Eminent Domain - De Facto Taking - Easements

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EMINENT DOMAIN—DE FACTO TAKING—EASEMENTS—The Pennsylvania Supreme Court held that when an easement has been ambiguously granted, the grantee has a right to make any reasonable and necessary use of the land and is not limited by the grantee's subsequent agreement, use, or acquiescence of the land.


In 1958, Transcontinental Gas Pipeline Corporation ("Transco") acquired a pipeline right-of-way over property owned by Serfas Lumber Company ("Serfas") in Ross Township, Monroe County, Pennsylvania. Transco and Serfas entered into a written agreement setting forth terms and conditions of the right-of-way. Pursuant to the agreement, Transco cleared a one-hundred-foot-wide right-of-way and constructed its first pipeline in August of 1958. A second pipeline was constructed


2. Id. The relevant portions of the agreement read as follows:

   [Grantor] does hereby grant, bargain, sell, and convey unto TRANSCONTINENTAL GAS PIPELINE CORPORATION, a Delaware corporation, its successors and assigns, . . . a right of way and easement for the purposes of laying, constructing, maintaining, operating, repairing, altering, replacing, and removing pipelines . . . .

   There is included in this grant the right, from time to time, to lay, construct, maintain, operate, alter, repair, remove, change the size of, and replace one or more additional lines of pipe approximately parallel with the first pipeline laid by the Grantee hereunder . . . .

   The Grantee shall have all other rights and benefits necessary for the full enjoyment or use of the rights herein granted, including, but without limiting the same to, the free and full rights of ingress, egress, and regress over and across said lands and other lands of the grantor to and from said right from time to time to cut and remove all trees, undergrowth and other obstructions that may injure, endanger, or interfere with the construction, operation, maintenance and repair of said pipelines . . . .

   Grantee agrees to bury said pipelines below normal plow depth and to pay for physical harm to growing crops, timber, fences, or other structural . . . improvements caused by construction, operation, repairing, alteration, or replacement or removal of said pipelines and appurtenant facilities.

   Id. (quoting the agreement between Serfas and Transco) (alteration in original).

3. Id.
by Transco in August of 1971,4 and a third in 1991.5 During the construction of the third pipeline, Transco cleared an additional thirty feet of woods adjacent to the original one-hundred-foot-wide right-of-way.6

The Zettlemoyers acquired the property from Serfas by separate deeds in December of 1985 and January of 1988.7 On July 3, 1991, the Zettlemoyers filed a petition for the appointment of viewers8 in the Court of Common Pleas of Monroe County, alleging that the clearing of the additional thirty feet, during the construction of the third pipeline, constituted a de facto condemnation9 requiring additional compensation.10

A Board of Viewers was appointed by the court of common pleas, and Transco filed preliminary objections to the appointment.11 After considering Transco's objections, the court of common pleas dismissed the Zettlemoyers' petition for an appointment of viewers, and held that the clearing of a one-

4. Id. The second pipeline was built twenty-five feet from the first pipeline. Id.
5. Id. All three pipelines were constructed within the first one-hundred-foot-wide right-of-way which was maintained by Transco on the property since 1958. Id.
6. Zettlemoyer, 657 A.2d at 922. Transco maintained that it was necessary to clear the additional area so that construction equipment could safely maneuver in constructing the third pipeline. Id.
7. Id. The Zettlemoyers took title to the property subject to Transco's right-of-way. Id.
8. Id. The petition for the appointment of viewers was filed pursuant to Section 1-502 of the Eminent Domain Code which reads, in pertinent part: "The Condemnee may file a petition requesting the appointment of viewers . . . to ascertain just compensation." Id. at 923 n.1 (citing PA. STAT. ANN. tit. 26, § 1-502(a)(6) (1995)).
9. Id. at 923. A de facto condemnation takes place whenever "the entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property." Id. (citing Redevelopment Auth. v. Woodrung, 445 A.2d 724, 727 (Pa. 1982)). A board of viewers is comprised of "persons appointed by a court to make an investigation of certain matters . . . and to report to the court the result of their inspection, with their opinion on the same." BLACK'S LAW DICTIONARY 1568 (6th ed. 1990).

