

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL DIVISION**

GARY M. PANIK,  
VITALY V. VJUNICHENKO AND  
GUEORGUI IVANOV,  
Plaintiffs

vs.

NO. 20-2123

RONALD F. GILBERT, CAROL A. WITHERS,  
ANDREW P. HINES, SR., WENDY J. HINES,  
LORRAINE GAY BARBELLA, JOHN R.  
HORNE and JOANNA E. HORNE,  
Defendants

and

PATRICK SHERIDAN and RUTH SHERIDAN,  
Additional Defendants

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Pro se

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Pro se

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Counsel for Ruth Sheridan

**MEMORANDUM OPINION**

Nanovic, P.J. – June 16, 2026

Plaintiffs in these proceedings own adjacent lots in a residential subdivision which Plaintiffs claim are inaccessible from the private subdivision road on which their properties front due to topography. Whether Plaintiffs have a viable cause of action for a right-of-way across other properties in the subdivision to gain access to their lots is the principal

issue we address in this opinion. “An easement may be created 1) expressly; 2) by prescription; 3) by necessity; or 4) by implication.” Phillippi v. Knotter, 748 A.2d 757, 758 (Pa.Super. 2000), appeal denied, 760 A.2d 855 (Pa. 2000). All four are in question here.

### **PROCEDURAL AND FACTUAL BACKGROUND**

On December 7, 1989, the Towamensing Township Supervisors approved the final subdivision plan for LaBelle Montage, a private residential development in Towamensing Township, Carbon County, Pennsylvania (referred to interchangeably hereafter as the “Development” and the “Subdivision”), submitted by Ronald F. Gilbert and Carol A. Withers (the “Gilberts”), owners and developers of the property in the Subdivision. This plan was recorded in the Carbon County Recorder of Deeds Office on January 3, 1990, in Map Book 2, Page 182. (the “Original Plan” and/or the “Original Subdivision Plan”).

The Subdivision consists of 26 numbered lots varying in size from 1.001 acres, Lot Number 25, to 5.322 acres, Lot Number 18, which is designated on the Original Subdivision Plan as a recreation lot. Relevant to this litigation, Lot Numbers 6, 7 and 18 on their southern boundaries all front on La Montage Drive, a 40 foot wide right-of-way surrounding approximately seventy-five percent of the Development – including all of its eastern and northern boundaries – and ending on the western side, approximately halfway down, in a cul-de-sac (the “Cul-de-Sac”). Lot Numbers 6, 7 and the lower half of Lot Number 18, later re-numbered as Lot Number 18-B, are currently owned by the Plaintiffs.

In addition to Lot 18's frontage on La Montage Drive on its southern end as laid out in the Original Plan, a 40 foot wide strip of land, 160.08 feet in length, juts out from Lot 18 on its western side and connects with the eastern side of the Cul-de-Sac, thereby

providing an additional means of direct access to Lot 18 from a subdivision road. Lot Number 19, a 1.401 acre lot, lies on the northern side of this 40 foot wide access strip and, in addition to being bounded on its southern and eastern sides by Lot 18, is bounded by La Montage Drive and the Cul-de-Sac on its western side, and Whispering Woods Drive, another subdivision road, on its north. Lot Number 5, a 1.528 acre lot, lies on the southern side of the 40 foot wide access strip and is bounded on its northwest corner by the Cul-de-Sac and on the north and east by Lot Number 18. Lot Number 18 has as its northern boundary Whispering Woods Drive and its eastern boundary Lot Nos. 17 and 6, with Lot Number 17 being on the northeast and Lot Number 6 being on the southeast. Lot Number 7 is to the immediate east of Lot Number 6. A sketch showing the relative location of these properties in the Original Subdivision Plan is attached as Appendix "A" to this Opinion.

