Problems with
Boundaries and Rights of Way

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BOUNDARIES and RIGHTS OF WAY

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I. About Marc S. Drier, Esquire

Marc S. Drier has been practicing law since 1980, and has developed a special interest in land use law. He has been an instructor for PBI, with materials published, multiple times, including three stints as a lecturer at the Municipal Law Colloquium, each time lecturing on land use law. He has twice authored the "Eminent Domain" section of the Solicitor's Handbook, issued by the Governor's office. He practices with Denise Dieter, Esquire at their office in Jersey Shore.

II. Concepts Covered

Boundaries and Rights of Way are actually very large topics. The basics of defining boundaries and resolving boundary disputes, and of doing the same for easements allowing passage, are covered. Not covered are the myriad of topics involving public rights of way, sometimes called "road law." Also not covered are easements for utilities.

III. Boundaries

A. The basic test for an adequate deed is whether or not the tract intended to be identified can reasonably be located. That is a broad test.

B. To interpret descriptions and to reconcile conflicting descriptions, there is a hierarchy of elements to use. The intent of the parties remains the polestar, but when recourse must be had to the words in the deed, and there are interpretation or reconciliation issues, the following rules of interpretation apply:

1. The best indications are reference to natural objects or landmarks found on the ground, the next best are artificial monuments, and the next best after that is reference to adjacent boundaries. Baker v. Roslyn Swim, 213 A2d 145 (Pa Super, 1965.)
2. After that, look to the "course and distance" language in the deed, Murrer v. Aurer Oil, 241 Pa Super 120 (1978.)
3. After that, look to the size measurement. Large v. Penn, (Pa S, 1821), 1821 WL 1819.
4. Favor the Grantee over the Grantor, Walker v. Walker, 33 A2D 455 (Pa Super, 1943).

The above is a clue as to why so many older deed descriptions refer to "old hemlocks" or "pile of stones." But is reference to an old tree really more dependable, especially in light of laser-guided surveyor equipment?

C. Doctrine of Consentable Boundary:

Case law adopts this doctrine as law. If a boundary as described is ambiguous, but the neighbors have for 21 years or more acted as if they accepted where the boundary should be, then a rebuttable presumption arises that the parties are bound by their prior joint settlement of the boundary line question. The purpose of this doctrine is to serve as a "rule of repose" for quieting title, and a discouragement of confusing and vexatious litigation. Schimp v. Allamam, 442 PaSuper 365 (1995). This is not the same as "adverse possession": exercising dominion, but not necessarily continual, hostile, exclusive possession is required. The courts say that this doctrine enforces either a "dispute and compromise" reached and implemented, or a "recognition and acquiescence" by one side of the dispute.

D. Adverse Possession:

This is another way of obtaining the basis for court determination of a boundary line in your favor. You or your predecessor in title must have some sort of claim, and must have 21 years or more of continual, adverse, hostile, exclusive possession of the ground in question. "Hostile" means you know there's another claimant and you do not have their permission and you seize possession anyway. The other terms are self-explanatory. If the claimant's tract changes ownership, the deed must "tack" on the adverse possession claim mentioning it as included, in order to keep the "21 years or more" continuity. If any part of the tract is "unenclosed woodland" then adverse possession is not allowed: this provision goes back to 1850, when tracts were larger and wooded areas were harder to protect against strangers camping out and claiming place. See Brennan v. Manchester Crossings, 708 A2d 815 (Pa Super 1998) for a full discussion of "adverse possession," and Matakitis v. Woodmansee, 667 A2d 228 (Pa Super 1995), for discussion of the outdated nature of the woodland rule.

E. Other Resources:

A full and excellent guide to the history and determination of land boundaries in Pennsylvania is the 1986 treatise "Boundary Retracement Principles and Procedures for Pennsylvania" published by the Pennsylvania Society of Land Surveyors. All you ever wanted to know about warrants, patents, and land grants can be found there.

