Understanding Easements 2023

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Foreword

Easements and rights-of-way can dramatically affect the use and development of real property. Yet they are often misunderstood and overlooked. This course and book will help you identify the principal types of easements, discover best practices for drafting and negotiating easements, and understand title insurance options and endorsements for easements.

We are especially grateful to our Course Planners, **Helen L. Gemmill, Esq.** and **Giuseppina G. McCarthy, Esq.** of McNees Wallace & Nurick LLC, Harrisburg, for recruiting an outstanding faculty for the program. Each faculty member has devoted significant time and effort developing the course and preparing written materials. All of them are described in the biographical section that follows.

On behalf of all who will benefit from this program we express our sincere gratitude to all of our volunteers.

Pennsylvania Bar Institute
Anita Jones, Program Manager

April 2023

Biographies

COURSE PLANNERS

Helen L. Gemmill, Esq.

Ms. Gemmill is a partner with McNees Wallace & Nurick LLC. Her current practice focuses on real estate litigation, including zoning, land development and title disputes. Over her career, she has also litigated business disputes in various areas, including environmental, employment, tax, contract, business tort, insurance and construction law. Ms. Gemmill is a certified federal court mediator for the U.S. District Court for the Middle District of Pennsylvania. She has been a panelist and speaker for many programs on civil litigation, legal ethics, land development and zoning. Ms. Gemmill serves on McNees' Ethics Committee and has been a leader in developing the firm's programs and policies to promote the success of women lawyers. She is a graduate of the University of Chicago and received her law degree from Washington University School of Law.

Giuseppina G. McCarthy, Esq.

Ms. McCarthy is a Member within the Real Estate Group at the law office of McNees Wallace & Nurick LLC and also is part of the Firm's Oil and Natural Gas Group and the Pipeline and Oil/Gas Infrastructure Group. As a member of the Real Estate Group, she represents commercial, developer, industrial and non-profit clients in the acquisition, development, leasing, and sale of real estate. She has substantial experience assisting clients with a wide array of leasing matters, including the leasing of shopping centers, and office, business, warehouse and industrial centers and has lectured several times on retail and office leasing. In addition, Ms. McCarthy represents clients in all aspects of real estate acquisition and sale transactions, from the drafting and negotiation of purchase and sale agreements, to review and analysis of due diligence materials, drafting of transaction documents, and ultimately closing. She also represents real estate investors and lenders, providing support and analysis with respect to real estate issues that may impact the collateral. Finally, Ms. McCarthy's practice includes the development of residential and commercial condominiums and planned communities. With respect to the Oil and Natural Gas Group and Pipeline and Oil/Gas Infrastructure Group, Ms. McCarthy's practice includes the representation of midstream operators in pipeline and transportation projects and the resolution of title issues arising from the severance of mineral rights. She also represents landowners in the drafting, negotiation and enforcement of oil and gas leases relating to Pennsylvania's Marcellus and Utica Shale formations.

FACULTY

Terrance Vaughn, Esq.

Terrence recently joined the Pennsylvania Department of Revenue as counsel practicing in the areas of Realty Transfer Tax, Sales and Use Tax, and Collections. Prior to joining the Office of Chief Counsel at the Department of Revenue, Terrence was Pennsylvania Counsel for Community Settlement in Harrisburg, the Pennsylvania title insurance arm of Bridgetrust Title, and subsidiary of Truist Bank. Terrence is admitted to practice in Pennsylvania and is a Pennsylvania licensed Title Agent.

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Chapter One

Understanding Easements

Chapter One
Section 1

Easement Overview, Negotiation, and Drafting

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UNDERSTANDING EASEMENTS

Easement Overview, Negotiation, and Drafting

I. WHAT IS AN EASEMENT?

A. Easement Defined

An easement is a limited non-possessory right to use the property of another for a limited, specified purpose. The Pennsylvania Superior Court has defined an easement as "a liberty, privilege or advantage which one may have in the lands of another without profit...." *Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc.*, 761 A.2d 139, 142 (Pa. Super.2000), quoting *Coffin v. Old Orchard Dev. Corp.*, 408 Pa. 487, 494, 186 A.2d 906, 910 (1962).

B. Affirmative or Negative

An easement can either be affirmative or negative. An affirmative easement, as the name implies, grants the holder the right to take some action on the servient tenement. A negative easement entitles the holder to prevent the servient landowner from doing something that would otherwise be permissible. Negative easements can only be created by an express writing signed by the grantor (the party subject to the negative easement), as there is no automatic right to a negative easement.

C. Appurtenant and In Gross

Easements are either easements appurtenant or easements in gross. Easements appurtenant attach for the benefit of one property (the "dominant tenement") and burden another (the "servient tenement"). Easements in gross, on the other hand, are personal to the grantee and are not appurtenant to land, but do burden the servient tenement.

The distinction between easements appurtenant and easements in gross is an important one. An easement appurtenant runs with the transfer of the dominant tenement. See 21 P.S. § 3:

> All deeds or instruments in writing for conveying or releasing land hereafter executed, granting or conveying lands, unless an exception or reservation be made therein, shall be construed to include all the estate, right, title, interest, property, claim, and demand whatsoever, of the grantor or grantors, in law, equity, or otherwise howsoever, of, in, and to the same, and every part thereof, together with all and singular the improvements, ways, waters, watercourses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues, and profits thereof.

An appurtenant easement passes automatically with the dominant tenement, regardless of whether it is mentioned in the conveyance. An appurtenant easement will also automatically pass with the servient tenement unless the new owner is a bona fide purchaser without prior notice of the easement.

Conversely, whether an easement in gross is assignable depends on its nature and the language of the grant itself. *Miller v. Lutheran Conference & Camp Association*, 331 Pa. 241, 249-251, 200 A. 646, 651-652 (1938).

The determination of whether an easement is appurtenant or in gross "must be determined by the fair interpretation of the grant or reservation creating the easement, aided if necessary by the situation of the property and the surrounding circumstances." *Lindenmuth v. Safe Harbor Water Power Corp.*, 309 Pa. 58, 64, 163 A. 159, 161, (1932)

D. Distinguished from Other Rights and Interests:

1. Fee Interest

Generally, a fee interest in a property includes with it all rights of possession and enjoyment of the property, subject, nevertheless, to any prior grants or conveyances. The beneficiary of any easement, however, is limited to the use that is defined in the grant of the easement.

2. License

A license, like an easement, grants the holder of the license a privilege to undertake certain activities on the land of another. Unlike an easement, however, licenses tend to be contractual rights personal to the beneficiary and do not run with the land.

3. Restrictive Covenant

A restrictive covenant is a promise by a landowner to not undertake certain uses or activities on a property. A restrictive covenant can be distinguished from a negative easement, which is a conveyance by the landowner to a third party of the right to object to certain uses of the property. See *Ephrata Area School Dist. v. County of Lancaster*, 886 A.2d 1169 (2005).

II. PRINCIPAL TYPES OF EASEMENTS

A. Express Easements

An express easement is an easement expressly granted to the dominant tenant by a writing.

B. Implied Easements

Implied easements, sometimes referred to as implied easements from prior use, arise "where an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." *Tosh v. Witts*, 381 Pa. 255, 258, 113 A.2d 226, 228 (1955). See also, *Bucciarelli v. DeLisa*, 547 Pa. 431, 436, 691 A.2d 446, 449 (1997).

Generally, courts have held that there are four elements in order to establish an implied easement:

> (1) there is a separation of title of two or more parts of the real estate, (2) there is such an obvious and continued use before the separation as to show intent to make the apparent easement permanent, (3) the easement is reasonably necessary to the beneficial enjoyment of the dominant tenement, and (4) the servitude is continuous and self-acting.

Ronald M. Friedman, *Ladner Pennsylvania Real Estate Law, Centential (Sixth) Edition*, §5.02(d).

C. Easement by Necessity

While similar to implied easements, an easement by necessity arises where common ownership of two parcels of land is severed. Unlike implied easements, which rely on past use and conduct, an easement by necessity will arise if the easement is required for use of the severed tract. In *Graff v Scanlan*, 673 A.2d 1028 (Pa. Cmwlth. 1996), the court set forth the test for the creation of an easement by necessity:

> 1. The titles to the alleged dominant and servient properties must have been held by one person. 2. This unity of title must have been severed by a conveyance of one of the tracts. 3. The easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.

Id. at 1032 (citation omitted).

The holder of the servient tenement has the right to choose the location of the easement, provided the location is reasonably convenient.

Easements by necessity are generally limited to providing access to landlocked properties.

In light of the Pennsylvania Supreme Court's decision in *In re: Opening a Private Road ex rel. O'Reilly*, 607 Pa. 280, 5 A.3d 246 (2010), easements by implication and necessity take on new importance for owners of landlocked properties, as the *O'Reilly* decision left serious questions as to whether an access road can be obtained under the Private Road Act (36 P.S. §§ 2731-2891) except in the most limited of circumstances.

D. Prescriptive Easements

The prescriptive easement is the easement analog to adverse possession. In order to establish a prescriptive easement, adverse, open, continuous, notorious, and uninterrupted use of land for twenty-one years must occur. *Lewkowicz v. Blumish*, 442 Pa. 369, 371, 275 A.2d 69, 70 (1971). See also, Vill. *of Four Seasons Ass'n, Inc. v. Elk Mountain Ski Resort, Inc.*, 2014 PA Super 232, 103 A.3d 814, 822 (2014). Necessity is not a requirement for a prescriptive easement. *Boyd v. Temple*, 460 Pa. 91, 94, 331 A.2d 433, 434 (1975).

As with adverse possession, use of the easement must be hostile. If the purported dominant tenement had permission to use the servient tenement, a prescriptive easement cannot arise.

There are several key differences between prescriptive easements and adverse possession. While adverse possession requires actual possession and exclusive use, prescriptive easements only require easement like use of the property. Furthermore, unlike adverse possession, which requires that the adversely possessed real property be included in subsequent conveyances for tacking to occur, prescriptive easements do not need to be explicitly included in the grant as easement rights are presumed to pass with the deed in accordance with 21 P.S. §3.

Pennsylvania courts do permit the servient tenement to relocate a prescriptive easement without the consent of the dominant tenement "where the resulting easement is as safe as the original location, the relocation results in a relatively minor change, and landowner's reasons for moving the easement are substantial. … We, therefore, conclude that Pennsylvania law permits a minor, safe relocation of prescriptive easements that does not unreasonably interfere with an easement holder's use and enjoyment." *Soderberg v. Weisel*, 455 Pa. Super. 158, 164-165, 687 A.2d 839,

842-843 (1997) (citations omitted). In *McNaughton Properties v. Barr*, 981 A.2d 222 (Pa. Super. 2009), the court refused to extend this doctrine to express easements.

III. COMMON USES OF EASEMENTS

A. Access Easements

One of the most common types of easements is the easement for vehicular or pedestrian access. An access easement will frequently define a specific portion of the property as being subject to the easement. Access easements will generally discuss (i) the type of access permitted (vehicular, pedestrian, etc.); (ii) the construction of the access easement area (undeveloped, paved, etc.) or the right to improve the existing access area; (iii) limits on the use of the access; (iv) maintenance and repair of the access area; and (v) indemnification and insurance.

B. Utility Easements

Utility easements allow utility companies to maintain their equipment on other people's property, either to supply utilities to the property itself, or to supply utilities to end users. Utility easements are generally either distribution easements, which convey the utility to end users, or transmission easements, which are for the long-haul transmission facilities for the utility.

Utility easements are generally acquired by use of a common form by the utility.

In Pennsylvania, public utilities have the right of eminent domain to acquire easements.

1. Distribution Easements

A distribution easement is an easement for the facilities necessary to convey the utility to an end user. A distribution easement may be found in a new development to provide for the distribution of water, gas, electric and CATV to developed lots.

2. Transmission Easements

A transmission easement, unlike a distribution easement, is usually for larger-scale facilities to enable the transmission of the product in question over longer distances. Due to the equipment involved, easements for transmission facilities tend to be larger in area, with more specific terms governing the use thereof.

C. Stormwater Easements

Stormwater management continues to be a major issue confronting developers in Pennsylvania. Addressing and managing stormwater generated on a site, as well as meeting water quality requirements promulgated by the state and federal governments, is a complicated process that usually requires the obtaining or granting of one or more stormwater easements.

1. Private Stormwater Easements

Under the common law, a property owner has the right to discharge stormwater onto its neighbor’s property by natural flow. The property owner, cannot, however, concentrate or increase the natural flow of stormwater onto its neighbor. If a development will increase the flow of stormwater onto the neighboring property, the landowner should obtain an easement over the neighboring property. In fact, some county conservation districts will require, as a condition of permit issuance, that the

developer obtain easements over the adjacent properties for stormwater, even if there is no increase in actual stormwater.

A stormwater easement may not be limited to surface water. It is not uncommon for stormwater easements to be used for the piping of stormwater to watercourses or stormwater management facilities located on other properties.

2. Stormwater Easements in favor of Governmental Entities

Easements are frequently granted to municipal and governmental entities in connection with stormwater management. Many municipalities require that as part of land development activities that the developer enter into an operation and maintenance agreement for stormwater management. These agreements, which encumber the whole project, grant the municipality certain rights in the event the stormwater management facilities are used and maintained in accordance with the approvals. Furthermore, with the revision of the Chapter 102 regulations, the Pennsylvania Department of Environmental Protection requires that an instrument setting forth the obligation to maintain post-construction stormwater management facilities be recorded and provided to subsequent purchasers of the property. See 25 Pa.Code §102.8(m). A copy of DEP's form instrument is included with these materials.