Any objection to the appointment of viewers not theretofore waived may be raised by preliminary objections filed within twenty days after the receipt of notice of the appointment of viewers. Objections to the form of the petition or the appointment or the qualifications of the viewers are waived unless included in preliminary objections. The court shall determine promptly all preliminary objections and make such orders and decrees as justice shall require. Id. at 923 n.2 (quoting PA. STAT. ANN. tit. 26, § 1-504 (1995)).
hundred-and-thirty-foot-wide area was the minimum area necessary for the use and enjoyment of the right-of-way.\textsuperscript{12}

The Zettlemoyers appealed to the Commonwealth Court of Pennsylvania.\textsuperscript{13} The commonwealth court reversed the court of common pleas and held that, because the easement was maintained at a one-hundred-foot width for thirty-three years, this had the effect of establishing the extent of the agreement.\textsuperscript{14} Therefore, the court held that the additional clearance by Transco constituted a de facto condemnation of the Zettlemoyers' land, necessitating compensation.\textsuperscript{15}

Transco appealed to the Supreme Court of Pennsylvania, which granted allocatur\textsuperscript{16} to determine whether Transco committed a de facto condemnation of the Zettlemoyers' land by clearing an additional thirty feet beyond the one-hundred-foot-wide right-of-way that had been maintained on the Zettlemoyers' land by Transco since 1958.\textsuperscript{17} The supreme court opined that the clearing of additional land by Transco was necessary to fulfill the purpose of the easement and, as such, was within the rights granted by the easement.\textsuperscript{18}

The supreme court began its analysis with an acknowledgment that when the width of an easement has been unequivocally specified in a grant, an easement may not be expanded beyond that size, even though such width would not facilitate the grantee's purposes and enjoyment.\textsuperscript{19} However, the court noted, if the terms of an agreement are unclear in specifying the width of an easement, prior Pennsylvania cases have indicated that an initial inquiry should include a determination of whether the parties intended the asserted use of the land.\textsuperscript{20} The court stated that once that determination has

\begin{itemize}
  \item \textsuperscript{12} Zettlemoyer, No. 2772 Civ. 1991, slip op. at 6.
  \item \textsuperscript{14} Zettlemoyer, 617 A.2d at 51.
  \item \textsuperscript{15} Id. The court relied on Pennsylvania Water & Power Co. v. Reigart, 193 A. 311 (Pa. 1937) (holding that parties to a deed granting a right-of-way without specifying its width may establish the width by subsequent use and acquiescence). \textit{Id.} at 54.
  \item \textsuperscript{16} Zettlemoyer, 657 A.2d at 923. Allocatur is a word used to denote that a writ or order is allowed. \textit{BLACK'S LAW DICTIONARY} 75 (6th ed. 1990).
  \item \textsuperscript{17} Zettlemoyer, 657 A.2d at 923. The court granted allocatur because the decision of the commonwealth court conflicted with a prior decision by the commonwealth court, Bowers v. Texas E. Transmission Corp., 611 A.2d 1350, 1352 (Pa. Commw. Ct. 1992), which held that a pipeline company is not limited to its original clearing of a right-of-way if additional clearing would be necessary and reasonable for the installation of additional pipelines. \textit{Id.}
  \item \textsuperscript{18} \textit{Id.} at 924.
  \item \textsuperscript{19} \textit{Id.}
  \item \textsuperscript{20} \textit{Id. See, e.g.,} Taylor v. Heffner, 58 A.2d 450 (Pa. 1948) (holding that when
\end{itemize}
been made, it must be shown that the asserted use is reasonable and necessary to effectuate the purpose of the grant.\textsuperscript{21}

The court next examined the written agreement between the parties to ascertain their intent.\textsuperscript{22} Based on the clear language of the agreement, the court held that Transco was granted the right to construct the third pipeline across the Zettlemoyers’ land.\textsuperscript{23} Further, even though the language of the grant was ambiguous in specifying the width of the easement, the court held that the agreement indicated that the parties intended to permit Transco to clear additional land if it would be reasonable and necessary to effectuate the purpose of the agreement.\textsuperscript{24}

Addressing the issue of whether the additional clearing was, in fact, reasonably necessary to achieve the purpose of the agreement, the court held that the record supported the conclusion that clearing an additional thirty feet was a reasonable action by Transco and was necessary to facilitate the construction of the third pipeline.\textsuperscript{25} The court reasoned that because the purpose of the agreement was to facilitate the