IV. Rights of Way

A. The "Bundle of Rights" theory is sometimes applied to questions of right of way, especially when valuation is concerned. This theory says that with land

ownership comes a "bundle of rights," like sticks held in the hand. There is not a single list of these rights. Usually the bundle is: 1) surface right (ownership); 2) air rights (above your tract); 3) subsurface rights (all that is below); 4) the right to exclude others from your tract; and 5) the right to use your tract as you see fit.

B. Creation of a Right-of-Way: This seminar is limited to right-of-ways of passage. Interpretation of express rights-of-way are to be construed in favor of the Grantee, but only if there is ambiguity. Zettlemoyer v. Transcontinental, 617 A2d 51 (PaC,1993), reversed in part, 657 A2d 920 (Pa, 1994). There are basically 5 ways a right-of-way are created: 1) express grant (as in a deed); 2) implication (described below); 3) created by necessity (see below); 4) created by estoppel (see below); and 5) created by adverse possession (called a prescriptive easement)

1. **Express**. This is the most common. A "grant of easement," or a deed grant or reservation, may be the tool creating an express right-of-way. Still, problems abound. How wide is it? What is the path? Can these features be changed? Are only certain uses or users intended? Can you go outside the designated width to install stormwater drainage channels?

2. **Easement by Implication**. If a lot is sold as part of a recorded plan that shows streets and alleys, the lot owner gains a right to use all the street and alleys servicing the subdivision. If a lot is sold with one boundary being a private road, it is implied (and enforceable) that the lot owner also gets use of that road, to the extent the Grantor had such right. King v. Rock, 610 A2d 48 (Pa Super, 1992). If a landowner severs a tract from a larger tract, and that severed tract appears to be served by an existing lane or road over the remaining tract (whether needed or not), it is implied (and enforceable) that the new lot owner also gets use of that lane or road.

3. **Easement of necessity**: If a tract owner severs off and conveys a portion, and in doing so leaves that portion no access to a public road, then if the Parent tract had access to a public road the severed portion is deemed to have a right to cross the parent tract as needed to get to the public road. This rule of law is essentially a rule to enforce an assumed (but unwritten) intention in the Grantor.

4. **Easement by Estoppel**: "Equitable Estoppel" is described by our Superior Court with the following lengthy sentence: "Equitable estoppel arises when his acts, representations or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so

that he will be prejudiced if the first party is permitted to deny the existence of facts." Zivari v. Willis, 611 A2d 293 (Pa Super 1992). In Zivari and other cases, someone who was allowed access over a lane or road in order to spend money improving their tract could then claim a permanent right to use the lane or road based on this equitable principle.

5. **Prescriptive Easement**: This is just like adverse possession, but pertains to gaining a right-of-way rather than a piece of ground. The use need not be daily, or exclusive, only regular and hostile. The same rule disallowing it if any portion passes through "unenclosed woodland" still exists, but that rule, found in statute, is considered largely outdated and may yet be repealed or lessened.

C. Limits and Changes in Use

The general rule is that only the property gaining the right of way can use it, and letting that property extend the easement to other tracts constitutes an unfair increase in the burden previously established in the servient estate. Compare to Joiner v. Southwest Central, 786 A2d 349 (PaC, 2001) which remanded a case, saying that right-of-way for utilities to a tract might allow use of the right-of-way to connect other tracts to electric service as well; the Joiner court said that the "no benefit for other properties" rule found in the Third Restatement of Property has not been adopted as Pennsylvania law.