D. Reciprocal Easement Agreements

Commercial projects generally include several subdivided lots together with shared infrastructure features. These shared improvements generally include roads, signs, stormwater management facilities and parking. Frequently the various landholders will enter into a reciprocal easement agreement or related document that provides for the use of these facilities and allocates the cost and maintenance thereof. Reciprocal easement agreements also include in many instances use restrictions and other obligations impacting the use of the properties.

Reciprocal easements are also included in residential condominium and planned community projects where the owners within the community have easement rights to use common open space areas, recreational facilities and parking areas. Further, developers of these communities reserve easements to allow development and construction of the improvements within the communities.

E. Railroad Rights of Way

Railroads acquired their rights of way by easement, in fee and as leaseholds.

F. Oil and Gas Exploration Easements

With the development of the Marcellus and Utica shales, as well as renewed interest in conventional gas plays, Pennsylvania has experienced a surge in new oil and gas exploration. Exploration and transportation of the hydrocarbons requires easements over the lands of others. In most instances, the gas company will acquire the easements it requires in the oil and gas lease encumbering the properties. In other instances, however, it will need to acquire easements from property owners for lands not covered by their leases. These easements generally include pipeline easements and access easements.

G. Restrictive Covenants and Negative Easements

1. Restrictive Covenants

A restrictive covenant is, in essence, an agreement by the servient tenement to not use its property in violation of certain provisions. Restrictive covenants are not favored by the courts, and enforcement may be limited by several factors. A court will not enforce a restrictive covenant where there is no longer a significant benefit to the intended beneficiary. *Gey v. Beck and Bindas*, 568 A.2d 672, 679 (Pa. Super. 1990) or where changed or altered conditions render strict adherence to the terms of a restrictive covenant use to dominant tenement Vernon *Twp. Volunteer Fire Dep't, Inc. v. Connor*, 579 Pa. 364, 376, 855 A.2d 873, 880 (2004). Likewise, a court is less likely to enforce restrictive covenants if the character of the neighborhood has changed. *Deitch v. Bier*, 333 A.2d 784, 786 (Pa. 1975). Furthermore, any effort to stop a long-standing violation of a restrictive covenant may be subject to laches.

2. Conservation Easements

Conservation easements are negative easements granted to a governmental or nonprofit entity for the purpose of preserving the character of the property in question. Multiple acts, including the Open Space Lands Act, 32 P.S. §5001 *et seq.*, and the Conservation and Preservation Easements Act, 32 P.S. §5051 *et seq.*, permit the creation and granting of conservation easements.

Note that conservation easements may grant the public the right to use the lands, but that is not a prerequisite for a conservation easement.

3. Agricultural Preservation Easements

The Agricultural Area Security Law, 3 P.S. §901 *et seq.*, allows for the creation agricultural conservation easements and the purchase thereof by the Commonwealth and counties. In order to be eligible for an agricultural preservation easement, the property must be located in an agricultural security area.

A property encumbered by an agricultural preservation easement is subject to significant limitations on the future use and development of the property; therefore, a property owner should be confident of its desire to subject the property to the easement. A form Agricultural Preservation Easement is included with the materials.

Note that an agricultural preservation easement is separate and apart from the preferential assessment available under the Pennsylvania Farmland and Forest Land Assessment Act of 1974 (commonly known as "Clean and Green"), 72 P.S. §5490.1 *et seq*. A property enrolled in Clean and Green is not necessarily subject to an agricultural preservation easement, nor is a property subject to an agricultural preservation easement required to be enrolled in Clean and Green.

4. Historic Easements

Under the Historic Preservation Act, 37 Pa. C.S. §501 *et seq.*, the Pennsylvania Historical and Museum Commission may acquire easements "in properties of historic, architectural and archaeological significance by gift, purchase, devise or any other lawful transfer when acquisition is necessary for the preservation thereof" 37 Pa.C.S. § 502(12). These easements can take the form of façade easements or other limitations on the changing the historical character of a property.

IV. INTERPRETATION OF EASEMENTS

Pennsylvania courts have provided extensive guidance on how easements are to be interpreted. When interpreting the terms of an easement, the terms of the grant are to be construed in favor of the dominant estate. *Duncan v. Gheen*, 185 Pa. Super. 328, 332, 138 A.2d 168, 170 (1958).

The Pennsylvania Supreme Court set forth the law for interpreting easements as follows:

> It is well-established that the same rules of construction that apply to contracts are applicable in the construction of easements. … In ascertaining the scope of an easement, the intention of the parties must be advanced. 'Such intention [of the parties] is determined by a fair interpretation and construction of the grant and may be shown by the words employed construed with reference to the attending circumstances known to the parties at the time the grant was made.

Zettlemoyer v. Transcon. Gas Pipeline Corp., 540 Pa. 337, 344, 657 A.2d 920, 924 (1995) (citations omitted).

The decision in *Zettlemoyer* is particularly instructive as to interpreting easements, and a copy of the decision is attached to these materials.

A. Easement Area

Where a grant of easement specifies an exact width of an easement, that width controls, even if it is insufficient for the desired use of the dominant tenement. *Zettlemoyer*, 540 Pa. 337, 344, 657 A.2d 920, 924 (1995) (citations omitted). However, when the width is not specified, the dominant tenement shall be entitled to use such width as is suitable and convenient for the proper enjoyment of the use granted. *Id*.

Frequently, one will find easements, especially older easements, that do not specify a width. While the common belief is that the "subsequent agreement, use, and acquiescence" of the easement establishes, as a matter of law, the width of such an easement, the *Zettlemoyer* court rejected such an argument. Instead, the court reiterated that the dominant estate is entitled to use such portion of the servient tenement as is suitable and convenient for the use intended. While "subsequent agreement, use, and acquiescence" can be evidence of the parties' intent, it is not determinative.

B. Scope of Use

The dominant tenement generally has the right to use the easement in any matter reasonably convenient or necessary in order to fully enjoy the purpose of the easement. This interest is countered by the interest of the servient tenement to not be unduly burdened and have the ability to use the easement area for any purpose not contrary to the easement. What constitutes reasonable use includes several factors, including considerations of changes in technology and the surrounding area.

C. Term

Unless otherwise provided in the easement documents, an easement is presumed to be perpetual.

V. CREATION AND TERMIANTION OF EASEMENTS

A. Reservation or Grant in Deed Conveying Property

Historically, many easements were reserved or granted in deeds conveying property. If the conveyance of the property included an easement, for example, the deed would typically include language similar to the following:

> TOGETHER WITH an access easement on, over, across and through the fifteen (15) foot strip of land along the eastern boundary of the lands of the Grantor herein.

Contra, if the grant is subject to a *new* easement in favor of the grantor, the deed would include language similar to the follow:

> RESERVING unto Grantor, its successors and assigns an access easement for the benefit of Grantor's remaining lands on, over, across and through the fifteen (15) foot strip of land along the eastern boundary of the lands conveyed herein.

While still a valid mechanism for creating and conveying easements, the general practice is to create easements by separate document.

B. Easement Agreement

In modern practice, the most common vehicle for conveying an easement between parties is a deed of easement or easement agreement. Such documents can take the form of a simple one or two page document, or be complex multipage reciprocal easement agreements governing several cross-easements and related provisions. Deeds of easement are similar to easement agreements, with stylistic differences.

C. Declaration

Where a grantor owns multiples parcels of property that it intends to convey to third parties, a declaration is commonly used to create easements benefiting the project.

One common source of easements not always considered by the practitioner is the declaration establishing condominium or planned community form of ownership. The Uniform Condominium Act (68 Pa. C.S. §3101 *et. seq.*) and the Uniform Planned Community Act (68 Pa. C.S. §5101 *et. seq.*) both establish certain easements governing the use and enjoyment of the community. Moreover, the declarants of such communities frequently include additional easements in the declaration establishing the community.

D. Termination of Easements.

Generally, easements are considered to have a perpetual term. Pennsylvania courts have outlined, however, 7 situations where easements can be extinguished – (1) release, (2) adverse possession, (3) abandonment, (4) merger of title, (5) foreclosure of a lien antedating the easement, (6) condemnation under power of eminent domain, or (7) cessation of purpose. *Ladner Pennsylvania Real Estate Law*, §5.03

Pennsylvania courts have held that nonuse is not enough to establish abandonment of an easement. Rather, the abandonment has to be combined with adverse possession by the servient tenement or

affirmative acts of the dominant tenement rending use of the easement impossible. *Ruffalo v. Walters*, 465 Pa. 236, 348 A.2d 740 (1975).

VI. DRAFTING AND NEGOTIATING THE EASEMENT

A. Properties Affected.

The first step when drafting an easement is to identify the property or properties affected. Identifying the properties in question at the beginning of the process is necessary to identify the dominant and servient tenements and to identify all parties necessary to grant the easements. In the best of circumstances, you will have a survey or engineer-prepared exhibit showing the anticipated location of the easement, as well as the appropriate property boundaries.

B. Parties

Once the proper parcels are identified, ownership of the land needs to be determined. Do not rely on tax cards or what was provided by a land man or agents of a utility company. Instead, review land records to determine who owns the property. Furthermore, determine if there are any other parties with an interest the property – tenants, option holds, equitable owners, mortgagees, etc. – as their consent and joinder may be necessary.

C. Use of Easement

The intended use of the easement will have a material effect on both the easement area and the other terms of the agreement. A sign easement, for example, will have significantly different terms than a pipeline easement. Moreover, the terms and conditions of a pipeline easement, for example, are significantly different that those imposed on a driveway easement.

In addition to use of the easement by the grantee, the party granting the easement should consider what rights within the easement area it may want to retain. For example if the electric company maintains an easement for overhead utility lines, what rights does the grantor want to have to construct improvements underneath the line, within the easement area granted to the electric company? These rights will need to be specifically reserved by the grantor as part of the easement document.

D. Easement Area

A clearly defined and laid out easement area is an essential part of a grant of an easement. A determination needs to be made of not only what is the principal easement area, but also what ancillary easement rights might be required. For example, a sign easement may need an ancillary easement for access to the sign or power lines to supply power to the easement.

E. Term

With the exception of temporary easements for construction activities, most easements are perpetual. What is required in this instance? A temporary easement will have a significantly smaller impact on a property than a perpetual easement, and will affect negotiations accordingly.

F. Exclusive vs. Nonexclusive

When defining the easement, it is important to identify whether the easement is exclusive to the grantee or whether other parties will have the right to use the easement area. Most easements are

non-exclusive, and the owner of the servient tenement may utilize the easement area for other purposes not incompatible with the easement. If the easement is intended to be exclusive, it should be clearly stated in the easement agreement.

G. Consideration

In many instances the grantee will offer consideration for the easement. While clients tend to focus on consideration over other terms of the grant, an easement is a limited grant of rights in the property. The amount paid for the easement should be directly tied to the rights actually granted.

H. Review Title

A review of title at some level is necessary for the reviewing and negotiating the easement, especially for the grantee. As noted above, it is imperative that the proper grantor and grantee are named in the instrument.

1. Mortgages and Liens

Any grant of an easement on a property that is encumbered by a mortgage is nevertheless subject to the mortgage. If the mortgagee forecloses on the property or accepts a deed in lieu of foreclosure, the easement is extinguished unless the mortgagee previously consented to the easement.

2. Competing Interests

A grant of easement is under and subject to prior encumbrances on the property. For example, the area where the easement is desired may already be subject to a prior grant that would prohibit or restrict the new easement. This is particularly problematic with underground utility easements, which frequently prohibit or restrict other utilities within their easement area. If an easement is intended to run through the area of an existing, non-exclusive easement, the grantee will want to obtain an encroachment agreement signed by the holder of the superior easement allowing for encroachment of the new easement into the existing easement.

VII. DRAFTING AND NEGOTIATING CHECKLIST

A. Form of Document

As the practice of real estate law has evolved over the years, different vehicles have been developed to grant and convey easements. For the drafting attorney, the form you choose will have a direct effect on the document. For the reviewing attorney, you need to determine if the chosen form is the proper method for effectuating the agreement of the parties.

1. Inclusion in Deed

If the easement is being granted or reserved in connection with a conveyance of property, it may be advantageous to include the grant in the conveying deed. This is particularly appropriate if the grant in question a minor grant without significant terms or conditions. If the easement or easements require significantly more terms and conditions, the better practice is to prepare separate documents, usually in the form of a declaration or easement agreement.

2. Easement Agreement

The term “easement agreement” as used here is intended to refer to any document drafted primarily for the purpose of granting an easement from one party to another. This can include an actual

easement agreement, a deed of easement or even more complex documents such as reciprocal easement agreements and cross-easement agreements. Furthermore, in large scale pipeline projects, it is common for the pipeline operator to present an option to acquire an easement that sets forth the terms and conditions of the easement, if the option is exercised.

Under modern practice, the easement agreement is the most common method for conveying easements. As grants of easements frequently include terms in addition to the actual grant, an easement agreement allows the parties to fully set forth their understanding in a clear and easy to manage format.

3. Declaration of Easement

A declaration of easement is appropriate where a developer of multiple parcels desires to impose easements on its properties. Declaration of easements are typically used in large development projects where features such as access roads, stormwater management facilities, signs and other improvements are shared.

