding by this Court is that the Feerrar gate does not effectively afford his property any protection or convenience, but at the same time prevents many from the normal use of their easement.

The Feerrar gate does not serve his stated purposes because of its proximity to Feerrar's home and garage and the physical characteristics of the land near the gate and the remainder of the Feerrar property. Granted, Feerrar argues he has placed a wood pile adjacent to the gate that prevents vehicles from simply passing to its side; nevertheless, such a wood pile is certainly not permanent in nature and obstructs only a small part of the Feerrar property with other parts of his land being such that vehicles could get by the gate without a tremendous amount of difficulty, particularly those of a four-wheel drive type and/or ATVs. Further, from

the location of the gate, Feerrar's houses and garage are well within easy walking distance for any ill-intentioned individual such as a thief or malicious mischief maker. Thus, there is no reasonable benefit being derived or protection being given to Feerrar, but at the same time, the gate operates as a significant impediment to many individuals going to Pine Village.

The mere inconvenience suffered by the travelers to Pine Village of getting in and out of the vehicle to open and close the gate is not sufficient in and of itself to require its removal. To some, the weight and structure of the gate is no more than a mere inconvenience; however; to many particularly women and the elderly, the weight and structure of the gate create an extreme difficulty in its operation, and in some circumstances the gate cannot be operated alone.

In the summertime, as many as 50 different owners, family members, visitors and tenants travel over Elder Lane, to make use of the residential/recreational lands of Pine Village on any given day. The easement rights created for the benefit of Pine Village specifically state that the right-of-way is to be for the use and benefit of its owners as well as patrons and others who may have occasion to travel the road to the land now owned by Pine Village. The right-of-way of Elder Lane must be available to all of these travelers, day or night. In addition, at nighttime or inclement weather, the locking/latching mechanism becomes an obstruction rather than merely an inconvenience to all the travelers to Pine Village, including physically strong men. This amounts to a substantial interference with the easement rights of Pine Village.

This Court does not believe the fact that Pine Village has chosen to erect a gate upon its land is material. That is a circumstance created by Pine Village, and the fact that it now argues a hardship results because two stops by travelers have to be made is not significant.

Feerrar's argument that Pine Village also has a gate on the right-of-way, therefore he can have one, ignores the fact that Pine Village has exclusive ownership of its right-of-way. The fact that Pine Village chooses to inconvenience and/or benefit itself and its tenants and others who are going to the Pine Village property by erection of a gate is not significant to the permissibility of the Feerrar gate. That being stated, it is clear upon view and inspection of the property that the Pine Village gate does effectively block vehicular access by most normal vehicles to the Pine Village property and would be a deterrent to trespassers, curiosity seekers or other nuisance visitors. The Pine Village gate does serve the purpose of protecting from fire, theft and malicious mischief if such would be the intent of those who might choose to venture onto Pine Village property over its driveway, north of Feerrar's property. Also, the Pine Village gate is significantly easier to operate than the Feerrar gate.

The most regular and significant use of Elder Lane by Pine Village and its tenants and other of its patrons and visitors occurs between April 1st and November 30th. At other times the use of Elder Lane is by a few visitors of Pine Village and is sporadic. It appears, therefore, that what little benefit Feerrar may have from his gate could be derived from closing and locking it from November 30th through April 1st. The benefit of closing and locking the gate during those months may be small but doing so is of little consequence to Pine Village.

If Feerrar chooses to close and lock the gate from December through March, a key must be delivered to Pine Village, by Feerrar, of such a quality that it can be duplicated by Pine Village for all those that Pine Village would permit to use the right-of-way, including its utility providers. In addition, Feerrar must provide a key to the fire company and emergency services that would typically provide service to the Pine Village property, and also for

emergency purposes to the closest permanent resident neighbor of Feerrar. Finally, in December through March, Feerrar cannot keep the gate closed or locked when someone is actually utilizing the Pine Village property. Those using the Pine Village property between the dates of November 30th and April 1st should give appropriate notice upon their arrival and departure to Feerrar so that he keeps the gate open and unlocked when the Pine Village property is actually occupied during those months.