\textsuperscript{21} Zettlemoyer, 657 A.2d at 924.
\textsuperscript{22} Id.
\textsuperscript{23} Id. The court cited the language in the agreement that stated: “[I]ncluded in this grant [is] the right from time to time . . . to construct . . . one or more additional lines of pipe approximately parallel with the first pipe.” Id. at 925. As evidence of the parties’ apparent contemplation of the possibility of the need to clear additional land when constructing pipelines, the court cited to the portion of the agreement that provided a remedy for “any physical damage to growing crops, timber, fences, or other structural . . . improvements caused by construction.” Id. The court also referenced the portion of the agreement which granted to Transco “all other rights and benefits necessary or convenient for the full enjoyment or use of the rights herein granted, including . . . the right from time to time to cut and remove all trees, undergrowth, and other obstructions that may injure, endanger, or interfere with the construction . . . of said pipeline.” Id.
\textsuperscript{24} Id. The trial court determined that the width of the area cleared by Transco was the minimum area necessary for the full use and enjoyment of the easement. Id. (citing Zettlemoyer, No. 2772 Civ. 1992, slip op. at 6). The court’s holding was based on Transco’s contention that it was necessary to clear an additional thirty feet in order to safely maneuver its construction equipment during the construction of the third pipeline. Id. Expert testimony was introduced by Transco that confirmed that the additional clearing was, in fact, necessary to prevent construction equipment from operating on top of the two existing pipelines and to prevent dirt from being piled on top of the two existing pipelines during the construction of the third pipeline. Id.
construction of gas pipelines across the property owned by the Zettlemoyers, denying Transco the right to clear additional land necessary to fulfill that purpose would defeat Transco's intent.  

Finally, the court addressed the Zettlemoyers' contention that Transco had conclusively established the width of the right-of-way by maintaining it at a width of one hundred feet since 1958. The court dismissed this argument, holding that subsequent agreement, use, and acquiescence of an easement does not, as a matter of law, establish the width of the easement when a written agreement between the parties does not expressly set forth the terms of the easement. The court supported its holding by citing prior case law which had consistently held that in cases involving ambiguously expressed easements, the width of an easement is determined by the parties' intended purpose of the grant, not by subsequent agreement, use or acquiescence of the land. The court also held that although a grantee's subsequent use and acquiescence has some evidentiary value as to the parties' intent or the purpose of the grant, the grantee has the right to make any reasonable and necessary use of an easement, provided that such use is within the purpose of the easement and the parties' original intent.

The court declared that, in the instant case, the language of the agreement was clearer evidence of the parties' intent than Transco's subsequent use and acquiescence. The court based its finding on the specific language of the agreement, which granted Transco the right to build and maintain additional

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27. Id. In effect, the Zettlemoyers argued that because Transco had maintained the easement at a one-hundred-foot width since 1958, the easement was permanently limited to such width, and any attempt by Transco to widen the easement would result in a de facto taking of the Zettlemoyers' property. Id.
28. Id. The "subsequent agreement, use, and acquiescence" argument was based on the theory that when a right-of-way is expressly granted, but its exact size is not specified in the grant, the parties may determine the limits by the use of the land after the grant is made. Zettlemoyer, 617 A.2d at 53.
29. Zettlemoyer, 657 A.2d at 925.
30. Id. See Lease v. Doll, 403 A.2d 558 (Pa. 1979) (holding that failure to immediately use an easement to its fullest extent does not limit the scope of the easement); Hammond v. Hammond, 101 A. 855 (Pa. 1917); Bowers v. Myers, 85 A. 860 (Pa. 1912) (holding that the fact that a grantee had used a right-of-way for one purpose for many years did not restrict its use to that purpose only).
31. Zettlemoyer, 657 A.2d at 926.
32. Id. The court also rejected the Zettlemoyers' contention that permitting additional clearance of land would grant Transco permission to clear away all of their land. Id. The court did so by emphasizing that the holding in this case would limit Transco to actions that were reasonable and necessary to fulfill the purpose of the agreement within the parties' original intent. Id.
pipelines, provided a remedy for any damage to the surrounding areas as a result of the construction of additional pipelines and the right to remove trees and other growth in order to facilitate construction of pipelines.\textsuperscript{33}

The supreme court reversed the commonwealth court.\textsuperscript{34} The court reinstated the decision of the trial court, holding that the clearing of the additional land by Transco was within the rights granted in the easement because Transco's actions were necessary to fulfill the purpose of the easement.\textsuperscript{35}

The development of the law of easements, granted expressly by deed, but undefined in terms of location and size, began with the Supreme Court of Pennsylvania's decision in \textit{Kraut's Appeal}.\textsuperscript{36} In \textit{Kraut's Appeal}, the supreme court addressed the issue of whether a grantee of an undefined easement can establish the limits of the grant by subsequent agreement, use and acquiescence.\textsuperscript{37} In \textit{Kraut's Appeal}, a property owner conveyed an unspecified right-of-way over his "remaining ground" to John Kraut ("Kraut") in order to facilitate the removal of filth from Kraut's privy.\textsuperscript{38} Kraut had originally used a vacant portion of the property owner's "remaining land" to carry the filth from his privy, but this portion was subsequently conveyed by the property owner to another party.\textsuperscript{39} In order to assist Kraut, the property owner opened a passage through his house which Kraut used twice for removing the filth from the privy.\textsuperscript{40} After the property owner's death, Matthew Craig ("Craig") obtained title to the land occupied by the property