A frequent source of easements in residential projects (and some commercial projects) are declarations creating condominiums under the Uniform Condominium Act (68 Pa. C.S. §3101 *et. seq.*) and the Uniform Planned Community Act (68 Pa. C.S. §5101 *et. seq.*). The acts themselves impose certain easements on the projects, and the declaration creating the project can contain (and usually does) language granting additional easements. If the project includes a condominium or planned community, consider incorporating any easements into the declaration, but be cognizant that both acts allow for the amendment of the declaration, so take care in the drafting of any additional easements.

B. Heading

1. Uniform Parcel Identifier

In counties that have adopted the uniform parcel identifier system and require the inclusion of a UPI number on recorded documents, the UPI number for the affected parcels is required on the documents. See 16 P.S. §9781.1. Generally, the UPI number is placed at the very top of the document. Many counties requiring UPI numbers further require that the UPI number be "certified" by the tax assessment office to confirm that the proffered UPI numbers and the parties recited match assessment records. In some counties, this can be a time-consuming process.

Care should be taken to review the recording standards for the individual county. Some counties require a UPI number and nothing more. Others will require additional address information about the properties or "prepared by / return to" headers.

2. Title

Choose a title for your document that accurately reflects the purpose of the document. In addition to possibly evidencing the parties' intent, the recorder's office will rely on the title for characterization of the document, and the title will also be helpful to future parties reviewing a title abstract or document index.

3. Date

As with any recorded document, care must taken to ensure that the date of the document is no later than the date of the earliest notary acknowledgement.

4. Parties

As noted above, it is imperative that the correct parties be identified at the beginning of the document. Consider the following:

- Names should match those set forth in the underlying instruments establishing ownership. If the name of the owner has changed (due to marriage, name change, merger, etc.) include both names and reference the change.
- For entities, reference the type of entity and state of incorporation. For individuals, describe any relationship ("adult individual," "husband and wife," "tenants in common").
- Some practitioners suggest incorporating the addresses of the parties. While not required, including the addresses of the parties somewhere in the document is a good practice.

For parties such as mortgagees or those not holding a legal interest in the property (such as equitable owners) that nevertheless desire to evidence their consent to the easement, in lieu of having them sign the document as a party consider having them execute a joinder rather than act as a signatory to the document.

C. Recitals / Background

Use of recitals is not required, but strongly recommended to explain the purpose of the document and the intent of the parties. Consider stating in the recitals (i) the affected properties; (ii) the nature of the easement being granted; (iii) the use of the dominant tenement requiring the use of the easement; and (iv) any other terms material to the easement.

It is important to note that recitals are generally not accorded the same weight as the operative terms of the contract. Therefore, it is advisable to expressly incorporate the recitals in the body of the agreement. See John E. Murray, Jr. and Timothy Murray, *Contract Law for the 21st Century Lawyer, Third Edition*, §36-3.

D. Submission/Agreement Clause

Typically included immediately after the recitals and beginning with "NOW, THEREFORE," this clause signifies the intent to bind the property or enter into an agreement. In some forms, this clause also serves as the actual grant.

1. Declarations.

In declarations, an affirmative statement that the declarant intends to submit the property to the terms and conditions of the declaration.

2. Easement Agreement

Easement agreements invariably use some form of this clause to evidence the intent to enter into an agreement or to make an actual grant. The form of this clause can either match that typically used in a contract, or it may actually include the granting language.

E. Grant.

Pursuant to 21 P.S. §2, the words "grant and convey" signify an intent to convey an interest in real property. Be sure to include granting language in your document.

F. Easement.

The document must, of course, set forth the easement being conveyed. In drafting the easement language, several factors need to be considered:

1. Type of Easement

The document should clearly and unambiguously set forth the type of easement being granted. The level of detail desired may depend on the party you represent in the negotiations. If you represent the dominant tenement, you will want the language as broad as possible to encompass all possible uses by your client. If, on the other hand, you represent the servient tenement, you will want to limit the scope of the easement as much as possible. Consider the following when drafting or reviewing the easement language:

- What use is intended to be covered by the easement?
- Is the easement exclusive or non-exclusive?
- For utility easements, is the easement for aboveground or underground facilities? What types of facilities are being installed? Is the easement limited to one line or multiple lines? May the easement be expanded?
- For access easements, what type of access is being provided? Is the access limited to motor vehicles or pedestrian use? Is the use seasonal? Is it primary access or emergency access?

2. Property benefitted by the Easement

Generally, an easement benefits the entire dominant tract, even if it is subdivided. If the dominant tract is to be subdivided at a later date, consider defining which portion can benefit from the easement. The easement should include specific language confirming which property is benefited by the easement and which property is burdened by the easement.

3. Parties Entitled to Use the Easement

Consider defining who may use the easement. With an access easement, for example, do you want to limit it to the owner of the dominant tenement, or allow their guests and invitees? Furthermore, if the servient tenement wants to limit the easement to a certain level of use, that should be specified in the agreement. The access easement benefiting today's sleepy farm may be tomorrow's TND.

4. Easement Area

The agreement needs to clearly set forth the area allocated to the easement. The easement area should be shown on an attached plan, and if possible, a metes and bounds description for the easement area should be provided. If the easement includes both temporary and permanent provisions, those areas should be differentiated.

5. Use of Easement Area

The easement agreement should clearly outline what improvements and uses are restricted in the easement area. If the grantor wants a specific use or improvement in the easement area protected, that use or improvement should be explicitly set forth in the document.

6. Term

If not otherwise stated, easements are generally to be held in perpetuity. If the easement is limited in term (such as a temporary construction easement), specify how long the easement is to remain in effect. Furthermore, if there is a triggering event that should result in the termination of the easement, specify the circumstances under which the easement is to be extinguished.

G. Consideration.

For many easements, consideration may be paid by the dominant tenement to acquire the easement. While consideration doesn't necessarily need to be included in the document, consideration is an important discussion point in the negotiation process.

H. Additional Provisions

1. Maintenance

The easement agreement should specify both who will maintain the easement and the standards of maintenance. If responsibility or costs are shared, the formula and specifics for sharing should be specified. The easement can also include self help rights to allow a party to perform maintenance obligations if the party tasked with such obligations fails to timely perform and such failure impacts the use of the easement.

2. Indemnification and Insurance

Easements frequently include indemnification and insurance provisions, setting forth the circumstances triggering an indemnification obligation as well as the requirements for insurance. Keep in mind that due to the perpetual nature of easements, specific insurance policy amounts need to be adjusted from time to time to reflect inflation. Insurance requirements can be accelerated through formulaic adjustments or by giving the servient tenement the right to adjust insurance requirements to match market conditions from time to time.

3. Easements on Agricultural Property

If the servient tenement is used for agricultural purposes and the easement is for underground facilities, consider incorporating language in the agreement to protect the agricultural use if you represent the owner of the servient tenement. Request that all facilities be buried to at least 48 inches deep so as not to interfere with future plowing. Furthermore, consider requesting that "double ditch" excavation be required. Double ditch excavation requires that the dominant tenement segregated the topsoil from the subsoil so that the topsoil can be placed on top once the trench is filled in.

4. Taxes

A grant of easement in many circumstances results in the imposition of realty transfer taxes, and may also trigger rollback taxes for preferentially-assessed properties. The agreement should outline who is responsible for those taxes.

5. Assignment

While an easement appurtenant will generally follow the conveyance of the land, easements in gross are held by the grantee and are freely assignable. If the desire is to limit the assignability of the easement, those provisions need to be set forth in the agreement.

6. Default

Easements are generally perpetual, and while injunctive relief may be available if the dominant tenement violates the terms of the easement, an easement generally cannot be terminated due to a default. If the servient tenement wants a default provision in order to permit termination or some other remedy, those provisions should be included.

Appendices

FORMS & EXHIBITS

DEP PCSM Instrument

(source of form: https://files.dep.state.pa.us/Water/BPNPSM/StormwaterManagement/ConstructionStormwater/Instrument%20sample_Final_August%202017.pdf)

DISCLAIMER

This document is a sample Instrument for the Declaration of Restrictions and Covenants (Instrument). Use of this template is not mandatory, but it is strongly recommended. The language included in this document serves as acceptable baseline terms and conditions for purposes of 25 Pa. Code §102.8(m)(2). The availability of this document does not constitute legal, accounting or tax advice. Not all Instruments necessarily follow the same format and should be tailored for their particular purpose. Formally completed Instruments are intended to be recorded, enforceable, legal documents. All persons considering the use of this Instrument to meet the requirements of 25 Pa. Code §102.8(m)(2) should obtain the services of an attorney, licensed to practice law in the Commonwealth of Pennsylvania.

Instructions:

- In this sample instrument, the grantor is the property owner, and the grantee is the person responsible for the implementation of the approved O&M Plan for the PCSM BMPs located on the property.
- Therefore, if the property owner and the person responsible for the implementation of the approved O&M Plan for the PCSM BMPs are the same person, the grantor and grantee would be the same person who would sign the instrument as both grantor and grantee.
- **The Commonwealth of Pennsylvania Department of Environmental Protection should not be listed as the grantee.**

SAMPLE

INSTRUMENT FOR THE DECLARATION OF RESTRICTIONS AND COVENANTS

This Instrument for the Declaration of Restrictions and Covenants (Instrument) is being made as of this _____day of_____, 20____, by _____ (the "Grantor"), having an address of _____ and _____ the "Grantee"), having an address of _____.

WITNESSETH:

WHEREAS, Grantor is the owner of certain land situated in _____ Township/Borough, _____County, Pennsylvania, containing +/- _____ acres and being designated as _____ on that certain Subdivision Plan recorded in _____ County Plot Book Volume _____, Page _____, and being _____ County Tax Parcel #/ Uniform Parcel Identifier _____, and being more particularly described in that certain Deed recorded to _____ County Instrument No. _____(the "Property");

WHEREAS, Grantor has agreed to provide this Instrument to protect the Property;

WHEREAS, the Property is included within the boundary of an Individual National Pollution Discharge Elimination System (NPDES) Permit for Discharges of Stormwater Associated with Construction Activities, the General NPDES Permit for Discharges of Stormwater Associated with Construction Activities (PAG-02), an Erosion and Sediment Control Permit (ESCP), or an Erosion and Sediment Control General Permit (ESCGP) for Earth Disturbance Associated with Oil and Gas Exploration, Production, Processing, or Treatment Operations or Transmission Facilities (Permit No._____) which identifies certain Post Construction Stormwater Management Best Management Practices (PCSM BMPs) located on the Property;

WHEREAS, the documents attached to this Instrument and incorporated herein shall include: either record drawings which accurately reflect as-built conditions or the approved PCSM Plan (if record drawings are not yet available), attached hereto as Appendix A; the long-term Operation and Maintenance Plan (O&M Plan), attached hereto as Appendix B; and, any Operation and Maintenance Agreements (O&M Agreements) between the permittee and the party responsible for implementation of the O&M Plan, attached hereto as Appendix C;

WHEREAS, Grantee has agreed to be responsible for implementation of the approved O&M Plan for the PCSM BMPs located on the Property as described in the O&M Plan, for which an agreement is attached hereto as Appendix C, and incorporated herein;

WHEREAS, Grantor has agreed to provide for necessary access, to applicable parties, related to long-term operation and maintenance of the PCSM BMPs;

SAMPLE

NOW THEREFORE, in consideration of the above and the mutual covenants, terms, conditions, and restrictions hereinafter set forth in this Instrument, and other good and valuable consideration, receipt of which is hereby acknowledged, Grantor provides and files this Instrument:

1. Purpose. The purpose of this Instrument is to provide notice and to ensure the operation and maintenance, and necessary access for operation and maintenance, of the PCSM BMPs on the Property and to prevent the use or development of the Property in any manner that may impair or conflict with the long-term O&M Plan. Per 25 Pa. Code §102.8(m)(2), this Instrument identifies the PCSM BMP(s), provides for the necessary access related to long-term operation and maintenance of the PCSM BMP(s) and provides notice that the responsibility for long-term operation and maintenance of the PCSM BMP(s) is a covenant that runs with the land that is binding upon and enforceable by subsequent grantees.

2. Declaration of Restrictions and Covenants. Grantor hereby declares that the Property shall be held, transferred, conveyed, leased, occupied or otherwise disposed of and used subject to this Instrument which shall run with the land and be binding on all heirs, successors, assigns, occupiers, and lessees.

3. Perpetual Duration. The provisions of this Instrument shall remain in effect in perpetuity, shall be deemed covenants running with the land regardless of ownership or use, and be binding upon all subsequent property owner(s); and the personal representatives, heirs, successors, or assigns of the Grantor.

4. Reserved Rights. Grantor reserves and accepts unto itself and the personal representatives, heirs, successors, or assigns of the Grantor, all rights accruing from ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not inconsistent with the purpose of this Instrument.

5. Subsequent Transfers. The terms of this Instrument shall be incorporated by reference into any deed or other legal instrument by which Grantor divests itself by sale, exchange, devise or gift of all or any portion of the Property. Failure of Grantor to perform any act required by this Instrument shall not impair the validity of this Instrument or limit its enforceability in any way. Upon valid sale or transfer of Grantor's ownership interest to a successor or assign and notice as required by this paragraph, Grantor shall be released from any responsibility for any violation of the terms of this Instrument caused by Grantor's successors or assigns or any third party which occurs subsequent to such sale or transfer.