Encroachment of Feerrar Shed

There is no question as to the extent of the encroachment of Feerrar's shed upon the Pine Village property. The surveyors for each party depict the extent of the shed encroachment -- Plaintiff's Exhibit 11, being the Vassallo survey of February 12, 2003 and Defendant's Exhibit 3, being the Hilling survey of April 20, 2000. The measurement of the encroachment is not listed on the Hilling survey, but Vassallo shows the encroachment by a measurement of 9.12 feet at the shed's northeast corner and 4.66 feet at the northwest corner. However, there is a discrepancy in the survey. On the Hilling survey, done for Feerrar, the lean-to that is attached to the east side of the shed, which effectively doubles the size of the shed and also doubles the extent of the encroachment. The lean-to is not depicted on the Pine Village/Vassallo survey. Although neither survey depicts a measurement of the extent of the frame shed's lean-to onto Pine Village property, this Court's view of the property and a scaling of the Hilling survey verify that the encroachment is nearly 20 feet at the lean-to's northeast corner.

The testimony seems to indicate and the parties accept that Mr. Fantanarosa constructed the shed on site himself sometime after he had purchased the property, sometime in

1986. As originally constructed, it did not have a lean-to and had two doors that opened on the southern end of the shed towards Feerrar's house. It had originally been constructed at a different angle to the property line and/or roadway, which is not altogether clear to the Court. Mr. Fantanarosa's testimony was simply that the angle of the shed has been changed since its original construction. Based on his testimony as a whole, the Court understands this angle was changed after he had sold the property to Feerrar. Mr. Feerrar denies making any change to the shed angle. The Court finds the shed's original citing has been changed but not significantly.

Mr. Fantanarosa's testimony was ambiguous as to whether or not when he constructed the shed he and/or Mr. Arthur Nestlerode knew that the shed encroached upon the Nestlerode (now Pine Village) property. There was a discussion between the two of them in which it was determined the shed should be located at the location it was built in order to avoid high water. When constructed, the shed had a wooden ramp on the south side leading from the ground up to the bottom of the shed doors. That wooden ramp has since been relocated to the north side by Feerrar. Feerrar has also added two doors to the shed on the north side that now open onto Pine Village property.

Feerrar contends that the shed encroachment is *di minimus* and that he should not be required to remove the shed due to the principle of laches. In support of his equitable right to maintain the shed in its present location, Feerrar asserts: that the shed is not easily moved; if it were to be removed the appurtenant structures consisting of the concrete ramp and canoe overhang, (lean-to) would have to be dismantled or demolished at a great but unspecified cost; that the Feerrar property's slope, wetlands and proximity of Feerrar's house would make the movement of the shed difficult if not impossible. Feerrar also asserts there has been no

adverse impact upon the use or enjoyment by Pine Village of its property due to the shed's encroachment.

Pine Village acknowledges that its predecessor, along with Fantanarosa believed that at the time the shed was constructed it was fully on Fantanarosa's property. *See*, Post-Trial Submission of Plaintiff filed November 26, 2003 at page 31. The Pine Village argument also asserts that laches cannot apply since the encroachment was not discovered until the Vassallo 2002 survey. This action was commenced in May of 2002, within three months of the time of the completion of Vassallo's survey, which showed and verified the encroachment to Pine Village.

As before, both parties properly cite authority as to whether or not Pine Village has lost its right to remove the shed encroachment due to its delay in seeking to enforce its rights. Accepting the legal principles each party has cited, this Court concludes laches does not prevent Pine Village from obtaining removal of the shed and that equity requires the encroachment of the shed must end.

After this property dispute between the parties had ripened into litigation, Feerrar chose to have his counsel write to Pine Village on July 10, 2002 asserting that a overhanging tree was threatening the safety of the shed. *See*, Plaintiff's Exhibit 34. The letter, prompted by Feerrar's concern, suggested that Pine Village should take care of the overhanging tree problem before damage might result to the shed. In view of this action by Feerrar, coupled with the modifications he has relatively recently made to the shed, it is clear that the shed's location does now threaten the property interests of Pine Village and that laches does not defeat Pine Village's right to have the shed removed.