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{34} \textit{Id.} at 927.
  \item \textsuperscript{35} \textit{Id.}
  \item \textsuperscript{36} 71 Pa. 64 (1872).
  \item \textsuperscript{37} \textit{Kraut's Appeal}, 71 Pa. at 67-68.
  \item \textsuperscript{38} \textit{Id.} at 66. Part of the property owner's "remaining ground" was vacant and part was occupied by a house in which the property owner lived. \textit{Id.} The precise language of the deed granted Kraut a passage "through, over and across the grantor's remaining ground . . . with the grantor's knowledge and consent and in exercise of the privilege granted to the grantee for the purpose of conveying filth . . . into the street." \textit{Id.} A privy is defined as "a small often detached building having a bench with one or more round or oval holes through which the user may defecate or urinate, and ordinarily lacking any means of automatic discharge of the matter deposited." \textsc{webster's new international dictionary} 1805 (3d ed. 1986).
  \item \textsuperscript{39} \textit{Kraut's Appeal}, 71 Pa. at 68. The conveyance was made with a covenant of special warranty, without the burden of the right-of-way previously granted by the property owner to Kraut. \textit{Id.} A covenant of special warranty is a clause of warranty inserted in a deed by which the grantor covenants, for himself and his heirs, to "warrant and forever defend" the title to the same, to the grantee and his heirs, against all persons claiming "by, through, or under" the grantor or his heirs. \textsc{black's law dictionary} 1589 (6th ed. 1990).
  \item \textsuperscript{40} \textit{Kraut's Appeal}, 71 Pa. at 66.
\end{itemize}
Recent Decisions

Kraut had not used the passage through the house after Craig obtained title to the land, and was denied such use by Craig when he finally attempted to do so. The supreme court held that when a right-of-way has been expressly granted, but its exact location and size are not specified in the grant, the intent of the parties in establishing the grant is controlling. The court initially determined that a reasonable reading of the parties' intent indicated that the right-of-way should be exercised over the vacant portion of the land and not the portion occupied by a residence. However, the court further held that the parties could ultimately define the location and size of a right-of-way by subsequent agreement, use and acquiescence. Therefore, the court opined that because a vacant portion of the land had been conveyed without the burden of reservations or conditions, the property owner clearly intended that the vacant portion of the land be discharged from the burden of the right-of-way. In addition, the court noted that Kraut had ceased to use the vacant land as a passage and had, instead, used the passage created by the property owner through the house as a path on which to carry the filth. The court held that this subsequent use defined the location and size of the right-of-way, and therefore Kraut retained a passage through the house in order to fulfill the purpose of the grant.

Subsequent decisions by the Supreme Court of Pennsylvania, however, rejected the "subsequent agreement, use, and acquiescence" argument set forth in Kraut's Appeal. In Benner v. Junker, the supreme court addressed the issue of whether a grantee's use of an easement is limited to its original use or

41. Id. Craig received title to the land through sale and conveyance from the property owner. Id.

42. Id. at 65. Craig had been in the possession of the land for over ten years, during which time Kraut had failed to use the passage through the house for the removal of filth. Id. at 66. Craig denied that the prior property owner made a passage for Kraut to carry the filth through the house he now owned. Id. at 65. Further, Craig claimed that the words of the deed "over and across the remaining ground" did not give Kraut the right to carry the filth through the house. Id.

43. Id. at 67. The court determined that the parties' intent is to be ascertained from the general terms of the grant, the condition of the ground at the date of the deed, and reasonable construction and inferences. Id.

44. Id.

45. Kraut's Appeal, 71 Pa. at 68.

46. Id. The burden would then necessarily be placed upon the remaining portion of land to which the property owner retained title. Id.

47. Id.

48. Id.

49. 43 A. 72 (Pa. 1899).
whether an easement can be used in any reasonable manner.\textsuperscript{50} In \textit{Benner}, the parties jointly owned a piece of property comprised of two lots on which two houses were erected.\textsuperscript{51} The houses were separated by an alley three-feet in width.\textsuperscript{52} The house on Samuel Benner's ("Benner") lot had always been used as a residence.\textsuperscript{53} The house on Jules Junker's ("Junker") property had been used as a residence for almost forty years until Junker's father established a bakery in the structure.\textsuperscript{54} Benner sought to enjoin Junker from using the alley for the business purpose of loading and unloading delivery wagons.\textsuperscript{55}

The supreme court held that because the deed to the property contained no restrictions as to the use of the alley, the parties could make any reasonable use of the alley, as long as the use was in furtherance of the original purpose of the grant.\textsuperscript{56} In this case, the court opined that the original intent of the parties was to create a common passageway for the occupants of both lots.\textsuperscript{57} Further, the court noted that although both lots had originally been maintained as residences, it would be unreasonable to assume that the alley could only be used as a convenience for those who maintained residences on the land.\textsuperscript{58} The court held that a reasonable interpretation of the grant would permit the use of the alley to facilitate the convenience for those who attempted to make any other use of the land.\textsuperscript{59}