6. Recordation. Grantor shall record this Instrument in the Official Records of _____County, Pennsylvania. Grantor shall pay all recording costs necessary to record this Instrument in the public records.

7. Notices. All notices, consents, approvals or other communications required under the provisions of this Instrument shall be in writing and shall be deemed properly given if hand delivered, sent by a nationally recognized overnight courier, or sent by United States certified mail,

SAMPLE

return receipt requested, addressed to the appropriate party or successor in interest, at the address most recently provided.

8. Access Provisions. The party responsible for the implementation of the O&M Plan may enter the Property upon reasonable notice, in a reasonable manner and at reasonable times for purposes of implementation of the O&M Plan.

9. Miscellaneous Provisions.

(a) Severability. If any provision of this Instrument or the application of it to any person or circumstance is found to be invalid, the remainder of the provisions of this Instrument and the application of the provisions to persons or circumstances other than those as to which it is found to be invalid, shall not be affected by the invalid provision.

(b) Amendment. Upon any reduction, loss, or failure of any PCSM BMP, the Grantor shall take immediate action to restore, repair, or replace the BMP or provide an alternative method of treatment. If a modification to the installed PCSM BMPs is proposed for any reason, this Instrument shall not be amended, terminated or in any way modified by the Grantor without the express prior written approval of the Commonwealth of Pennsylvania Department of Environmental Protection (Department). After receiving approval from the Department, the Grantor shall record any such amendment, termination or modification of this Instrument as described in Paragraph 6, above. If an amendment or modification of this Instrument is needed for reasons other than PCSM BMP modification or site redevelopment, the Grantor shall provide notice to the Department or delegated county conservation district in writing at least 20 business days prior, unless otherwise approved by Department, to recording any amendment, termination or modification of this Instrument. After the 20 business days have elapsed without written notification from the Department, the Grantor may record any such amendment, termination or modification of this Instrument as described in Paragraph 6, above.

(c) Controlling Law. The interpretation and performance of this Instrument shall be governed by the laws of the Commonwealth of Pennsylvania.

(d) Captions. The captions in this Instrument have been inserted solely for convenience of reference and are not a part of this Instrument and shall have no effect upon construction or interpretation.

(e) Rights of the Department. The rights of the Department shall be preserved under the laws of the Commonwealth of Pennsylvania, and include, but not be limited to, the following:

(i) To identify, to preserve and to protect in perpetuity the PCSM BMPs in a manner consistent with the O&M Plan.

(ii) To enter upon the Property in a reasonable manner and at reasonable intervals and times for the purpose of monitoring compliance with this Instrument.

SAMPLE

(iii) To proceed at law or in equity to enforce the provisions of this Instrument, and to prevent the occurrence of any of the prohibited activities hereinafter set forth.

(iv) To approve or disapprove a request for an amendment submitted under Paragraph 9(b), above.

IN WITNESS WHEREOF, the undersigned, being the Grantor and Grantee, herein, has hereunto executed on the day and year first above written.

_____
Grantor Signature Date

_____
Printed Name

ATTEST: Commonwealth of Pennsylvania
County of_____

On this, the _____ day of_____, 20___, before me, a Notary Public, personally appeared _____, having a title of _____ within the business entity of _____, known to me (or satisfactorily proven) to be the person whose name is subscribed to the foregoing document, and acknowledged that he/she executed the same for the purposes therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal.

NOTARY SEAL

_____ My Commission Expires: _____
Notary Public

_____
Grantee Signature Date

_____
Printed Name

ATTEST: Commonwealth of Pennsylvania
County of_____

On this, the _____ day of_____, 20___, before me, a Notary Public, personally appeared _____, having a title of _____ within the business entity of _____, known to me (or satisfactorily proven) to be the person whose name is subscribed to the foregoing document, and acknowledged that he/she executed the same for the purposes therein contained.

SAMPLE

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal.

NOTARY SEAL

_____ My Commission Expires: _____

Notary Public

SAMPLE

Agricultural Preservation Easement

(source of form: Dauphin County Conservation District,
Agricultural Easement Purchase Program,
http://www.dauphincd.org/ag/ALP%20Links/DEED%20OF%20EASEMENT.pdf)

Prepared By:

Return To:

UPI#

DPERSF (6-2006)

EXHIBIT "C"

DEED OF AGRICULTURAL CONSERVATION EASEMENT TO THE COMMONWEALTH OF PENNSYLVANIA IN PERPETUITY

THIS DEED OF AGRICULTURAL CONSERVATION EASEMENT, made this _____ day of _____, _____, by and between _____ _____(hereinafter, "Grantor") and the Commonwealth of Pennsylvania (hereinafter "Grantee") is made pursuant to the Agricultural Area Security Law (P.L. 128, No. 43) as amended (hereinafter "Act") is made pursuant to the Act.

WHEREAS, Grantor is the sole owner of all that certain land situate in _____ Township, _____Dauphin_____ County, Pennsylvania more particularly described in Exhibit "A" attached hereto consisting of _____ acres and all buildings and improvements erected thereon ("the subject land");

AND WHEREAS, the State Agricultural Land Preservation Board has determined to purchase an agricultural conservation easement in the subject land pursuant to the Act;

AND WHEREAS, the Agricultural Land Preservation Board of _____Dauphin_____ County, Pennsylvania has recommended that the Commonwealth purchase an agricultural conservation easement in the subject land pursuant to the Act;

AND WHEREAS, all holders of liens or other encumbrances upon the subject land have agreed to release or subordinate their interests in the subject land to this Deed of Agricultural Conservation Easement and to refrain from any action inconsistent with its purpose;

NOW THEREFORE, in consideration of the sum of $_____ dollars, the receipt and sufficiency of which is hereby acknowledged, Grantor does voluntarily grant, bargain and sell, and convey to the Grantee, its successors and assigns and the Grantee voluntarily accepts, an agricultural conservation easement in the subject land, under and subject to the Act and the following terms and conditions:

1. Permitted Acts - During the term of the agricultural conservation easement conveyed herein, the subject land shall be used solely for the production for commercial purposes of crops, equine, livestock and livestock products, including the processing or retail marketing of such crops, equine, livestock or livestock products if more than fifty percent of such processed or merchandised products are produced on the subject land (hereinafter "agricultural production"). For purpose of this Deed, "crops, equine, livestock and livestock products" include, but are not limited to:

(a) Field crops, including corn, wheat, oats, rye, barley, soybeans, speltz, buckwheat, hay, potatoes and dry beans;
(b) Fruits, including apples, peaches, grapes, cherries, pears, and berries;
(c) Vegetables, including tomatoes, pumpkins, snap beans, cabbage, carrots, beets, onions, sweet corn and mushrooms;
(d) Horticultural specialties, including nursery stock ornamental shrubs, ornamental trees and flowers;
(e) Livestock and livestock products, including cattle, sheep, hogs, goats, horses, poultry, furbearing animals, milk, eggs, and furs;
(f) Timber, wood and other wood products derived from trees; and
(g) Aquatic plants and animals and their byproducts.
(h) Commercial equine activity including boarding of equine, training of equine, instruction of people in handling, driving or riding equines, use of equines for riding or driving purposes, pasturing equines all of where a fee is collected. THE TERM DOES NOT INCLUDE ACTIVITY LICENSED UNDER THE ACT OF DECEMBER 17, 1981 (P.L. 435, NO. 135), KNOWN AS THE "RACE HORSE INDUSTRY REFORM ACT."

Except as permitted in this Deed, neither Grantor nor his agents, heirs, executors, administrators, successors and assigns, nor any person, partnership, corporation or other entity claiming title under or through Grantor, or their agents, shall suffer, permit, or perform an activity on the subject land other than agricultural production or commercial equine activities.

2. Construction of Buildings and Other Structures - The construction or use of any building or other structure on the subject land other than as existing on the date of the delivery of this Deed is prohibited except that:

(a) The erection of fences for agricultural production or a commercial equine activity and protection of watercourses such as lakes, streams, springs and reservoirs is permitted.

(b) The construction of one additional residential structure is permitted if:
    (i) The construction and use of the residential structure is limited for the landowner's principal residence or for the purpose of providing necessary housing for persons employed in farming the subject land on a seasonal or full-time basis.
    (ii) No other residential structure has been constructed on the restricted land at any time since the delivery of the Deed,

(iii) The residential structure and its curtilage occupy no more than two acres of the restricted land, and

(iv) The location of the residential structure and its driveway will not significantly harm the economic viability of the subject land for agricultural production or a commercial equine activity.

(c) The construction or use of any building or other structure for agricultural production or a commercial equine activity is permitted. The maximum building coverage may be restricted if the County Agricultural Conservation Easement Purchase Program approved by the State Board imposes such a restriction.

(d) The replacement of a residential structure existing on the restricted land on the date of the granting of the easement is permitted if the preexisting residential structure is razed or removed and the replacement residential structure is erected within the curtilage of the residential structure it replaces.

(e) The renovation or modification of an existing residential structure, or an addition to an existing residential structure, is permitted if it would not increase the curtilage of the residential structure.

(f) The renovation or modification of an existing agricultural building or structure, or an addition to an existing agricultural building or structure, is permitted. The maximum building coverage may be restricted if the County Agricultural Conservation Easement Purchase Program approved by the State Board imposes such a restriction.

3. Subdivision - The land under the Agricultural Conservation Easement is subject to the Subdivision Guidelines of the County of Dauphin, Agricultural Land Preservation Program, approved by the State Agricultural Land Preservation Board on December 28, year of 1995, as may be attached hereto. If the subject land is subdivided, the Deeds to all of the subdivided parcels shall state on which of the subdivided parcels the residential structure permitted by this Deed may be constructed. Deeds to all other parcels shall recite that no additional residential structure is permitted.

4. Utilities - The granting of rights-of-way by the Grantor, his heirs, executors, administrators, successors and assigns, or any person, partnership, corporation or other entity claiming title under or through Grantor in and through the subject land for the installation, transportation, or use of, lines for water, sewage, electric, telephone, coal by underground mining methods, gas, oil or oil products is permitted. The term "granting of rights-of-way" includes the right to construct or install such lines. The construction or installation of utility lines other than of the type stated in this paragraph is prohibited on the subject land.

5. Mining - The granting of leases, assignments or other conveyances or the issuing of permits, licenses or other authorization for the exploration, development, storage or removal of coal by underground mining methods, oil and gas by the owner of the subject land or the owner of the underlying coal by underground mining methods, oil and gas or the owner of the rights to develop the underlying coal by underground mining methods, oil and gas, or the development of

appurtenant facilities related to the removal of coal by underground mining methods, oil or gas development or activities incident to the removal or development of such minerals is permitted.

6. Rural Enterprises - Customary part-time or off-season minor or rural enterprises and activities which are provided for in the County Agricultural Easement Purchase Program approved by the State Board are permitted.

7. Soil and Water Conservation - All agricultural production or commercial equine activity on the subject land shall be conducted in accordance with a conservation plan approved by the County Conservation District or the County Board. Such plan shall be updated upon any change in the basic type of agricultural production or commercial equine activity being conducted on the subject land. In addition to the requirements established by the County Conservation District or the County Board, the conservation plan shall include an installation schedule and maintenance program and a nutrient management component which, when completely implemented, will improve and maintain the soil, water and related plant and animal resources of the land and shall require that:

(i) The use of the land for growing sod, nursery stock ornamental trees, and shrubs does not remove excessive soil from the subject land, and

(ii) The excavation of soil, sand, gravel, stone or other materials for use in agricultural production or commercial equine activities on the land is conducted in a location and manner that preserves the viability of the subject land for agricultural production or commercial equine activity.

As part of the settlement documents, the executed Conservation Plan Agreement shall be recorded with the Deed of Easement at the County Recorder of Deeds.

8. Responsibilities of Grantor Not Affected - Except as specified herein, this Deed does not impose any legal or other responsibility on the Grantee, its successors or assigns. Grantor shall continue to be solely responsible for payment of all taxes and assessments levied against the subject land and all improvements erected thereon. Grantor shall continue to be solely responsible for the maintenance of the subject land and all improvements erected thereon. Grantor acknowledges that Grantee has no knowledge or notice of any hazardous waste stored on or under the subject land. Grantee's exercise or failure to exercise any right conferred by the agricultural conservation easement shall not be deemed to be management or control of activities on the subject land for purposes of enforcement of the Act of October 18, 1988, (P.L. 756, No. 108), known as the Hazardous Sites Cleanup Act.

Grantor, his heirs, executors, administrators, successors or assigns agree to hold harmless, indemnify and defend Grantee, its successors or assigns from and against all liabilities and expenses arising from or in any way connected with all claims, damages, losses, costs or expenses, including reasonable attorneys fees, resulting from a violation or alleged violation of any State or Federal environmental statute or regulation including, but not limited to, statutes or regulations concerning the storage or disposal of hazardous or toxic chemicals or materials.

9. Enforcement – Annually, Grantee, its successors, assigns or designees shall have the right to enter the subject land for the purpose of inspecting to determine whether the provisions of this Deed are being observed. Written notice of such annual inspection shall be mailed to Grantor, his heirs, executors, administrators, successors or assigns at least ten days prior to such inspection. The annual inspection shall be conducted between the hours of 8 a.m. and 5 p.m. on a weekday that is not a legal holiday recognized by the Commonwealth of Pennsylvania or at a date and time agreeable to the county and the landowner.