If the shed was not in its location of encroachment and was outside of the 10-foot setback, the shed would not be threatened by any falling limbs or activities on Pine Village property. In addition, Pine Village is hampered in its efforts to remove or harvest a valuable cherry tree because of the shed's proximity to it. Pine Village, therefore, cannot be secure in its property interest. Under these circumstances, Feerrar cannot rely upon the doctrine of laches or any former acquiescence or permission of Pine Village to excuse his continuing of this shed encroachment. Feerrar asserts that laches should be applied because the delay prejudiced him insofar as the fact that he enlarged the encroachment by constructing a concrete ramp to the south, a wooden ramp to the north, and the extension of the lean-to. This was done on dates that Feerrar did not make clear but very well may have occurred at a time he knew there were some property line issues with Pine Village. Feerrar offered no testimony as to the expense of these additions, nor the cost of dismantling them, nor of moving the shed. Nevertheless, it is obvious from viewing the shed that cost and expense of dismantling the shed or moving it is relatively small.

Regardless, Feerrar's actions were not undertaken in good faith insofar as the additional encroachment was concerned, because while the original shed location may not have clearly crossed the boundary line, there is no question from the location of the Pine Village gate and the well-recognized cherry tree boundary monument and tree line which denotes the property line of Pine Village, that the shed was virtually next to the property line. This proximity can be demonstrated through Defendant's Exhibits 15A and 15B and was apparent to the Court on its view of the property. Before undertaking any enlargements or additions to the

shed that would extend towards Pine Village it was incumbent upon Feerrar to make certain he was doing so upon his own property.

Not only do the foregoing equitable principles justify removal of the shed, Pine Village has a right to proceed with the removal under the provisions of the Zoning Ordinance of Cummings Township. *See*, 53 P.S. §10617.1. The encroachment is a substantial impact upon Pine Village's right to quietly enjoy its property without having concern that activities on its property might damage the shed.

Under this Court's equitable determination and, also, by applying the zoning code enforcement provisions, the shed must be moved so that it no longer encroaches upon Pine Village and is brought in compliance with the 10-foot setback ordinance of Cummings Township. The cases cited at pages 32-34 of Plaintiff's post-trial submission, filed November 26, 2003, also support this conclusion. The Court accepts the argument of Pine Village as to the shed, as set forth on those pages, as the further reasoning for the Court's order directing that Feerrar will be required to remove the shed.

Pine Village's Right to Damages

Pine Village asserts it is entitled to monetary damages from Feerrar for incurring survey expenses, its inability to access its property due to the Feerrar gate erected across Elder Lane, and the expense it was put to in order to improve its road which leads in a northerly direction onto L.R. 41021. The survey expense claimed for the Vassallo survey work is represented by Plaintiff's Exhibits 16 and 17, the first being the April 20, 2002 invoice for the full survey in the amount of \$1,467 and the second being a February 19, 2003 invoice for \$244 for an additional sketch plan of the details of the boundary line. This latter was obviously an

expense incurred in connection with this litigation. The former was for establishing the boundary line location. It is in accordance with Feerrar's survey done by Hilling. The survey done by Pine Village allowed it to assess its rights, as well as where it could or could not cut timber and otherwise carry on landowner activities. The Court does not dispute the reasonableness of the Vassallo survey expenses nor does Feerrar; however, the Court does not find any basis in law for these survey expenses to be awarded. Even though Feerrar's action of encroachment by the shed and garage may be actionable, a survey to determine whether the cause of action does exist or has merit is not an expense of litigation that is recoverable.

The loss of use damages asserted to be suffered by members of the families of Pine Village are asserted at being \$7,500-\$10,500 in total extent based upon the fair value of weekend use of the real estate at being \$300. The Court believes that the loss of use damages also is not recoverable by Pine Village. Although Pine Village had difficulty in accessing its property due to the Feerrar gate, their actual loss amounted to an inconvenience of using the northern right-of-way. The northern road's access was certainly more difficult; however, it did not entirely stop access to the Pine Village property. Nor did the Feerrar gate cause Pine Village to be deprived of any income, as there was no testimony that it lost any rent from any of its tenants. What the Feerrar gate did cause was the alleged loss of enjoyment of using the property by its owners.