In \textit{Hammond v. Hammond},\textsuperscript{60} the Supreme Court of Pennsylvania addressed the issue of whether a grantee of an undefined right-of-way has the right to do whatever is necessary to fulfill the purposes of the easement as named in the grant.\textsuperscript{61}

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\item \textsuperscript{50} \textit{Benner}, 43 A. at 73.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.} The parties held joint title to the property on which both of their houses were built, but the deed to the land did not mention the alley. \textit{Id.} The alley was located on an equal portion of each party's land, such that neither party had more access to the alley than the other. \textit{Id.}
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Benner}, 43 A. at 72. Benner claimed that the process of loading and unloading wagons created noise and confusion, often awakening him from his sleep. \textit{Id.} Benner also complained of the smell from the horses which pulled the delivery wagons. \textit{Id.}
\item \textsuperscript{56} \textit{Id.} The court limited its holding by stating that although Junker could use the property in any reasonable manner, such use could not prevent Benner from exercising his own right of reasonable use. \textit{Id.} at 73.
\item \textsuperscript{57} \textit{Id.} at 72-73.
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} 101 A. 855 (Pa. 1917).
\item \textsuperscript{61} \textit{Hammond}, 101 A. at 856.
\end{itemize}
In *Hammond*, Martin Hammond (the "father"), the owner of a large farm, conveyed by deed a portion of his farm to Philip Hammond (the "son"). Because the premises conveyed were landlocked, the father also conveyed to the son a right-of-way over a creek owned by the father in order to have access to a public road. The language of the deed did not include any limits on the use of the easement. Twenty-one years after the conveyance, the son built a bridge across the creek as a means of safer and quicker passage. Shortly thereafter, a flood occurred, and the son's bridge obstructed the flow of water and resulted in damage to the father's premises.

In addressing the issue of whether the son had a right to build a bridge across the creek, the court held that a grantee of an undefined right-of-way has the right to do whatever is necessary in order to make the right-of-way usable for the purposes named in the grant. Based upon the language in the deed, the court determined that the clear intent of the grant was to provide a safe and convenient access to a public road for the residents of the land, and a bridge was necessary to fulfill that purpose. Further, the court determined that the fact that a bridge was not built by the son immediately after the conveyance did not mean that the son was precluded from doing so at a later date, if such action furthered the original purpose of the grant.

In 1937, in *Pennsylvania Water & Power Co. v. Reigart*, the Superior Court of Pennsylvania addressed the issue of whether parties to a deed, in which a right-of-way was expressly granted but not defined in terms of location and size, may define such

62. *Id.*
63. *Id.*
64. *Id.* The language of the deed provided: "[T]he said Philip A. Hammond, his heirs and assigns, is to have the free and uninterrupted use, liberty, and privilege of a road twenty feet in breadth from the said premises across the creek to the public road, now, hereafter, and forever." *Id.*
65. *Id.* Prior to the erection of the bridge, the only means of crossing the creek were by buggy, horseback, or use of a log foot-bridge. *Id.* These methods of passage were unsafe and often difficult in times of flooding. *Id.*
67. *Id.* at 856-57. The court stated that had the father wanted to limit the grant in such a way as to exclude the building of a bridge, he could have done so by changing the words of the grant. *Id.* at 856.
68. *Id.* at 856.
69. *Id.* The court held that neither the fact that the bridge did not exist at the time of the conveyance, nor the fact that the son managed to access the public road for twenty-one years without a bridge was controlling. *Id.*
limitations by subsequent agreement, use, and acquiescence.\textsuperscript{71} In \textit{Reigart}, Mathias Reigart ("Reigart") granted to the Pennsylvania Water \& Power Company (the "power company") a right-of-way for the construction and maintenance of lines used for the transmission of electrical current.\textsuperscript{72} According to the terms of the grant, only one utility tower was to be built on the property.\textsuperscript{73} The tower was built shortly after the grant was made and maintained on the land for over twelve years.\textsuperscript{74} In 1935, however, the power company installed a system of lightning arresters\textsuperscript{75} on the land which extended the right-of-way twenty-five feet beyond the area that had been used by the power company for the previous twelve years.\textsuperscript{76} Despite the supreme court's holdings in \textit{Benner} and \textit{Hammond}, the superior court held that because the right-of-way was granted in general terms and without precise location and size limits, the extent and mode of the use of the right-of-way was fixed by the power company's subsequent use of the land for twelve years.\textsuperscript{77}

\textsuperscript{71} \textit{Reigart}, 193 A. at 313.