On September 1, 2005, the Towamensing Township Supervisors approved a revision to the Original Subdivision Plan, which revision was recorded on September 2, 2005, in Carbon County Map Book 3, Page 725 (the "Revised Plan" and/or the "Revised Subdivision Plan"), fifteen years after the recording of the Original Plan. The revision affected Lot Numbers 19, 18 and 17. The 40 foot wide access strip, which formerly was a part of Lot 18, was eliminated and 143.64 feet of its length, from the Cul-de-Sac extending east, was added to Lot 19, now owned by Defendants, John R. Horne and Joanne E. Horne. Additionally, the eastern boundary line of this lot was straightened such that the original size of Lot 19 was increased from 1.401 acres to 1.857 acres. A strip of land approximately 50 feet in width, which was originally part of Lot 18 along its eastern boundary with Lot 17, was added to Lot 17 to increase the acreage of this lot from 2.039

acres to 2.424 acres. The remainder of Lot 18 was divided into a northern half and a southern half. The northern half was re-numbered as Lot 18-A and consists of 2.127 acres; the southern half was re-numbered as Lot 18-B and consists of 2.344 acres.<sup>1</sup> A sketch showing the boundaries of these properties as changed in the Revised Plan is attached as Appendix "B" to this Opinion.

Under the Revised Subdivision Plan neither Lot 18-A nor Lot 18-B have any direct access to the Cul-de-Sac, since the former 40 foot wide access strip for Lot 18 was eliminated. Lot 18-A retains its boundary with Whispering Woods Drive on its north. Lot 18-B retains the same 39.54 feet frontage on La Montage Drive as its southern boundary as existed for the former Lot 18. The notes to the Revised Subdivision Plan indicate that the Towamensing Township Supervisors may require the driveway from La Montage Drive into Lot Number 18-B to be paved if the grade for this driveway exceeds eight percent.

Following approval of the Original Subdivision Plan on December 7, 1989, and before approval of the Revised Plan on September 1, 2005, the Gilberts conveyed title to various lots in the Subdivision with reference to the Original Subdivision Plan. These included Lot Number 17, originally conveyed to the Gilberts by deed dated March 11, 1997, and now owned by Defendants, Patrick and Ruth Sheridan; Lot Number 6 conveyed by the Gilberts to Brian J. Duelfer by deed dated October 14 1991, and now owned by Plaintiff, Gueorgui Ivanov, pursuant to deed dated August 28, 2020; and Lot Number 7, originally conveyed by the Gilberts to Ralph R. Cortazzo and Carole A. Cortazzo by deed dated February 3, 1990, and now owned by Plaintiff, Gary M. Panik. Each of these original conveyances by the Gilberts also contain a notation advising that

the conveyance is subject to a Declaration of Covenants, Conditions and Restrictions for LaBelle Montage as filed in the Office of the Recorder of Deeds of Carbon County in Miscellaneous Book Volume 62, Page 978. Paragraph 26 of these Covenants, Conditions and Restrictions states that "the Grantors herein may, in their sole discretion, modify, amend or add to these restrictions as they apply to the *remaining* lands of Grantors known as LaBelle Montage, so long as the intent thereof is not changed." (emphasis added).

The remaining lots which are directly involved in this litigation, Lot Numbers 19, 18-A, 18-B, and 16 – the latter lot being to the immediate east of Lot 17 and north of Lot 7, and now owned by Defendants, Andrew P. Hines, Sr. and Wendy J. Hines – were all originally conveyed by the Gilberts after approval of the Revised Subdivision Plan, with the exception of Lot 16. Lot 16 was first conveyed by the Gilberts to Dennis K. Smith and Kimberlee Smith by deed dated January 11, 1991, recorded February 4, 1991. Each of these conveyances, including that for Lot 16, includes a statement or is bound by constructive notice that the conveyance is subject to the Declaration of Covenants, Conditions and Restrictions for LaBelle Montage filed in the Office of the Recorder Deeds of Carbon County in Miscellaneous Book Volume 62, Page 978. Lot Number 18-A is currently owned by Defendant, Lorraine Gay Barbella; Lot Number 18-B is currently owned by Plaintiff, Vitaly Vjunichenko.

The Plaintiffs in these proceedings, Gary M. Panik, Gueorgui Ivanov, and Vitaly V. Vjunichenko, own Lot Numbers 7, 6 and 18-B, respectively. The Defendants, Andrew P. Hines, Sr. and Wendy J. Hines, Patrick and Ruth Sheridan, Lorraine Gay Barbella, and John R. Horne and Joanna E. Horne own Lot Numbers 16, 17, 18-A and 19, respectively.

Defendants, Ronald F. Gilbert and Carol A. Withers, are the former owners of Lot Number 17 and the developers of the LaBelle Montage Subdivision whom Plaintiffs claim are obligated by contract to repair and maintain the access road Plaintiffs claim as a means of access to their properties in this litigation.