Grantee, its successors, assigns or designees shall also have the right to inspect the subject land at any time, without prior notice, if Grantee has reasonable cause to believe the provisions of this Deed have been or are being violated.

Grantor acknowledges that any violation of the terms of this Deed shall entitle Grantee, its successors, assigns or designees to obtain an injunction against such violation from a court of competent jurisdiction along with an order requiring Grantor, his heirs, executors, administrators, successors or assigns to restore the subject land to the condition it was in prior to the violation, and recover any costs or damages incurred including reasonable attorney's fees. Such relief may be sought jointly, severally, or serially.

10. Duration of Easement – The agricultural conservation easement created by this Deed shall be a covenant running with the land and shall be effective in perpetuity. Every provision of this Deed applicable to Grantor shall apply to Grantor's heirs, executors, administrators, successors, assigns, agents, and any person, partnership, corporation or other entity claiming title under or through Grantor.

11. Conveyance or Transfer of the Subject Land – Grantor, his heirs, executors, administrators, successors or assigns, and any person, partnership, corporation, or other entity claiming title under or through Grantor, shall, within thirty (30) days of a change in ownership or within any lesser period prescribed in the county program, notify the county agricultural land preservation board and the Pennsylvania Department of Agriculture in writing of any conveyance of transfer of ownership of the subject land. Such notification shall set forth the name, address and telephone number of the Grantor and the party or parties to whom ownership of the subject land has been conveyed or transferred, and the price per acre or any portion thereof and a reference to the volume and page in which the transfer has been recorded by the County Recorder of Deeds.

This obligation shall apply to any change in ownership of the subject land. Whenever interest in the subject land is conveyed or transferred to another person, the deed conveying or transferring such land shall recite in verbatim the language of the easement as set forth in this deed.

12. Applicability - Every provision of this Deed applicable to Grantor shall apply to Grantor's heirs, executors, administrators, successors, assigns, agents, and any person, partnership, corporation or other entity claiming title under or through Grantor.

13. Interpretation – This Deed shall be interpreted under the laws of the Commonwealth of Pennsylvania. For purposes of interpretation, no party to this Deed shall be considered to be the drafter of the Deed. All provisions of this Deed are intended, and shall be interpreted, to effectuate the intent of the General Assembly of the Commonwealth of Pennsylvania as expressed in Section 2 of the Act.

To have and to hold this Deed of Agricultural Conservation Easement unto the Grantee, its successors and assigns in perpetuity.

AND the Grantor, for himself, his heirs, executors, administrators, successors and assigns does specially warrant the agricultural conservation easement hereby granted.

IN WITNESS WHEREOF, the undersigned have duly executed this Deed on the day first written above.

GRANTOR

Witness: _____[Seal]

_____ _____[Seal]

_____ _____[Seal]

_____ _____[Seal]

ACKNOWLEDGMENT

COUNTY OF SS:

COMMONWEALTH OF PENNSYLVANIA

On this _____ day of _____ , 20___ , before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of _____ personally appeared the above named _____ and _____, and in due form of law acknowledged the above Deed of Agricultural Conservation Easement to be their voluntary act and deed, and desired the same to be recorded as such.

WITNESS my hand and Notarial Seal the day and year aforesaid.

_____

Notary Public

My Commission expires:

FORM ACCESS AND UTILITY EASEMENT
(author's form)

*Note this form is for informational purposes only and is not intended for use without consultation and review by counsel.

Prepared By/Return To:
_____
_____
_____

UPI: _____
UPI: _____

_____ Township
_____ County, Pennsylvania

ACCESS AND UTILITY EASEMENT AGREEMENT

THIS ACCESS AND UTILITY AGREEMENT (this "**Agreement**") is made this ____ day of _____, 20_____ by and between _____, a _____ ("**Grantor**") and _____, a _____ ("**Grantee**").

Background:

A. Grantor is the fee owner of that certain parcel of real property located in _____ Township, _____ County, Pennsylvania more fully described on Exhibit "A" attached hereto and incorporated herein (the "**Property**").

B. The Property includes those certain Phases identified as _____ and _____ (the "**Retained Property**") on that certain _____ (the "**Final Plan**") to be recorded in the _____ Recorder of Deeds Office.

C. Pursuant to that certain deed of even date herewith, which is intended to be recorded in the _____, Grantee is the fee owner of those certain phases identified on the Final Plan as _____ (the "**Transferred Property**").

D. Grantors desire to grant to Grantees, and Grantees desire to accept from Grantors, easements on, over and through the Retained Property for access to the Transferred Property and for the discharge of storm water on, over and through the Retained Property.

NOW, THEREFORE, in consideration of Grantee's purchase of the Transferred Property and other good and valuable consideration, the sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, Grantor and Grantee agree as follows:

1. Recitals. The Background section is incorporated herein as if set forth in full.

2. Grant of Easement for Access. Grantor does hereby grant and convey to Grantee, its successors and assigns, a perpetual, non-exclusive easement in, on, over, under and through the Retained Property for the benefit of the Transferred Proeprty, for the purposes of ingress, egress and regress to and from the Transferred Property.

3. Grant of Easement for Storm Water Discharge. Grantor does hereby grant and convey to Grantee, its successors and assigns, for the benefit of the Transferred Proeprty (a) perpetual nonexclusive right, privilege and easement for the channeling, draining and discharge of storm water from the Transferred Property in and over the Retained Property and (b) a perpetual, non-exclusive easement, for the purpose of constructing, operating, maintaining, repairing and replacing (including the right to landscape and grade the Retained Property) certain storm water management improvements that Grantee determines may be necessary for the discharge of stormwater from the Transferred Property in and over the Retained Property, including, without limitation, swales, pipes, basins and culverts (collectively, the "Storm Water Improvements"), as well as reasonable rights of ingress, egress and regress on, over and through the Retained Property for the installation, repair, replacement and maintenance of the same.

4. Maintenance. At such time as the Storm Water Improvements are constructed, the Storm Water Improvements shall be maintained by Grantee, at Grantee's sole cost and expense, in accordance with the requirements of any final plan therefor and the post construction maintenance obligations contained therein, without contribution from Grantor except to the extent that storm water generated on the Retained Property is discharged through the Storm Water Improvements.

5. Indemnity. Grantee shall indemnify and hold Grantor harmless from any claim, liability or expense, including reasonable attorney's fees, on account of any property damage or personal injury to Grantor arising from Grantee's exercise of its rights hereunder, provided that such property damage or personal injury was not caused by the gross negligence or willful misconduct of Grantor, their partners, agents, employees, and/or invitees.

6. Insurance. Grantee shall maintain commercial general liability insurance in an amount not less than $_____ covering all occurrences commonly insured against for death, bodily injury and property damage arising out of or in connection with the rights granted hereunder.

7. Assignment. Grantee may assign its maintenance, indemnification and insurance obligations hereunder to a unit owners' association or master association created pursuant to the Uniform Planned Community Act, 53 Pa. C.S. 5101 *et seq.* or the Uniform Condominium Act, 53 Pa. C.S. 3101 *et seq.*, and upon such assignment, the assignee shall be solely responsible for such maintenance, indemnification and insurance.

8. Modification. This Agreement may not be changed orally or in any other manner other than by an agreement in writing and signed by the party against whom enforcement of the change is sought.

9. Binding Effect. This Agreement, and all of the provisions hereof, shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors and assigns in title to the Transferred Property and the Retained Property, respectively and shall (a) benefit and be an appurtenance to the Transferred Property, (b) burden the Retained Property and (c) run with the title to the Transferred Property and the Retained Property.

10. Severability. The provisions of this Agreement are severable. If any provision or part hereof is declared invalid or unenforceable or is set aside for any other reason by a court of competent jurisdiction, then the remainder of this Agreement shall remain in full force and effect between the parties.

11. Counterparts. This Agreement may be executed in counterparts.

[SIGNATURE PAGE FOLLOWS.]

IN WITNESS WHEREOF, with intent to be legally bound, the parties hereto have executed this Agreement as of the day and year first above written.

WITNESS/ATTEST:	BUYER:
By:_____	By:_____
Name:	Name:
Title:	Title:
WITNESS/ATTEST:	SELLER:
By:_____	By:_____
Name:	Name:
Title:	Title:

COMMONWEALTH OF PENNSYLVANIA :
: SS:
COUNTY OF _____ :

On this, the _____ day of _____, 20_____, before me, a Notary Public, the undersigned officer, personally appeared _____, who acknowledged himself to be the _____ of _____ (the "Company"), and that he, as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____
Notary Public

(SEAL)

COMMONWEALTH OF PENNSYLVANIA :
: SS:
COUNTY OF _____ :

On this, the _____ day of _____, 20_____, before me, a Notary Public, the undersigned officer, personally appeared _____, who acknowledged himself to be the _____ of _____ (the "Company"), and that he, as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the Company by himself as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____
Notary Public

(SEAL)

EXHIBIT A

[Attach legal description of Retained Property]

FORM DECLARATION OF RECIPROCAL EASEMENT

(author's form)

*Note this form is for informational purposes only and is not intended for use without consultation and review by counsel.

DECLARATION OF RECIPROCAL EASEMENTS AND COVENANTS

THIS DECLARATION OF RECIPROCAL EASEMENTS AND COVENANTS (the "Declaration") is made this ____ day of _____, 20__, by and among _____, a _____ ("Developer"), _____, a _____ ("Parcel Two Owner"), and _____, a _____ ("Parcel Three Owner").

B A C K G R O U N D:

A. Developer is the fee owner of a certain tract of land located in _____, _____ County, _____, more particularly described on **Exhibit A** attached hereto and made a part hereof, and designated as Parcel One ("Parcel One") on the _____ Subdivision Plan dated _____, 20__, last revised _____, prepared by _____, recorded in the Office of the Recorder of Deeds in and for _____ County, _____ in Plan Book ____ at Page ____ (the "Plan"), Sheets _ and _ of which are attached hereto and made a part hereof as **Exhibit B**.

B. Parcel Two Owner is the fee owner of that certain tract of land designated as Parcel Two on the Plan ("Parcel Two").

C. Parcel Three Owner is the fee owner of that certain tract of land designated as Parcel Three on the Plan ("Parcel Three ").

D. Developer intends to develop Parcel One and construct a _____ thereon in accordance with the Plan (the "Development").

E. Parcel One, Parcel Two and Parcel Three are referred to herein individually as a "Parcel" and collectively as the "Parcels," and the fee owner of a Parcel is referred to herein as an "Owner."

F. The parties hereto desire to establish certain covenants and restrictions prescribing permitted and prohibited uses, certain easements for pedestrian and vehicular ingress and egress, and for the installation, maintenance and use of utility lines and storm water management facilities, and to set forth certain maintenance requirements and other standards, which covenants, restrictions, easements, requirements and standards shall run to the benefit of and bind the respective Parcels or any portion thereof and the Owner of any Parcel or any portion thereof.

NOW THEREFORE, with intent to be legally bound, the parties hereto declare that the Parcels shall be held, conveyed, encumbered, leased, occupied, used and improved subject to the covenants, restrictions, easements, requirements, standards, covenants and agreements set forth herein:

ARTICLE I – GRANT OF EASEMENTS

1.01 Access Easements; Parking.

(a) Developer hereby declares, grants and conveys to Parcel Two Owner, for the benefit of the Parcel Two, a perpetual, non-exclusive easement and right to use the roadways, entrances and exits into and out of the Development designated as Entrance #1, Entrance #2 and Entrance #3 on the Plan as shown on **Exhibit C** attached hereto and made a part hereof, for the purposes of ingress, egress, passage and deliveries by vehicles and pedestrians.

(b) Developer hereby declares, grants and conveys to Parcel Three Owner for the benefit of the Parcel Three, a perpetual, non-exclusive easement and right to use the roadway, entrance and exit into and out of the Development designated as Entrance #2 on the Plan, as shown on **Exhibit C**, for the purposes of ingress, egress, passage and deliveries by vehicles and pedestrians.

(c) The easements granted in this Section 1.01 specifically exclude easements for parking. The parking on each of the Parcels shall be contained only on such Parcel and shall be in compliance with all governmental rules, regulations, ordinances, or laws relative to parking requirements. Notwithstanding the foregoing, each of Parcel Two and Parcel Three shall at all times have not less than ten (10) parking spaces for every 1,000 square feet of gross floor area within the improvements on the Parcel if such improvements are being used as a restaurant, and not less than five (5) parking spaces for every 1,000 square feet of gross floor area within the improvements on the Parcel if such improvements are being used for any other retail purpose.

1.02. Utility Easements.

(a) The Owner of each Parcel hereby grants and conveys to the Owners of the other Parcels, for the benefit of such other Parcels, a perpetual, non exclusive easement on, over, under and across all parking areas, roadways, and landscaped areas lying and being on the granting Owner's Parcel for the purposes of installation, operation, maintenance, repair, replacement, removal and relocation of underground storm drainage lines, sanitary sewer lines, water lines, gas mains, electric power lines, telephone lines, cable lines, fiber optic lines and other underground utility lines (the "Utility Lines") to serve the facilities located on the Parcels. The location and installation of any Utility Lines shall be in accordance with the Plan as shown on **Exhibit D** attached hereto and made a part hereof, and any subsequent relocation of any Utility Lines shall be subject, as to location, to the approval of the Owner upon whose Parcel the Utility Lines are to be situated, which approval shall not be unreasonably withheld, delayed or conditioned.