\textsuperscript{72} \textit{Id.} The pertinent language of the deed set forth the following:

\begin{quote}
[A] free and uninterrupted right of way on, over, and through said land for the purpose of constructing, maintaining, and operating on said right of way a line or lines for the transmission of electric current, as well as telephone and telegraph lines; together with all necessary towers, structures, poles, hangers, wires, cables, attachments and other appliances. The said right of way to be located by engineers of grantee, his heirs, and assigns.
\end{quote}

\textit{Id.} The deed also granted to the power company a right of entry for the purpose of "constructing, maintaining and operating the lines, the right to cut or trim trees and underbrush on the way, and the right to build from time to time on said right of way such additional transmission, telephone and telegraph lines as [the grantee] may wish and determine." \textit{Id.}

\textsuperscript{73} \textit{Id.} The tower was to be erected in an area which was specified on a blue-print that was attached to the deed. \textit{Id.}

\textsuperscript{74} \textit{Id.} The tower was approximately ninety-six feet in height and twenty feet square at the base. \textit{Id.} The base of the tower extended ten feet on each side of its center line. \textit{Id.} Three cross arms were placed sixty feet from the ground. \textit{Id.} The cross arms had a spread of approximately twenty-seven feet, thirteen and one-half feet on each side of the center line. \textit{Id.}

\textsuperscript{75} \textit{Id.} The lightning arresters consisted of two pairs of wires which were attached to the legs of the tower on each side at a maximum distance of twenty-five feet from the center line of the right-of-way. \textit{Id.}

\textsuperscript{76} \textit{Reigart}, 193 A. at 313. The power company contended that the lightning arresters were necessary because the transmission of current was frequently interrupted when the lines were struck by lightning. \textit{Id.} The lines were struck by lightning so frequently that there was often an interference with the delivery of current. \textit{Id.} After the wires were installed, the number of interruptions due to lightning was reduced to a fraction of what it had been previously. \textit{Id.}

\textsuperscript{77} \textit{Id.} at 314. The superior court's holding was based on the decision in \textit{Kraut's Appeal}. \textit{Id.} Although the supreme court's decisions in \textit{Benner} and \textit{Hammond} directly conflicted with that court's holding in \textit{Kraut's Appeal}, the superior court did not have to adhere to the test set forth in \textit{Benner} or \textit{Hammond}, because neither \textit{Benner} nor \textit{Hammond} expressly overruled \textit{Kraut's Appeal}. \textit{Id.} The court held that
Therefore, the superior court concluded that the installation of the lightning arresters created an additional burden on the servient land for which the owner was entitled to compensation.\textsuperscript{78}

In \textit{Lease v. Doll},\textsuperscript{79} the Supreme Court of Pennsylvania addressed the issue of whether a grantee's use of an easement is limited to the use the grantee had made of the easement in the past.\textsuperscript{80} Once again, the court affirmed its position that an ambiguously granted easement may be used in any reasonable manner and is not limited by subsequent agreement, use and acquiescence.\textsuperscript{81} However, the court expanded its prior holding and stated that a grantee does not have to make immediate use of an easement to the fullest extent possible.\textsuperscript{82} Rather, the court held that a grantee is entitled to make any reasonable use of the easement at any time, provided that such use is within the scope of the parties' intent and the purpose of the grant.\textsuperscript{83}

In \textit{Lease}, Charles Lease ("Lease") purchased a plot of land contiguous with John Doll's ("Doll") land.\textsuperscript{84} Lease's land was completely landlocked, but a deed conveying title to Lease expressly granted him a right-of-way over Doll's adjoining land.\textsuperscript{85} For over twenty years, the right-of-way was used as a footpath for travelling between Lease's land and a public road.\textsuperscript{86} When Lease attempted to prepare the right-of-way for vehicular use, Doll erected a fence on the property, effectively limiting the right-of-way to a footpath.\textsuperscript{87} The court viewed the intended use of the easement as the key issue in determining whether the right-of-way was limited to the area necessary for a