In these proceedings, Plaintiffs seek access to the northern half of their properties across a gravel road connecting with the eastern right-of-way of the La Montage Drive Cul-de-Sac and across the southern portion of Lot Numbers 19, 18-A, 17 and 16, rather than from the southern half of their properties which front on La Montage Drive and which Plaintiffs claim, due to topography and grade, is impossible and impracticable as a means of access. This gravel right-of-way, the claimed access road, is not depicted on either the Original Subdivision Plan or the Revised Subdivision Plan. Plaintiffs claim the right to use this gravel road through one or more legal theories: (a) an express easement, (b) an easement by necessity, (c) an easement by implication, (d) an easement by prescription, and/or (e) an easement by equitable estoppel.

Plaintiffs commenced this action by the filing of a praecipe for writ of summons on September 8, 2020. A complaint was filed on December 23, 2020, and an amended complaint was filed on September 1, 2023. Plaintiffs' claims for an easement, though not formally characterized as such in the pleadings, appear to seek an order to quiet title, for a declaratory judgment, or for an injunction to determine the parties' respective rights under the law.

By Order dated January 3, 2025, we directed the parties to brief multiple issues, some of which involve pure questions of law which we address here, and others which are dependent on evidence yet to be presented and factual findings based on that

evidence in order to assist our understanding of what evidence is relevant to the issues we need to decide at the time of trial.<sup>2</sup>

## **DISCUSSION**

### **Significance of Original Plan and the Area Designated as a Recreational Area**

A threshold issue which needs to be addressed is the significance and effect of the selling of lots by the Gilberts under the Original Subdivision Plan before the Plan was revised, and what rights and burdens attached as a consequence of those conveyances. This applies not only to Lot Numbers 6 and 7, owned by Ivanov and Panik, respectively, both of which properties were originally conveyed by the Gilberts before the Plan was revised in 2005, but also to any other lots which may have been sold by the Gilberts before the Plan revision.<sup>3</sup>

As a general principle of real estate conveyancing, lots sold according to an approved and recorded subdivision plan have protected rights, which run with the property, to use and enjoy common areas designated on the subdivision plan for particular uses for those purposes – such as for recreational purposes and the location of subdivision roads – as implied easements appurtenant to every lot in the subdivision, and to enforce the corresponding burdens imposed on those properties subject to such use as restrictive covenants. Potis v. Coon, 496 A.2d 1188, 1192-93, 1195 (Pa.Super. 1985) (noting that the “grantee of a lot, which is sold according to a plan of lots on which streets or alleys not previously open or projected as a public street are plotted out by the grantor, acquires an easement over those streets and alleys as a private right of property arising out of the grant, of which he cannot be deprived without compensation”; prior use

or necessity is not a requirement for an easement created by reference to a map or plan of lots whether or not recorded).

In Rahn v. Hess, 106 A.2d 461 (Pa. 1954), the Pennsylvania Supreme Court explained that:

where an owner of land subdivides it into lots and streets on a plan and sells his lots accordingly, there is an implied grant or covenant to the purchaser that the street shall be forever open to the use of the public and operates as a dedication of them to public use. The right passing to the purchaser is not the mere right that he may use the street, but that all persons may use it.

Id. at 463. The Court further recognized

a clear distinction between the public right of passage over dedicated streets and the individual rights of property involved in such dedication. The latter are private contractual rights resulting as a legal consequence from the implied covenants under which the grantees purchased....

Id. at 464. See *also* Kao v. Haldeman, 728 A.2d 345, 347-348 (Pa. 1999) (quoting Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R. Co., 87 A. 968, 970 (Pa. 1913)); O'Donnell v. City of Pittsburgh, 83 A. 314, 317 (Pa. 1912) (noting that “the easement over the streets is appurtenant to every lot and becomes a property interest in the purchaser of the lot which may be protected by appropriate legal process”; that those parties having notice of the plan of lots are “charged with notice of all the plan contains, including the streets and alleys, their location and width”).