Litigation arises when use of a right-of-way is expanded or updated. For example, from footpath or horse carriage use to motor vehicle use. Intent of the original parties controls, but some rules have evolved to help interpret that intent. A 1948 case said that where a right-of-way was given for access to what would be a home site, it can be inferred that that included the right to dig holes and install electric power line poles to give the home electric service. Dowgiel v. Reid, 59 A2d 115 (Pa, 1948). A later case also allowed a utility easement to be assumed as part of a vehicle access. Pope v. Muth, 481 A2d 355 (Pa Super 1984). Our state supreme court said that "normal evolution of use of the dominant tenement will permit reasonable increases in the burden imposed on the servient treatment," Bodman v. Bodman, 321 A2d 910 (Pa, 1974). Thus cars are permitted where there had only been pedestrians, and a bridge can be built where previously there was only a ford. Soltis v. Miller, 282 A2d 369 (Pa, 1971). On the other hand, where a specific easement width was granted, courts have been reluctant to infer (or otherwise allow) a widening.

What can the servient estate do in the way of changes? The rule is anything that does not materially interfere with the use of the right-of-way. It has been

specifically held that placement of a gate is acceptable, so long as the easement owner is given a key; this is not considered an "unreasonable obstruction." Matakitis v. Woodmansee, 667 A2d 228 (Pa Super, 1995). There are cases which say that the servient estate owner may fence or otherwise block the outer edges of the right-of-way, so long as access to the originally intended terminus, or dominant estate owner's entry point onto their land, is not impeded. Problems arise more frequently when the servient estate owner wants to place or keep trees or other items within the right-of-way but not within the established or "reasonable" cartway that is within the right-of-way.

The proper adjudication of such disputes seems to again depend on "intention." Thus, where a party expected to use an existing road, and received a conveyance of a right to use the road, followed but not preceded by a wider (50 foot) description of the road, it was held that the right of unencumbered passage only applied to the existing cartway. Baney v Eoute, 784 A2d 123 (Pa Super, 2001). On the other hand, where a right-of-way was laid out in subdivision with a 50 foot width, but had longstanding impediments within the 50 foot width and a long standing, open gravel cartway, it was held that a dominant estate owner could compel the removal of the impediments and claim unimpeded use of the full 50 foot width, at any time. Croyle v. Dellape, 832 A2d 466 (Pa Super, 2003). Extensive briefing on arguments for and against allowing impediments that do not prevent passage but are within a defined width right-of-way can be found in Bair v. Charney, Lycoming County Docket No. 15-00140.

D., E. Condemnations

Public entities can, with certain restrictions, condemn a right-of-way. This is called "Eminent Domain," and it is statutory, with additional restrictions based on the federal and state constitutions. It is helpful to know, however, that there exists the "Private Road Act," which allows private condemnation of a road up to 25 feet wide, upon payment of "just compensation" to the servient estate, to provide relief to any tract that is landlocked. A property is landlocked even if it has an express or implied right-of-way, if that right-of-way as a **practical** matter is not really serviceable. Much can be said about The Private Road Act, since in late 2010 the state supreme court in a remand ruling of great consequence said that that Act is unconstitutional unless it is being invoked for a primarily public benefit rather than private benefit. The ruling was 4:3, and one of the four has been relieved of judicial duties. Isn't it of lasting public benefit to have a tract made useful and then taxed as such? Isn't a municipality still allowed to condemn a "public road" that extends out only to provide access to a few private landowners? Don't get me started. The latest on that is an en banc Commonwealth Court decision, with six concurring majority opinions, that

upholds that 2010 apparent decision "because it must," but lambasts the supreme court, loudly and thoroughly, and tells them they should change it back. Allocatur has been requested but there has been no decision yet.

F. Generally a private right-of-way is not lost by lack of use. A continual 21 years and more of complete non-use could possible be held to be abandonment, or an adverse possession regaining of this part of the "bundle of rights" held by the servient estate. However, the courts, primarily in early decisions, have held that non-use, even for 21 years, is not abandonment. Hall v. McCaughey, (Pa, 1865) 51 Pa 43. Only action by the dominant estate holder himself that completely removes the ability to use the easement is sufficient to prove "abandonment." Sabados v. Kiraly, 393 A2d 486 (Pa Super, 1978).