\textsuperscript{78} Id.
\textsuperscript{79} 403 A.2d 558 (Pa. 1979).
\textsuperscript{80} Lease, 403 A.2d at 558.
\textsuperscript{81} Id. at 562-63.
\textsuperscript{82} Id. at 562 n.9.
\textsuperscript{83} Id. at 564.
\textsuperscript{84} Id. at 560.
\textsuperscript{85} Lease, 403 A.2d at 560. A common owner had title to both lots, and had reserved a portion of the land owned by Doll, enabling the common owner to grant to Lease the right-of-way over the Doll land. Id. The deed stated: "That the grantees and their successors may at all times have the right to use [the right-of-way] as an outlet from the premises hereby conveyed to the public road." Id.
\textsuperscript{86} Id. Access to Lease's land continued to be by foot, even after motor vehicles were in general use. Id. at 561.
\textsuperscript{87} Id. at 561. Lease had dumped stones on the existing pathway and its surrounding area, enlarging the pathway to a width sufficient for vehicular use. Id.
footpath or if the right existed to expand the width of the easement sufficient for vehicle passage. The court determined that if the width of an easement is not specified in a grant, an easement would be considered to be of such width as is necessary and convenient for any reasonable use to accommodate the intended purpose of the easement. The court noted that because the purpose of the easement was to provide an outlet from Lease's land to the public road, vehicular use of the right-of-way was reasonable, even though the right-of-way had been used only as a footpath in the past. Additionally, the court indicated that the fact that Lease did not immediately use the easement to its fullest potential did not diminish the scope of the easement.

The court's holding in Lease appeared to have the effect of abrogating the determination of the limits of an ambiguous easement on the basis of "subsequent agreement, use and acquiescence." According to the court's holding in Lease, a grantee may, at any time, make any reasonable use of an easement, provided that such use is in fulfillment of the parties' intent and the original purpose of the grant.

Recently, in Bowe r v. Texas Eastern Transmission Corp., the Commonwealth Court of Pennsylvania addressed the issue of how to determine the extent of an ambiguously granted easement. In Bowe r s, a property owner conveyed an easement to Texas Eastern Transmission Corporation's ("Texas Eastern") predecessor in title by deed in 1943 for the purpose of laying a gas pipeline. Shortly after the conveyance, Texas Eastern's

88. Id. at 561 n.5.
89. Id. at 561-62. The court stated that the determination of a reasonable width should be ascertained by "taking into consideration the character and situation of the property, the circumstances affecting the use, and the purposes to be served." Id. at 561 n.5.
90. Lease, 403 A.2d at 562-63. The court based its decision in part on the fact that such use would not unreasonably interfere with Doll's use of his land and also on the fact that Lease's land would be rendered useless for all practical purposes if vehicular traffic was prohibited. Id. at 564.
91. Id. at 562-63 n.9.
92. Id. at 563 n.10.
93. Id. at 561.
95. Bowers, 611 A.2d at 1351-52.
96. Id. at 1351. The grant stated:
[T]he right to lay, operate, renew, alter, inspect and maintain a pipeline for the transportation of . . . gas, Grantee selecting the route, upon, over, under and through the [landowner's total tract of land] and also the right . . . to lay, operate, renew, alter, inspect, and maintain a second pipeline for like transportation, adjacent to and parallel with the first pipeline; and Grantee at any and all reasonable times shall have the right to ingress and egress to and
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predecessor in title constructed two pipelines stretching three
tenths of a mile onto the adjacent property owned by the
easement grantor.\textsuperscript{97} Over forty years later, Texas Eastern
cleared an additional one hundred and twenty-five feet of the
property owner's land in order to replace one of the original
pipelines with a new pipeline.\textsuperscript{98} The property owner alleged
that Texas Eastern was limited to the original forty-foot-wide
path used by Texas Eastern and its predecessor in title under
the easement for over forty years.\textsuperscript{99}

The commonwealth court, consistent with the supreme court's
decisions in \textit{Hammond} and \textit{Lease}, rejected the property owner's
argument that when an easement is granted in ambiguous
terms, the easement is limited by use and acquiescence.\textsuperscript{100} The
court held, instead, that when the terms of an easement are
ambiguous, the easement may be used in any manner that is
reasonable and consistent with the original purpose for which
the easement was originally granted.\textsuperscript{101}

Thus, by 1992, the "subsequent agreement, use and
acquiescence" argument appeared to have been replaced by a
"reasonable and necessary" standard in resolving the scope of an
ambiguous easement.\textsuperscript{102} The "reasonable and necessary"
standard was used to determine the extent of ambiguously
granted easements.\textsuperscript{103} However, the commonwealth court's
opinion in \textit{Zettlemoyer} failed to take into consideration the cases
rejecting the "subsequent agreement, use and acquiescence"
argument, and, instead, held that when a right-of-way is
expressly granted, but its exact dimensions are not set forth in
the grant, the parties may define the dimensions of the right-of-
way by subsequent agreement, use and acquiescence.\textsuperscript{104}
Because this decision directly conflicted with the commonwealth
court's holding in \textit{Bowers}, the supreme court granted allocatur.\textsuperscript{105}