Lot owners whose purchase is according to a plot plan which depicts certain property as an unimproved park area acquire a private easement or right of use to use that area for such purposes, which correspondingly limits the underlying landowner's use of the property to those uses which do not interfere with its use as a park. Reed v. Reese, 374 A.2d 665, 668 (Pa. 1976)<sup>4</sup>; Towamencin Sumneytown Pike, LLC v. Philadelphia



Suburban Development Corporation, 283 A.3d 394 \*17 (Pa.Super. 2022) (Non-Precedential Decision); Cunningham v. Cronin, 206 A.3d 569 (Pa.Super. 2019) (holding that the conveyance of real estate which references a map or plan depicting a street, alleyway and greenway with concrete steps creates an easement to all such common properties within the plan). This right is specifically enforceable and binding on subsequent owners of the servient property by other lot owners in the subdivision, since constructive notice of the restriction by virtue of references to the plan in a recorded deed are binding on the servient owners. Reed, 374 A.2d at 670-671 (Pa. 1977) (“Thus, even though the plan was unrecorded, since the recorded deed made reference to the plan which, in turn, designated an area as a park, the sale of the lot and deed to Reed was in itself sufficient to establish in Reed, as a matter of law, a private right of use or easement in the designated park area.”); Potis, 496 A.2d at 1192 (holding that references to a plan contained in a deed make the plan a part of the deed); Doylestown Township v. Teeling, 635 A.2d 657, 660-661 (Pa.Cmwlt. 1993) (defining a deed restriction or restrictive covenant as “a restriction in an instrument relating to real estate by which the parties pledge that something will not be done”) (quoting Black’s Law Dictionary 329, 1182 (5<sup>th</sup> ed. 1979)).

This private right survives a subsequent revision of the subdivision plan which eliminates the recreation area; as a private vested property interest appearing in the chain of title, it cannot be abrogated by amending the subdivision plan. Reed, 374 A.2d at 670; Potis, 496 A.2d at 1192 n.9 (holding private easement rights in unopened subdivision road unaffected by township approval of resubdivision effectively eliminating road).<sup>5,6</sup> This is in contradistinction to lot owners who purchased their property after the plan

revision deleting reference to the recreation area and who acquired no rights to enforce the former recreational designation. *Cf. Nord v. Devault Contracting Company, Inc.*, 334 A.2d 276, 278 (Pa. 1975) (“[A]n easement by implication arises only where that was the intent of the parties, as shown by the terms of the grant and the surrounding circumstance. ... The law merely gives effect to the intent implicit in the conveyance.”); *Potis*, 496 A.2d at 1193 n.12.

Based upon the foregoing, if any other lots were conveyed pursuant to the Original Subdivision Plan and before it's revision which are not already included in this litigation, the owners of these properties are indispensable parties who need to be joined by Plaintiffs before any decision can be made by this court affecting their right to have Lot Number 18 as originally plotted used for recreational purposes. See *Kinney v. Lacey*, 252 A.3d 644 (Pa.Super. 2021).

**Whether as a Matter of Law a Lot Owner in a Residential Subdivision Can  
Obtain a Right-Of-Way by Adverse Usage Across a Common Area  
Designated for Recreational Purposes**

Interrelated with the foregoing issue requiring Lot 18 in the Original Subdivision to be used for recreational purposes, are Plaintiffs' claims for a prescriptive easement across this property as a means of access to their properties. “A prescriptive easement is created by (1) adverse [hostile], (2) open, (3) notorious, (4) continuous and uninterrupted use for a period of twenty-one years. Moreover, the party asserting the easement must demonstrate clear and positive proof. Permissive use defeats a claim of a prescriptive easement. The landowner has the burden of proving consent, but only after the alleged easement holder proves the use was adverse, open, notorious, and continuous for twenty-one uninterrupted years.” *Village of Four Seasons Ass'n, Inc. v. Elk*

Mt. Ski Resort, Inc., 103 A.3d 814, 822 (Pa.Super. 2014) (internal citations omitted), appeal denied, 125 A.3d 778 (Pa. 2015). “In case of a right of way the right must not only have been enjoyed without interruption for 21 years, but that enjoyment must have been adverse to the rights of the owner of the land, in order to give title.” Stevenson v. Williams, 145 A.2d 734, 736 (Pa.Super. 1958). “Before the title of a landowner may be encumbered by an easement, the court must have clear proof that the prescriptive rights have been established by a user with hostile intent, and not through indulgence, permission or mutual accommodation.” Id. at 736-737. The use must be inconsistent with the owner’s rights, that is adverse or hostile to the owner’s interests. “Where one uses an easement whenever he sees fit, without asking leave, and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty-one years is a title which cannot be afterwards disputed.” Adshead v. Sprung, 375 A.2d 83, 85 (Pa.Super. 1977) (citations and quotation marks omitted).