Certainly, the enjoyment of the property has a value, but the Feerrar gate did not stop Pine Village from enjoying their property. The Pine Village damages in connection with loss of use are based upon Pine Village (the Nestlerodes) declining to use their real estate for various weekends. The Court believes this testimony as to damages is speculation. The Court

was not convinced from Nestlerodes' testimony that they were stopped from using the property due to the Feerrar gate or the necessity of using the northern access rather than Elder Lane. To the contrary, it appears they carried on significant construction and improvements to their real estate during the time the Feerrar gate was in existence. The Pine Village testimony as to loss of enjoyment damages is found not credible.

The expense of improving the northern access route is based upon the expenditure of \$1,175 to Martin's, Inc. for bulldozer work and to P-Stone, Inc. for stone in the amount of \$230.56. The stone invoice indicates it was delivered in May 2002. The bulldozer invoice indicates that work was done in October 2002. In addition, thereto, in order to accomplish the stone delivery and remove a stuck delivery truck and to improve the grade of the road, the principles of Pine Village, Daniel Nestlerode and Mary Jo Nestlerode asserted they operated a Skid-Steer for 101 hours with a fair value for such work being \$5,050 calculated at \$50 per hour.

The Feerrar gate was erected in September 2000 and maintained through 2003. The P-Stone and Martin bills were not incurred until this litigation ensued. The Court does not give credibility to the Pine Village assertions that they suffered damages requiring the repair of the northern roadway due to the Feerrar gate's erection in 2000, based upon the significant lack of time between when the gate was erected and their choosing to improve the roadway after litigation was well underway. Furthermore, it would have been reasonable for Pine Village to pursue obtaining a preliminary injunction as part of the litigation in order to have the Feerrar gate opened rather than to simply proceed with improving its northern right-of-way. While certainly Pine Village has a choice to pursue such legal remedies it may desire, including

whether or not to seek a preliminary injunction, the fact remains that this Court cannot find the expenses asserted for improvement of the northern right-of-way were proximately caused or a direct result of Feerrar's erection of his gate. Accordingly, Plaintiff's claim for those damages must be denied.

Legal Conclusions

1. The right-of-way known as Elder Lane was created in 1951 by the reservation of a right-of-way in deed of Charles A. Apple and wife to Charles H. Elder and wife, Lycoming County Deed Book 379, page 94.

2. This deed from Apple to Elder did not subject the lands retained by Apple to any right-of-way for the benefit of Elder.

3. Pine Village has succeeded to the rights of Apple as the dominant estate owning the benefit of the easement of the Elder Lane right-of-way. Elder's property was a servient estate subject to it. Feerrar's property has been derived from the Elder tract and is also servient and subject to the private roadway.

4. The Elder Lane right-of-way extends north from its intersection with L.R. 41021 to the property of Pine Village, but does not cross nor subject the Pine Village property to any right-of-way.

5. The Elder Lane right-of-way, which benefits Pine Village, has a width of 16 feet as it crosses the property of Feerrar.

6. Feerrar's gate is an unreasonable interference with the easement rights of Pine Village.

7. Feerrar's garage and concrete pad encroach upon the Elder Lane right-of-way and its slopes and embankment.

8. The doctrine of laches does not apply to prevent the removal of the Feerrar garage and pad from any encroachment upon Elder Lane.

9. The encroachment of the Feerrar garage and pad upon Elder Lane is not so substantial as to justify their removal when other solutions can be equitably ordered to correct the adverse results caused by the encroachment.

10. Feerrar's shed encroaches upon Pine Village's property. The doctrine of laches does not apply to prevent the removal of this encroachment. The shed violates the Cummings Township Zoning Ordinance 10-foot setback requirement. The encroachment substantially interferes with Pine Village's property rights and must be terminated.