(b) The Owner of a Parcel burdened by Utility Lines, or the Owner of any Parcel benefited by said Utility Lines, may maintain and repair (and, so long as it does not unreasonably interfere with the use of the granting Owner's Parcel, relocate) such Utility Lines, provided that such repair and maintenance are performed expeditiously and upon no less than seven (7) days' prior written notice to the granting Owner if such work is

performed by a grantee Owner. Any such maintenance, repair or relocation shall be performed at the sole cost and expense of the party requiring same, in such a manner as to minimize any interference with the operation and use of the granting Owner's Parcel. The party performing the work shall, at its sole cost and expense, repair any damage to any improvements on the granting Owner's Parcel and, promptly after completion of the work, restore the granting Owner's Parcel to the condition it was in immediately prior to the work. Each Owner shall indemnify and hold harmless the granting Owner and any occupant of the granting Owner's Parcel from any claims, damage or loss which may result from the activities of the grantee Owner in making such repairs or relocating its facilities.

1.03 Benefits of Easements; Easement Areas.

(a) The easements granted in Sections 1.01 and 1.02 shall be for the benefit of, but shall not be restricted solely to, the Owners of the Parcels. Each Owner may grant the benefit of such easement to the tenants and other occupants of its Parcel for the duration of such occupancy, and to the customers, employees, agents and business invitees thereof. The grant of these easements is not intended to create, nor shall it be construed as creating, any rights in or for the benefit of the general public. The areas affected by the easements granted in Sections 1.01 and 1.02 are sometimes collectively referred to herein as the "Easement Areas."

(b) Each Owner shall have the right to close off portions of the Easement Areas located on its Parcel for such time from time to time as may be legally necessary, in the reasonable opinion of such Owner's counsel, to prevent the acquisition of prescriptive rights by any other party; provided, however, that such closing shall occur upon no less than fifteen (15) days prior written notice to each other Owner and shall be done in a manner so as to interfere as little as reasonably possible with the normal business conducted on the Parcels. Each Owner may temporarily close off portions of the Easement Areas located on its Parcel as reasonably necessary for the purpose of repair, construction and reconstruction of improvements located on such Parcel.

1.04 Temporary Construction Easements. In connection with any construction work to be performed in the development of the Development, each Owner hereby grants to the Owners of the other Parcels temporary easements for incidental encroachments upon the granting Owner's Parcel which may occur as a result of construction, so long as such encroachments are reasonably required by the construction work to be performed and such construction work is expeditiously pursued. A party performing work on the Parcel of another party shall use commercially reasonable efforts to minimize interference with the normal use of the affected Parcel, and shall, at its sole expense, repair any damage to any improvements on the affected Parcel and, promptly after completion of the work, restore the affected Parcel to substantially the condition it was in immediately prior to the work.

1.05 Storm Water Drainage Easement.

(a) In addition to the easements provided for in Section 1.02 (a), Developer hereby grants and conveys to Parcel Owner A for the benefit of Parcel _____, a perpetual, non-exclusive easement and right to use, in accordance with the Plan as shown

on **Exhibit E** attached hereto and made a part hereof, the storm water drainage and retention facilities located on Parcel _____ for the purpose of draining storm water into and through and impounding storm water within such facilities, including all pipes, ditches, flumes, culverts, inlets, storm water detention ponds and other facilities constructed for the drainage and management of storm water.

ARTICLE II – MAINTENANCE AND OPERATION

2.01 Facilities and Repair.

(a) Each Owner shall maintain, repair and replace, at its sole cost and expense, all improved portions of its respective Parcel so as to keep such areas at all times in a safe, sightly and good condition in a manner consistent with the custom and practice employed in first class shopping centers/commercial developments in the area in which the Development is located and in accordance with all laws, rules and regulations of all governmental authorities having jurisdiction over the Development. Without limiting the foregoing in any way, each Owner shall perform or cause to be performed the following maintenance obligations with respect to its Parcel:

(i) Maintain the surface of the parking areas and roadways on its Parcel evenly covered with the type of surfacing material originally installed or such substitute as shall in all respects be equal in quality, use and durability as the material originally installed;

(ii) Provide for the clearing of snow and the treatment of ice on the parking areas, roadways and sidewalks within its Parcel within a reasonable period of time;

(iii) Maintain any directional signs or markers in the parking areas on its Parcel;

(iv) Repaint the striping and markings on its Parcel as needed;

(v) Maintain and relamp lighting fixtures as needed; and

(vi) Perform any other duties required by applicable laws, rules or regulations.

(b) Each Owner shall be responsible, at its sole cost and expense, for keeping its own Parcel clean and free from refuse and rubbish. Any landscaped areas on the respective Parcels shall be mowed and otherwise tended to by the Owner thereof.

(c) Each Owner shall service, maintain, repair and replace and pay the cost of any fees or charges in connection with the Utility Lines located on its Parcel to the extent that such Utility Lines service the improvements on that Parcel.

(d) Each Owner shall cause all buildings and improvements located on its

Parcel to comply with all requirements of law and governmental regulations applicable thereto; provided however, that an Owner may contest any such law or regulation so long as such contest would not create any material danger of a loss of title to, or impairment in any way, of the use of all or any portion of the Easement Areas for their intended purposes.

(e) Without limiting the provisions of Article VI of this Declaration, if any Owner fails to operate and maintain its Parcel to the standards required by this Declaration, and if such failure continues for a period of thirty (30) days following notice of such failure from any other Owner (the "Objecting Owner") specifying in reasonable detail the deficiencies in maintenance and operation (provided that where the lack of maintenance immediately jeopardizes the ability to continue to operate upon the Objecting Owner's Parcel, only such notice and opportunity to cure shall be required as may be practicable under the circumstances), the Objecting Owner may, at its election, commence to perform to the standards required hereunder, the repair and/or maintenance of the Parcel at the sole cost and expense of the Owner of the Parcel.

ARTICLE III – LIABILITY AND INDEMNIFICATION

3.01 Liability; Indemnification. Each Owner shall indemnify and hold harmless every other Owner, tenant and occupant of the Parcels from and against any damages, liability actions, claims and expenses (including, without limitation, reasonable attorneys' fees) in connection with the loss of life, bodily injury and/or damage to property arising from or out of any occurrence in or upon the indemnifying Owner's Parcel, or occasioned wholly or in part by an act or omission of such Owner or its tenants, agents, contractors, employees or licensees, excluding, however, any loss, damage or claim resulting from the tortious acts of the Owner, tenant or occupant sought to be indemnified or its or their tenants, occupants, agents, contractors, employees or licensees.

3.02 Liability Insurance. Each Owner shall maintain or cause to be maintained commercial general liability insurance providing coverage against claims on account of loss of life, bodily injury or property damage that may arise from, or be occasioned by, the use or occupancy of its Parcel and the Easement Areas by the Owner and the tenants, agents, contractors, employees, licensees, customers and invitees of such Owner or the occupants of its Parcel, except as herein provided. Such insurance shall be carried by a reputable insurance company qualified to do business in the Commonwealth of Pennsylvania and shall have minimum limits of _____ Dollars ($_____) per occurrence and _____ ($_____) in the aggregate, combined single limit, with deductibles not to exceed _____ Dollars ($_____), for loss of life, bodily injury and property damage. Each Owner shall maintain or cause to be maintained contractual liability insurance to cover such Owner's agreement to indemnify set forth in Section 3.01 hereof. Policies of insurance provided for in this Section 3.02 shall name all other Owners as additional insureds, provided that the other Owners request in writing to be named, and shall provide that the policies shall not be cancelled without at least ten (10) days' prior written notice to the Owners named as additional insureds.

3.03 Casualty Insurance; Waiver of Subrogation. Each Owner shall carry or cause to be carried fire and extended coverage insurance on all buildings and improvements

constructed on their respective Parcels in an amount sufficient to cover the costs of demolition and other work required to place the Parcel in a clean, sightly and safe condition upon the occurrence of a casualty, unless the Owner is permitted to self insure as provided above. Each Owner (the "Releasing Owner") releases all other Owners from and against any and all claims, demands, liabilities or obligations whatsoever for damage to the Releasing Owner's property (and loss of rents or profits) resulting from or in any way connected with any fire or other casualty, whether or not such fire or other casualty shall have been caused by the negligence or the contributory negligence of the party being released or by any agent, associate or employee of the party being released, to the extent that such damage or loss is covered by any insurance which the Releasing Owner is required to obtain hereunder.

ARTICLE IV – REMEDIES

5.01 Self-Help; Lien Rights; Disputes.

(a) If any Owner defaults in the performance of any of its obligations under this Declaration (a "Defaulting Owner") and such default adversely affects the Owner of another Parcel (an "Affected Owner") or the Affected Owner's tenants, and the Defaulting Owner fails to cure the default within ten (10) days after receipt of written notice from the Affected Owner specifying the default, then the Affected Owner, in addition to all other remedies it may have at law or inequity, shall have the right to perform such obligation on behalf of the Defaulting Owner. In such event, the Defaulting Owner shall promptly reimburse the Affected Owner the cost thereof, together with interest thereon from the date of expenditure at a rate equal to the lesser of (i) ten percent (10%) per annum, or (ii) the maximum rate permitted by law. If the default is not reasonably susceptible of being cured within a ten (10) day period, the time for the Defaulting Owner to cure the default shall be extended for an additional reasonable period, provided that the Defaulting Owner commences its efforts to cure within the original cure period and thereafter diligently prosecutes those efforts to completion. Notwithstanding the foregoing, in the event of a genuine emergency, the Affected Owner may act after giving such notice as is practicable under the circumstances.

(b) Any claim for reimbursement under Section 5.01(a), together with the interest thereon as aforesaid, shall be secured by a lien on the Defaulting Owner's Parcel and the improvements thereon owned by the Defaulting Owner, which lien shall be effective upon the recording of a notice thereof in the appropriate county office, and such lien shall be enforceable in the same manner as a judgment lien. Notwithstanding the foregoing, the lien shall be subordinate to any first mortgage or deed of trust or similar instrument now or hereafter affecting the subject Parcel and to the interest of any ground lessor, and any purchaser at any foreclosure or trustee's sale (as well as any grantee by deed in lieu of foreclosure or trustee's sale) under any such mortgage, or any assignee of such ground lease shall take title subject only to liens thereafter accruing pursuant to this Section 6.01

5.02 Injunctive and Other Remedies. In the event of a breach by any Owner of any obligation of this Declaration, any other Owner shall be entitled to obtain an order

specifically enforcing the performance of such obligation or an injunction prohibiting any such breach and/or to relief by other available legal and equitable remedies. Any costs and expenses of any such proceeding, including reasonable attorney's fees, shall be paid by the Defaulting Owner and, if not paid within ten (10) days of demand therefore, may be secured by the lien provided for in Section 5.01(b) hereof.

5.03 Non-Waiver. No delay or omission of any Owner in the exercise of any right accruing upon any default of any other Owner shall impair such right or be construed to be a waiver thereof, and every such right may be exercised at any time during the continuance of such default. A waiver of any Owner of a breach of, or a default in, any of the terms and conditions of this Declaration by any other Owner shall not be construed to be a waiver of any subsequent breach of or default in the same or any other provision of this Declaration. Except as otherwise specifically provided in this Declaration, no remedy provided for herein shall be exclusive, but each shall be cumulative with all other remedies provided for herein, and all remedies at law or in equity shall be available.

5.04 Non-terminable Declaration. No breach of the provisions of this Declaration shall entitle any Owner or party to cancel, rescind or otherwise terminate this Declaration, but such limitation shall not affect, in any manner, any other rights or remedies which any party may have hereunder by reason of any breach of the provisions of this Declaration. No breach of the provisions of this Declaration shall defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value covering any part of the Development or any improvements thereon.

5.05 Force Majeure. In the event any Owner or any other party shall be delayed or hindered in or prevented from the performance of any act required to be performed by such party by reason of an event beyond the reasonable control of such Owner or party, including, but not limited to, Acts of God, failure of power, riots, insurrections, strikes, embargoes, or adverse weather conditions preventing the performance of work, then the time for performance of such act shall be extended for a period equivalent to the period of such delay. Lack of adequate funds or financial inability to perform shall not be deemed to be a cause beyond the control of such Owner or party.

ARTICLE VI – TERM

6.01 Term. The term of this Declaration and the easements, rights, obligations and liabilities created hereby shall be for the longer of ninety-nine (99) years or perpetual to the extent permitted by law, unless terminated earlier by a written instrument executed by all of the then Owners of the Parcels, which termination instrument shall be recorded in the Office of the Recorder of Deeds in and for _____ County, _____.

ARTICLE VII – EFFECT OF INSTRUMENT

7.01 Mortgage Subordination. Any mortgage or deed of trust affecting any portion of the Parcels shall at all times be subject and subordinate to the terms of this Declaration,

except to the extent expressly otherwise provided in Section 6.01(b) hereof, and any party foreclosing any such mortgage or deed of trust or acquiring title by deed in lieu of foreclosure or trustee's sale shall acquire title subject to all of the terms and provisions of this Declaration, subject to Section 6.01 (b) hereof. Each party hereto represents and warrants to the other parties that there is no presently existing mortgage or deed of trust lien on its Parcel, other than mortgage or deed of trust liens that are expressly subordinate to the lien of this Declaration.