A permissive use is not adverse and will not support a claim for a prescriptive easement. Because the sale of lots pursuant to a subdivision plan that designates an area for recreational use creates, as a matter of law, an implied easement in favor of all lot owners in the subdivision to use the designated area for these purposes, a lot owner’s use of the recreational area by itself is neither adverse nor hostile to the owner’s interest: it is merely the exercise of a pre-existing legal right. Such use, standing alone, is entirely consistent with, not contrary to, the lot owner’s legal right and cannot be properly characterized as adverse or hostile. Consequently, unless Plaintiffs can establish that their usage of Lot 18 was unquestionably inconsistent with their implied easement rights – that it posed an actual interference with the rights of use reserved to the servient owner

or unreasonably interfered with such rights – the critical element that the use be adverse or hostile is missing. Kao, 728 A.2d at 349.

Lot Number 7, now owned by Gary M. Panik, was first conveyed to Ralph R. Cortazzo and his wife, Carol A. Cortazzo, by the Gilberts by deed dated February 3, 1990. The Cortazzos claim to have installed a septic system on the property in 1991. Panik's predecessors in title built a home on the property fourteen years later, in 2005, the same year the Revised Subdivision Plan was approved and recorded. While more than twenty-one years has clearly passed since the transfer of title from the Gilberts to Lot Number 7 first occurred, and while Panik is entitled to tack adverse usage by his predecessors in title during the prescriptive period to meet the requirement of twenty-one years of uninterrupted use (see Maiella v. Joseph, 307 A.3d 638, \*6 (Pa.Super. 2023) (Non-Precedential Decision)), whether Panik can establish that such usage was adverse and hostile to his and his predecessors legal right to use Lot 18 for recreational purposes is an open question.<sup>7</sup>

**Whether the Recorded Termination of an Express Right-Of-Way by  
the Successor in Title of the Dominant Estate is Binding  
Upon a Later Purchaser with Constructive Notice of the Termination**

Before the Revised Subdivision Plan was approved on September 1, 2005, the Gilberts sold Lot 6 to Brian J. Duelfer by deed dated October 14, 1991, recorded on October 21, 1991. In this deed, the Gilberts granted Duelfer a forty foot wide right-of-way extending east from the La Montage Drive Cul-de-Sac to Lot 6. This right-of-way, by its terms held in common with the Gilberts, covers the entire width and length of the access strip for Lot 18 as originally plotted, bisects Lot 18 through its middle, and continues across the entire width of Lot 17 along its southern boundary with Lot 6 and crosses the

southern tip of Lot 16 where it ends on the northern boundary line for Lot 7. See Appendix “C” attached to this Opinion. At the time of this grant to Duelfer, with the exception of Lot 16 which had previously been conveyed by the Gilberts to Dennis K. Smith and Kimberlee A. Smith by deed dated January 11, 1991, recorded February 4, 1991, the Gilberts were the owners of all properties over which the easement passed.<sup>8</sup> The grant of this easement in the Duelfer deed further states that the Gilberts, their heirs and assigns, shall be solely responsible for the maintenance and repair of the right-of-way.

Brian J. Duelfer and his wife, Nancy A. Duelfer, sold Lot 6 to David B. Cronk and Patricia Cronk by deed dated August 7, 1996, recorded August 23, 1996. This deed specifically included in its grant the 40 foot wide right-of-way previously granted to Mr. Duelfer. The Cronks conveyed this property to Plaintiff, Gueorgui Ivanov, by deed dated August 28, 2020, recorded September 1, 2020. This deed makes no mention of the 40 foot wide right-of-way and does not contain an appurtenance clause.

Prior to executing the deed, the Cronks entered a written agreement with the Gilberts dated August 6, 2020, to terminate the easement contained in the Duelfer deed. The agreement, made expressly binding on the parties and their heirs, successors and assigns, specifically provides that:

All rights and obligations pursuant to the Easement Paragraph [*i.e.*, the Duelfer easement] are hereby terminated and void, and from this point further, the paragraph should be deleted from the deed for Lot No. 6, LaBelle Montage Subdivision, and the property shall be transferred and conveyed as if the Easement Paragraph had never been included in any deed in the chain of title and that it had never existed. This Agreement may be signed in counterparts.