\begin{itemize}
\item from such pipelines . . . .
\item Id.
\item 97. Id. The original two pipelines were twenty inches in diameter. \textit{Id.} A forty-foot strip of land was maintained by Texas Eastern and its predecessor in title to provide access to the pipelines. \textit{Id.}
\item 98. Id. The original grant was made in 1943, and the additional clearing took place in 1989. \textit{Id.} The new pipeline was thirty-six inches in diameter, sixteen inches larger than the original pipeline. \textit{Id.}
\item 99. Id. at 1351-52.
\item 100. \textit{Bowers}, 611 A.2d at 1351.
\item 101. Id. at 1352.
\item 102. See \textit{Zettlemoyer}, 657 A.2d at 926.
\item 103. See \textit{Lease}, 403 A.2d at 561-62.
\item 104. \textit{Zettlemoyer}, 617 A.2d at 54 (citing \textit{Reigart}, 193 A. at 311).
\item 105. \textit{Zettlemoyer}, 657 A.2d at 923.
\end{itemize}
The supreme court’s decision in *Zettlemoyer* conclusively establishes the proper test for determining the extent of an easement when the width of an easement is not specified in the grant. When a grant of an easement is ambiguous, the *Zettlemoyer* opinion makes it clear that the proper test is whether a grantee’s asserted use is a reasonable and necessary use in relation to the original purpose of the grant and within the intent of the original parties to the grant.\(^6\)

The *Zettlemoyer* opinion is significant because it effectively eliminated the “subsequent agreement, use and acquiescence” test as a means for ascertaining the extent of an easement. As a result of *Zettlemoyer*, the value of subsequent agreement, use and acquiescence has been effectively limited to a mere source of extrinsic evidence of the parties’ original intent and the purpose of the grant.\(^7\) This clarification of the proper test was necessary because the opinions in *Kraut’s Appeal* and *Reigart* supported the “subsequent agreement, use and acquiescence” argument and these opinions had never been expressly overruled. As a result, these early decisions were still being cited as a source of authority. While the decisions in *Kraut’s Appeal* and *Reigart* remain intact, the court’s opinion in *Zettlemoyer* appears to have completely rejected the “subsequent agreement, use and acquiescence” argument, leaving these cases devoid of any precedential value.

In addition, the test set forth in *Zettlemoyer* more closely mirrors the rules of construction that are applicable to easement grants than did the “subsequent agreement, use and acquiescence” test.\(^8\) These rules of construction provide that if the location and size of an easement are specified in a grant, then clearly a grantee’s use of an easement is limited to the specifications.\(^9\) If, however, the language of a granting deed is ambiguous regarding size and location, then the rules of construction provide that the intent of the parties as to the original purpose of a grant is a controlling factor in determining

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106. *Id.* at 924.
107. *Id.* at 926.
108. *Id.* The rules of construction that apply to easement grants are the same rules that apply to the construction of contracts. *Id.* at 924 (citing Sigal v. Manufacturer’s Light and Heat Co., 299 A.2d 646 (Pa. 1973) (holding that the same rules of construction that apply to contracts are applicable in the construction of easement grants) and Percy A. Brown & Co. v. Raub, 54 A.2d 35 (Pa. 1947) (holding that canons of construction used in the interpretation of easements are the same canons used in the interpretation of contracts)).
109. *Id.* at 924.
the extent of an easement.\textsuperscript{110}

Thus, while the "subsequent agreement, use and acquiescence" test ignored the parties' intent and, instead, focused on the parties' actions, the test set forth in \textit{Zettlemoyer} is practically identical to the rules of construction for easement grants. This close resemblance will favorably result in consistency among Pennsylvania courts when addressing this issue.

However, the \textit{Zettlemoyer} court failed to take into consideration those cases in which the parties' intent or the original purpose of a grant is unascertainable. This could be a frequent occurrence because more likely than not the parties to this type of action are not the original property owners. Clear evidence of intent may be difficult to obtain, particularly if the parties obtained title to the properties in question decades, or even centuries, after the grant was made. Furthermore, in such cases the original purpose of a grant may have been outmoded through the passage of time.

The \textit{Zettlemoyer} opinion may be used as a basis for a court to reject a reasonable use of an easement if there is evidence to show that the use was not the original purpose of an easement. The "subsequent agreement, use and acquiescence" test would be a more effective means of determining the extent of an easement when the parties' intent is not easily ascertainable or if the original purpose of the easement had been antiquated. Perhaps in the future the use of the test set forth in \textit{Zettlemoyer} may be limited in its application to those cases in which the parties' intent as to the original purpose of the grant may be easily determined. When such factors are unable to be determined, the use of an easement over a long period of time in a particular manner ought to be a controlling factor. In those instances, the most equitable remedy may be obtained by the utilization of the "subsequent agreement, use and acquiescence" test.

\textit{Melissa J. Ferragonio}

\textsuperscript{110} \textit{Zettlemoyer}, 657 A.2d at 926.