7.02 Binding Effect. Every agreement, covenant, promise, undertaking, condition, easement, right, privilege option and restriction made, granted or assumed hereunder, as the case may be, by any party to this Declaration is made by such party not only for the personal benefit of such party, but also to constitute an equitable servitude on such Owner's Parcel, appurtenant to and for the benefit of the other Parcels. Any transferee of fee title to any Parcel shall automatically be deemed, by acceptance of such title, to have assumed all of the obligations of this Declaration relating to the Parcel so acquired from and after the date of acquiring such title, and to have agreed with the then Owner or Owners of all other Parcels to execute any and all instruments and to do any and all things reasonably required to carry out the intention of this Declaration. The transferor shall, upon the completion of such transfer, be relieved of all further liability under this Declaration with respect to the property so transferred, except liability with respect to matters remaining unsatisfied that may have arisen during the period of ownership of the land conveyed.

7.03 No Third-Party Beneficiaries; Non-Dedication. Nothing contained in this Declaration shall be deemed to be a gift or dedication of any portion of the Development to the general public or for any public use or purpose whatsoever. Nothing in this Declaration, expressed or implied, shall confer upon any person, other than the parties hereto and their successors and assigns, any public or private benefits, rights or remedies under or by reason of this Declaration.

7.04 Non-Recourse. Notwithstanding anything to the contrary contained in this Declaration, each Owner shall be liable and responsible for the obligations, covenants, agreements and responsibilities created hereunder and for any judgment rendered hereon only to the extent of its respective interest in the land and improvements on its Parcel. The foregoing shall not be deemed to preclude the non-defaulting Owners from pursuing and obtaining equitable remedies such as injunctive relief or specific performance upon a breach by an Owner.

ARTICLE VIII – NOTICES

8.01 Notices. Any notices, requests, demands or other communications hereunder shall be in writing and shall be deemed to have been sufficiently given or served for all purposes if (i) personally delivered, (ii) delivered by overnight courier prepaid by sender, or, (iii) mailed by registered or certified mail, return receipt requested, postage prepaid to the parties at the addresses shown below or at such other address as the respective parties may from time to time designate by like notice. Each such notice shall be effective upon being so delivered. Notices rejected or refused for acceptance of delivery or

undeliverable because of a change of address of which no notice was given shall be deemed to be received as of the date of the rejection, refusal or inability to deliver. Addresses for notices hereunder are as follows:

If to Developer:

_____
_____
_____
_____
_____

With a Copy to:

_____
_____
_____
_____
_____

If to Parcel Two Owner:

_____
_____
_____
_____
_____

With a Copy to:

_____
_____
_____
_____
_____

If to Parcel Three Owner:

_____
_____
_____
_____
_____

With a Copy to:

_____
_____
_____
_____
_____

Attn: Real Estate Department

ARTICLE VIII – MISCELLANEOUS

8.01 Miscellaneous.

(a) If any provision of this Declaration, or portion thereof, or the application thereof to any person or circumstances shall, to any extent, be held invalid, inoperative or unenforceable, the remainder of this Declaration, or the application of such provision or portion thereof to any other persons or circumstances shall not be affected thereby. It shall not be deemed that any such invalid provision affects the consideration for this Declaration. Each provision of this Declaration shall be valid and enforceable to the fullest extent permitted by law.

(b) This Declaration shall be interpreted and construed in accordance with the laws of the Commonwealth of Pennsylvania.

(c) The statements and recitals set forth in the Background of this Declaration are a material part of this Declaration and are incorporated herein. The Article headings are for convenience only, shall in no way define or limit the scope or content of this Declaration, and shall not be considered in any construction or interpretation of this Declaration or any part hereof.

(d) Nothing in this Declaration shall be construed to make the parties hereto partners or joint venturers or render any party liable for the debts or obligations of the others.

(e) This Declaration shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, successors-in-title, and assigns.

(f) The easements, granted or created herein and the rights, restrictions and obligations created hereunder shall run with the land and be unaffected by any change in the ownership of any Parcel or by any change of use, demolition, reconstruction, expansion or other circumstances, except as specified herein.

(g) Each of the Owners agrees that it will, at any time from time to time, within thirty (30) days following receipt of a request by any other Owner, execute and deliver to such other Owner a written statement certifying: (i) that this Declaration has not been amended and is full force and effect, or if amended, so stating with particularity, (ii) that to the certifying Owner's actual knowledge, there are no defaults in the performance of any provisions contained herein, or describing each default of which said Owner has knowledge, and (iii) such other matters as may reasonably be requested by the requesting Owner, its transferees or mortgagees. Any statement delivered pursuant to this subsection by be relied upon by any prospective transferee or mortgagee of the requesting Owner.

(Signature page follows.)

IN WITNESS WHEREOF, with intent to be legally bound hereby, the parties hereto have set their hands and seals hereto, as of the day and year first above written.

ATTEST:

By:_____
Name:
Title:

DEVELOPER:
_____:

By:_____
Name:
Title:

ATTEST:

By:_____
Name:
Title:

PARCEL TWO OWNER:
_____:

By:_____
Name:
Title:

ATTEST:

By:_____
Name:
Title:

PARCEL THREE OWNER:
_____:

By:_____
Name:
Title:

COMMONWEALTH OF PENNSYLVANIA :
: SS:
COUNTY OF :

On this _____ day of _____, 20__, before me, a Notary Public, the undersigned officer, personally appeared _____, who acknowledged himself to be the _____ of _____, the General Partner of _____, a Pennsylvania limited partnership, and that he as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of such general partner by himself as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____
Notary Public

(SEAL)

COMMONWEALTH OF PENNSYLVANIA :
: SS:
COUNTY OF :

On this _____ day of _____, 20__, before me, a Notary Public, the undersigned officer, personally appeared _____, who acknowledged her/himself to be the _____ of _____, a _____ corporation, and that (s)he as such officer, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of such corporation by her/himself as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____
Notary Public

(SEAL)

[Attach a legal description of Parcel One
pursuant to Background Paragraph A.]

Exhibit "A"

[Attach Plan pursuant to Background Paragraph A.]

Exhibit "B"

[Attach Plan depicting Access Roadways pursuant to Paragraph 1.01.]

Exhibit "C"

[Attach Utility Lines Plan pursuant to Paragraph 1.02]

Exhibit "D"

[Attach Storm Water Management Plan pursuant to Section 1.05.]

Exhibit "E"

***Zettlemoyer v. Transcon. Gas Pipeline Corp.*, 540 Pa. 337, 344, 657 A.2d 920, 924 (1995)**
(can be found on the LexisNexis website)

Chapter One
Section 2

Title Insurance Considerations

Giuseppina G. McCarthy, Esq.
McNees Wallace & Nurick, LLC
Harrisburg

UNDERSTANDING EASEMENTS

Title Insurance Considerations

I. Options for insuring easements

Like fee and leasehold interests in a property, the holder of an easement can have their easement rights insured via a title insurance policy. Easements can be insured as a stand alone transaction, as in the circumstance where an entity acquires an agricultural easement, conservation easement, pipeline or utility easement, or the easement can be insured as part of a larger transaction. Both existing easements that were created prior in time but continue to run with the land and new easements that are created as part of the transaction can be insured.

II. Questions to consider when insuring easements.

When analyzing an easement in conjunction with the issuance of title insurance coverage, consider the following:

- What is the scope of the easement being granted?
- Have all required parties granted the easement?
- Is the description of the easement sufficient?
- Is the easement exclusive?
- Are there any liens or encumbrances affecting the servient property and if so, have the lien holders consented to the grant of the easement?
- Does the easement provide the intended benefit?
- Does the easement encroach upon existing property rights/easements?

III. Easement Related Title Endorsements

- **ALTA 17.1** (PA 1210 for loan policy/PA 1211 for owner's policy) – Indirect Access and Entry
- **ALTA 17.2** (PA 1550 for owner's policy/PA 1551 for loan policy) – Utility Access
- **ALTA 28** (PA 1310 for loan policy/PA 1311 for owner's policy) – Easement-Damage for Enforce Removal
- **ALTA 28.1** (PA 1312 for loan policy/PA 1313 for owner's policy) – Encroachments-Boundaries & Easements
- **ALTA 28.3** (PA 1314 for loan policy/PA 1315 for owner's policy) – Encroachments-Boundaries and Easements, Land Under Development
- **ALTA 28.2** (PA 1316 for loan policy/PA 1317 for owner's policy) - Encroachments-Boundaries and Easements, Described Improvements
- **ALTA 34-06** (PA 1660) – Identified Risk

Chapter One
Section 3

Litigation and Enforcement of Easements

Helen L. Gemmill, Esq.
McNees Wallace & Nurick, LLC
Harrisburg

Member, McNees Wallace & Nurick LLC.
https://www.mcneeslaw.com/people/helen-l-gemmill/

UNDERSTANDING EASEMENTS

LITIGATION AND ENFORCEMENT OF EASEMENTS

I. Procedural Considerations

A. Types of Actions

1. Action for Declaratory Judgment under Pennsylvania Declaratory Judgments Act, 42 Pa.C.S. §§ 7531-7541

a. General scope of declaratory judgment remedy

"Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree." 42 Pa.C.S. § 7532.

b. Construction of written documents in declaratory judgment action

"Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder." 42 Pa.C.S. § 7533.

c. Need for actual harm, not possibility of future harm.

Associates of Philipsburg v. Hurwitz, 437 A.2d 447 (Pa. Super. 1981) (claim that defendant's use will create harm or be burdensome denied in the absence of any incident of past or current harm suffered).

d. All necessary parties must be joined in action.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. 42 Pa.C.S. § 7540(a).

Mains v. Fulton, 423 Pa. 520, 224 A.2d 195 (1966) (all lot owners in development required to be joined in declaratory judgment action regarding easement for power lines, not just lot owners who refused permission for erection of lines across their property); *Barren v. Dubas,* 441 A.2d 1315, 1316 (Pa.Super. 1982) ("when there is a dispute as to the existence of an easement, all owners of servient tenements have a material interest in the controversy and should be joined as defendants, even though such an owner may have had no part in the interference with, or obstruction of, the alleged easement").

e. Effect of alternative remedy.

Declaratory judgment remedy is additional and cumulative to other remedies. A party can elect to bring a declaratory judgment action or another available remedy without any effect on substantive rights. 42 Pa. § 7541(b) (subject to exceptions in 7541(c) that are not relevant to easements).

f. Availability of jury trial.

A jury trial is available to decide issues of fact in a declaratory judgment action.
42 Pa.C.S. § 7539.

2. Action in Ejectment

a. Governed by Pa. Rules of Civil Procedure 1051-1058.

b. Can be brought when plaintiff is not in possession.

Borough of Ulysses v. Mesler, 986 A.2d 224, 227 (Pa. Commw. Ct. 2009) (plaintiff may file an action in ejectment when the plaintiff does not possess the land, "but has the *right to possess* it, against a defendant who has actual possession.").

c. Action in ejectment is not an exclusive remedy.

Pennsylvania law allows a plaintiff to enforce rights under an easement or right of way by either an action in ejectment or by way of an action in equity. *See Croyle v. Dellape*, 832 A.2d 466, 471 (Pa. Super. 2003) (both an action in equity and an action in ejectment are proper forms of action for a plaintiff seeking to prevent encroachment of its easement); *Williamstown Borough Auth. v. Cooper*, 591 A.2d 711, 714 (Pa. Super. 1991) (municipal water authority permitted to bring action in ejectment to prevent the building of encroachments on property over which the water authority had a right of way).

d. Venue.

Action may be brought only in the county in which the land or a part of the land is located. Pa. R. Civ. P. 1052.

e. Requirement for description of land and abstract of title.

Complaint must contain a description of the land. Pa. R. Civ.P. 1054(a). Requirement can be satisfied by copying the legal description from the deed into a paragraph of the complaint, or attaching an exhibit with the legal description and incorporating it by reference. Tax parcel number is helpful.

Required to set forth an abstract of title upon which the party relies. Pa. R. Civ. P. 1054(b). Must go back in time at least to the common source of adverse titles.

f. Availability of jury trial.

No jury trial is available in ejectment action. Pa. R. Civ. P. 1058.

3. Quiet Title Action

a. Governed by Pa. Rules of Civil Procedure 1061-1068.

b. Quiet title action may be brought for 4 purposes .

(1) to compel an adverse party to commence an action of ejectment;

(2) where an action of ejectment will not lie, to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title or interest in land;

(3) to compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land; or

(4) to obtain possession of land sold at a judicial or tax sale.

Pa. R.Civ. P. 1061(b)

c. Relief allowed.

Pa. R. Civ. P. 1066(b) specifies the form of the judgment or order than can be entered.

(b) Upon granting relief to the plaintiff, the court

(1) shall order that the defendant be forever barred from asserting any right, lien, title or interest in the land inconsistent with the interest or claim of the plaintiff set forth in the complaint, unless the defendant takes such action as the order directs within thirty days thereafter. If such action is not taken within the thirty-day period, the prothonotary on praecipe of the plaintiff shall enter final judgment.