11. Pine Village is not entitled to monetary damages from Feerrar.

PINE VILLAGE, INC.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-00,732
	:	
H. GENE FEERRAR,	:	CIVIL ACTION – IN EQUITY
	:	NON-JURY TRIAL ADJUDICATION
Defendant	:	AND DECREE NISI

Date: June 4, 2004

DECREE NISI

In accordance with the foregoing findings of fact, discussion and legal conclusions it is ORDERED and DIRECTED that:

1. Defendant, H. Gene Feerrar, does not own or hold any right-of-way easement over the property of Plaintiff, Pine Village, Inc.

2. The property of Defendant, H. Gene Feerrar, is subject to the easement of a right-of-way in favor of the Pine Village property as established by the deed of Charles A. Apple to Charles H. Elder and Emily J. Elder, his wife, dated November 6, 1951, recorded in Lycoming County Deed Book 379, page 94.

3. Defendant, H. Gene Feerrar, his heirs, successors and assigns and those claiming by, under and through him or them (hereafter collectively “Feerrar”), must create a clearly defined, usable 16-foot roadway over the Pine Village right-of-way easement. This roadway must be stoned with at least 2 inches of gravel of a 2B or 1A type of limestone for a width of 16 feet from the location from where Feerrar’s gate now exists to the Pine Village gate. This 16-foot stoned cartway shall follow as close as possible the original line of Elder Lane, except that it should be offset at least 2 feet from the southeast corner of the concrete pad

and follow the approximate line from that point, which would parallel the original line of Elder Lane, until it can be rejoined into the original line at or about the north line of Feerrar's tract of ground. The west line of this stone cartway should also be at least 2 feet east of the bottom of the steps that go down easterly from the concrete pad to Elder Lane. Feerrar shall maintain appropriate mulch or vegetative cover on the embankment that is east of his garage sloping down to Elder Lane so as to prevent erosion and water runoff. Feerrar shall also cause the water draining from his storm gutters and other improvements to be diverted through piping to an appropriate ditch so the water does not accumulate upon the Elder Lane passageway to the Pine Village gate. The drainage shall be located where the water now turns and flows easterly across Elder Lane. A pipe of sufficient capacity, not less than 8 inches, shall be installed at that location by Feerrar to handle this water discharge. Feerrar shall not park any vehicles, nor allow any other impediments or obstructions of any nature, even on a temporary basis, to be stopped, located or maintained within the 16-foot-wide stone cartway. The stoning and creation of the roadway and the water drainage provisions set forth above must be completed by August 31, 2004 and maintained appropriately thereafter by Feerrar.

4. Defendant, H. Gene Feerrar, his heirs, successors and assigns and any one using the Feerrar property or claiming by, under or through him or them (hereafter collectively "Feerrar") shall not obstruct the 16-foot-wide right-of-way easement by a gate, bars or other enclosure; provided, however, that Feerrar may maintain a gate in its present

location provided it is not more difficult to operate than the present gate and that it is not locked or closed between April 1st and November 30th of each year. If the gate is to be locked between December 1st and the following March 31st then Feerrar must deliver a key to Pine Village of such a quality that it can be duplicated by Pine Village for all those that Pine Village would permit to use the right-of-way, including its utility providers. In addition, Feerrar must provide a key to the fire company and emergency services that would typically provide service to the Pine Village property, and also for emergency purposes to the closest permanent resident neighbor of Feerrar. During the period of December through March, Feerrar cannot keep the gate closed or locked when someone is actually utilizing the Pine Village property. Those using the Pine Village property between the dates of November 30th and April 1st should give appropriate notice upon their arrival and departure to Feerrar, and upon notice Feerrar shall keep the gate open and unlocked when the Pine Village property is actually occupied during those months.

Feerrar's present gate must be unlocked and kept open, as provided above, immediately upon being given notice of this Order.

5. Defendant, H. Gene Feerrar, shall remove the shed and its attachments from their present encroachment upon the Pine Village property to a point that is at least 10 feet from the property line of Pine Village. The shed encroachment must be removed not later than July 15, 2004.

6. Pine Village is denied compensation as a result of its loss of the use and interference with its easement rights by H. Gene Feerrar, except that Feerrar shall pay Pine Village's record costs within 30 days of being given notice of this Order.

BY THE COURT,

William S. Kieser, Judge

cc: Joseph R. Musto, Esquire
Michael J. Casale, Jr., Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)