(2) shall enter a final judgment that a document, obligation or deed affecting a right, lien, title or interest in the land is cancelled or is valid, invalid or discharged or that a copy of a lost plan, document, obligation or deed is an authentic copy;

(3) shall enter a final judgment ordering the defendant, the prothonotary, or the recorder of deeds to file, record, cancel, surrender or satisfy of record, as the case may be, any plan, document, obligation or deed determined to be valid, invalid, satisfied or discharged, and to execute and deliver any document, obligation or deed necessary to make the order effective; or

(4) shall enter any other order necessary for the granting of proper relief.

d. Availability of jury trial.

No jury trial is available in quiet title action. Pa. R. Civ. P. 1067.

4. Land Use Appeals

Private easement rights are immaterial to zoning determinations and cannot be considered by zoning boards and municipal governing bodies in connection with land use approvals. *In Re Towamencin Sumneytown Pike, LLC*, 273 A.3d 95, 104 (Pa. Commw. Ct. 2022) (ordinance requiring applicant to obtain the written consent of a private third party easement holder prior to approval of a zoning application is invalid).

Conflicts arising from private instruments of title may not be resolved in land use proceedings. *BR Assocs. v. Bd. of Comm'rs of Twp. of Upper St. Clair*, 136 A.3d 548 (Pa. Commw. 2016) (whether easement encompasses installation and maintenance of stormwater facilities is an issue that must be decided by the courts, not by a local government body in a land use proceeding); *Gulla v. North Strabane Twp.*, 676 A.2d 709 (Pa. Commw. 1996) (enforcement of private rights has no application in a zoning dispute).

B. Injunctive Relief.

Preliminary and/or permanent Injunctions are available to enforce easement rights. To be entitled to a permanent injunction, a party must establish a clear right to relief, and must have no adequate remedy at law, *i.e.*, damages will not compensate for the injury. A preliminary injunction has the additional requirement of proof of immediate irreparable harm. *See PA Energy Vision, LLC v. South Avis Realty, Inc.*, 120 A.3d 1008, (Pa. Super. 2015) (claimant did not have clear easement right to use railroad crossing).

The purpose of a preliminary injunction is to prevent irreparable injury or gross injustice by preserving the status quo as it exists or as it previously existed before the acts complained of in the complaint. *Duquesne Light Co. v. Longue Vue Club*, 63 A.3d 270 (Pa. Super. 2013) (preliminary injunction properly preserved status quo that existed prior to denial of access to easement).

If court grants a preliminary injunction, order must include a requirement that the plaintiff post a bond in an amount determined by the court to protect the defendant in the event that the injunction was improperly entered and the defendant sustains damages. Pa.R.Civ. P. 1531(b); *Parkinson v. Lowe*, 760 A.2d 65, 68 (Pa. Super. 2000). If the order does not require a bond, the error can be cured with the re-issuance of the preliminary injunction in a new order. *Id.*

II. Substantive Considerations

A. Express Easements

1. Express easements are interpreted using contract principles.

Hann v. Saylor, 562 A.2d 891, 893 (Pa. Super. 1989) (court must interpret the terms of an easement agreement, as well as the extent of the rights therein, by applying general principles of contract law); *PARC Holdings, Inc. v. Killian*, 785 A.2d 106 (Pa. Super. 2001) ("As with any contract the rights conferred by the grant of an express easement must be ascertained solely from the language of the deed, provided that the deed language is unambiguous"); *Zettlemoyer v.Transcontinental Gas Pipeline Com.*, 540 Pa. 337, 657 A.2d 920 (1995) (unambiguous language granted dominant tenant the right to build additional pipelines and remove trees and obstructions).

2. Silent or ambiguous easements.

When the language is ambiguous, a court may resort to evidence of extrinsic circumstances as an aid to interpretation. *PARC Holdings, Inc. v. Killian*, 785 A.2d 106 (Pa. Super. 2001) (extrinsic evidence showed intention that easement for land development would include right to install utilities in easement area).

When the purposes of an express easement are not specifically stated, the court must ascertain the objectively manifested intention of the parties in light of the circumstances in existence at the time of conveyance. *PARC Holdings, Inc. v. Killian*, 785 A.2d 106 (Pa. Super. 2001).

If the easement is ambiguous or silent as to the location, size, duration or purpose, court must determine the reasonable and necessary use of the easement within the intentions of the original parties to the grant. *See McNaughton Props., LP v. Barr,* 981 A.2d 222, (Pa. Super. Ct. 2009) (refusing relocation of express easement as intent of original parties to 1954 deed governs, and subsequent owner decision to develop property is irrelevant).

Whether an easement is ambiguous is a question of law for the court. Resolution of conflicting parol evidence as to what the parties intended by an ambiguous provision is for the trier of fact. *PARC Holdings, Inc. v. Killian*, 785 A.2d 106 (Pa. Super. 2001).

B. Prescriptive Easements

1. Proof of Elements. Party claiming prescriptive easement must prove that easement was created by adverse, open, continuous, notorious and uninterrupted use of land for twenty-one years. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

2. Permissive or adverse. Whether a use is adverse or permissive is a question of fact. *Gehres v. Falls Township*, 948 A.2d 249, 251 (Pa. Commw. 2008).

3. Normal evolution of use. The degree of use of a prescriptive easement may increase in certain circumstances to accommodate the normal evolution of the dominant tenement where reasonable, but right-of-way acquired by prescription cannot expand in size. *Hash v. Sofinowski*, 487 A.2d 32, 36 (Pa. Super. 1985) (larger size of modern farm equipment does not allow expansion of width of prescriptive easement). To determine whether a particular use is permissible under a prescriptive easement, "a comparison must be made between such use and the use by which the easement was created with respect to (a) their physical character, (b) their purpose, (c) the relative burden caused by them upon the servient tenement." *McGavitt v. Guttman Realty Co*., 909 A.2d 1, 4–5 (Pa. Super. 2006) (heavy commercial truck use not a reasonable extension of access to single family residence).

C. Easement by Necessity

1. Proof of Elements. Three fundamental requirements for an easement by necessity are:

1) the titles to the alleged dominant and servient properties must have been held by one person; 2) this unity of title must have been severed by a conveyance of one of the tracts; and 3) the easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.

Bartkowski v. Ramondo, 219 A.3d 1083, 1092 (Pa. 2019). A right of way from necessity over the land of another is always of strict necessity. *Id.* Right of way never exists when person can get to own property through own land. *Id.* Convenience is no foundation for the claim. *Id.*

D. Easement by Implication

1. Proof of Elements. easement by implication exists if the party claiming such an easement establishes three things:

(1) a separation of title; (2) prior to the separation, the use giving rise to the easement was "so long continued, and so obvious or manifest, as to show that it was meant to be permanent"; and (3) the easement is "necessary to the beneficial enjoyment of the land granted or retained."

Gurecka v. Carroll, 155 A.3d 1071, 1076 (Pa. Super. 2017)

2. Easement by reference to a map or plat is an easement by implication. *Potis v. Coon*, 496 A.2d 1188, 1191-93 (Pa. 1985). Where a municipality fails to accept or open a dedicated street in a plan within twenty-years, the owners of property within the plan or subdivision retain private rights of easement by implication over the unopened streets. *Estojak v. Mazsa*, 562 A.2d 271, 274 (Pa. 1989)

E. Exclusive Easements

1. Exclusive easement deprives the servient owner of all beneficial use and enjoyment of the land. *Fedorko Props. v. C.F. Zurn & Assocs*., 720 A.2d 147 (Pa. Super. 1998).

2. Exclusive easements are disfavored and need evidence of clear intent to grant an easement that precludes all rights of servient estate. The use of the term "exclusive easement" is not sufficient as a matter of law to grant an easement which excludes the servient estate. *Fedorko Props. v. C.F. Zurn & Assocs.*, 720 A.2d 147 (Pa. Super. 1998) (record lacked evidence of any intent of the parties to exclude servient tenant from use).

F. Attorneys' Fees for Breach of Easement

Attorneys' fees cannot be recovered in an action to enforce easement rights unless the terms of the easement expressly grants that right. *See S & R Coal Co. v. Rausch Creek Land, L.P.*, 2015 Pa. Super. Unpub. LEXIS 1385, 122 A.3d 451, 2015 WL 5853617 (Pa. Super. 2015) (unpublished).

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Home Address _____ City _____

State_____ Zip_____ County_____ Date of Birth_____

❑ I am an attorney employed full time by a local, state, or federal government agency or a nonprofit legal services office, as opposed to an independent contractor. Your Signature_____

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Date Admitted to Supreme Court of Pennsylvania _____

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Earliest Date Admitted in Any State _____ State_____

Have you ever been a member of this association? ❑ Yes ❑ No

Other State or Local Bar Memberships_____

_____

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Applicant's signature_____

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2020 Schedule of Dues

EARLIEST ADMIT DATE TO ANY STATE BAR	PRORATED SCHEDULE	DUES	GOV'T ATTY.*
On or before 9/19/16	Nov.–March	$335.00	$268.00
	April–June	252.00	201.00
	July–Sept.	168.00	134.00
	Oct.–Dec.	84.00	67.00
9/20/16 thru 9/19/17	Nov.–March	$268.00	$215.00
	April–June	201.00	162.00
	July–Sept.	134.00	108.00
	Oct.–Dec.	67.00	54.00
9/20/17 thru 9/19/18	Nov.–March	$201.00	$161.00
	April–June	151.00	121.00
	July–Sept.	101.00	81.00
	Oct.–Dec.	51.00	41.00
9/20/18 thru 9/19/19	Nov.–March	$134.00	$108.00
	April–June	101.00	81.00
	July–Sept.	67.00	54.00
	Oct.–Dec.	34.00	27.00
On or after 9/20/19	FREE		

LAWYERS NOT ADMITTED TO PRACTICE IN PA (ASSOCIATE MEMBERSHIP)

Not Admitted to PA Bar	Nov.–May	$175.00	N/A
	June–Dec.	88.00	N/A

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If you are a private practitioner in one of the counties listed, you must first be a member of a local bar assn. before joining the PBA. If you have any questions or need a referral to a local bar assn., please call 800-932-0311 or 717-238-6715.

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- ❑ Aeronautical & Space Law $20.00
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- ❑ Criminal Justice $35.00
- ❑ Education Law $15.00
- ❑ Elder Law $45.00
- ❑ Environmental & Energy Law $25.00
- ❑ Family Law $65.00
- ❑ Intellectual Property Law $45.00
- ❑ International & Comparative Law $15.00
- ❑ Labor & Employment Law $40.00
- ❑ Municipal Law $15.00
- ❑ Public Utility Law $35.00
- ❑ Real Property, Probate & Trust Law. $35.00
- ❑ Solo & Small Firm Practice $40.00
- ❑ Tax Law $15.00
- ❑ Workers' Compensation Law $30.00

❑ Check here if you are a new section member or you have not belonged to the selected section for five years or longer. You will receive a free, one-year section membership! (Limited to one free section membership.)

**Current as of Jan. 1, 2020; dues fees in effect until Dec. 31, 2020. Call PBA at 800-932-0311 or 717-238-6715 for current information.*

Join
The Real Property, Probate & Trust Law Section

of
The Pennsylvania Bar Association

The Real Property, Probate & Trust Law Section concentrates on landlord/tenant relations, environmental issues, eminent domain, and probate matters. Members are also active in improving the relationship between realtors and lawyers.

The *Real Property, Probate & Trust Law Newsletter*, published twice a year, keeps members up to date by recapping section activities and highlighting recent developments in the field.

An annual retreat is open to all section members. Networking with colleagues from around the state and attending educational workshops are other important advantages of section membership.

Any member of the Pennsylvania Bar Association is eligible to join the section, for just $35 dues per year. Simply fill out and return this form with your check.

Note: You must be a member of the Pennsylvania Bar Association to join.

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100 South St., P.O. Box 186
Harrisburg, PA 17108

For More Information Call PBA:
800-932-0311 (toll free in U.S.) or 717-238-6715

12/11

PBA Working Rules of Professionalism



The practice of law is a profession, a genuine calling inspirited with service to the system of justice, not a common business enterprise. The quality of the profession is only as worthy as the character of the people who practice it.

Self-esteem, shared respect for each other, the clients we serve, the judges and the officers with whom we work, are essential to it.

Civility is a virtue, not a shortcoming. Willingness to temper zeal with respect for society's interest in preserving responsible judicial process will help to preserve it.

Unwritten rules of professional courtesy have long sustained us. Since they are sometimes forgotten, we should set them down again and conscientiously observe them.

1 Treat with civility the lawyers, clients, opposing parties, the Court, and all the officials with whom we work. Professional courtesy is compatible with vigorous advocacy and zealous representation.

2 Communications are lifelines. Keep the lines open. Telephone calls and correspondence are a two-way channel; respond to them promptly.

3 Respect other lawyers' schedules as your own. Seek agreement on meetings, depositions, hearings and trial dates. A reasonable request for a scheduling accommodation should never be unreasonably refused.

4 Be punctual in appointments, communications and in honoring scheduled appearances. Neglect and tardiness are demeaning to others and the judicial system.

5 Procedural rules are necessary to judicial order and decorum. Be mindful that pleadings, discovery processes and motions cost time and money. They should not be heedlessly used. If an adversary is entitled to something, provide it without unnecessary formalities.

6 Grant extensions of time when they are reasonable and when they will not have a material, adverse effect on your client's interest.

7 Resolve differences through negotiation, expeditiously and without needless expense.

8 Enjoy what you are doing and the company you keep. You and the world will be better for it.

Beyond all this, the respect of our peers and the society which we serve is the ultimate measure of responsible professional conduct.