August 6, 2020, Agreement to Terminate Rights and Obligations recorded in Carbon County Deed Book Volume 2517, Page 815. The agreement was recorded on August 31, 2020.

To the extent Ivanov or the other Plaintiffs rely on the Duelfer easement as a basis for finding an express easement to their properties, the law does not support Plaintiffs' position. The Cronks executed the termination agreement before executing Ivanov's deed, and the termination agreement was recorded prior to the recording of Ivanov's deed, albeit eight days before Plaintiffs commenced suit. Under Pennsylvania law, a property owner whose deed is recorded after the recording of an agreement terminating an easement that benefited the property takes subject to the termination and is bound by it. Nolt v. TS Calkins & Associates, LP, 96 A.3d 1042, 1048 n.5 (Pa.Super. 2014) (recognizing the duty of a purchaser of real estate to investigate the title of the seller and the need for the purchaser to exercise due diligence in this regard, including examination of "what appeared in the appropriate indexes in the office of the recorder of deeds, and in the various courts of record whose territorial jurisdiction embraced the land in dispute").<sup>9</sup>

**Whether the Interest of Third-Party Donee Beneficiaries in an Express Easement as a Matter of Law is Tantamount to a License Revocable at Will Absent Detrimental Reliance**

The second basis on which Plaintiffs claim an express easement from the La Montage Cul-de-Sac and across Lot Numbers 19, 18-A and 17 to their properties is pursuant to a written contract dated April 9, 2017, between John R. Horne and Joanne E. Horne, owners of Lot 19; James M. D'Ambrosia, then owner of Lot 18-A; and Ronald F.

Gilbert and Carol A. Withers, the owners of Lot 17 at the time. This agreement is entitled "Construction Easement Agreement" and was recorded on June 15, 2017.

The agreement states that a 20 foot wide construction easement from LaBelle Montage Drive over and along the southern boundary line of the parties' properties – Lot Numbers 19, 18-A and 17 – and ending at Lot Number 7 exists as an *alternate* means of ingress and egress to their properties, and it was the intent of the parties "to memorialize the existence, continuation and use of the Construction Easement." The agreement further provides that it is binding on the parties to the agreement and their respective heirs, executors, administrators and assigns, and shall run with the land. Although not named as parties or signatories to the agreement, the agreement contains the following sentence within the body of the agreement: "In addition, the owners of Lot[] Nos. 6, 7 and 18-B [*i.e.*, Plaintiffs' properties] shall also have the right to use this Construction Easement."

By agreement dated January 7, 2019, the parties to the April 9, 2017 Construction Easement Agreement agreed to terminate the Construction Easement Agreement. This new agreement captioned "Termination of Construction Easement Agreement" and signed by the same parties who signed the Construction Easement Agreement, was recorded in the Carbon County Recorder of Deeds Office on April 22, 2019. In the termination agreement the parties express their desire to terminate the easement as it pertains to their properties (*i.e.*, Lot Numbers 19, 18-A and 17) defined therein as the "Real Property," and specifically state:

1. EXTINGUISHMENT OF RIGHTS AGAINST REAL PROPERTY: The Easement, to the extent that it affects the Real Property, is terminated, released, and extinguished. Notwithstanding anything here to the contrary,

this termination of the Easement does not affect or apply to any real property other than the Real Property described here, nor does it release the rights of HORNE, GILBERT, and DAMBROSIA in or under the Easement as against any party other than HORNE, GILBERT and DAMBROSIA.

Termination of Construction Easement Agreement, ¶1. The termination agreement is likewise made binding on the parties, their heirs, successors and assigns.

In their complaint,<sup>10</sup> Plaintiffs alleged that at the time the Construction Easement Agreement was entered "there were already completely constructed homes on Lot Nos. 19, 18-A, 17, and 7," (Complaint, paragraph 45), and that Plaintiff Gary M. Panik's predecessor in title, Barbara Ann Panik, "had been informed that it was intended that the easement agreement would permit her and her guests, heirs, successors, and assigns to use the access drive for all purposes, including ingress and regress to and from her completed home." (Complaint, paragraph 47). Plaintiffs also alleged "[n]o further construction occurred on Lot Nos. 19, 18-A, 17, or 7 after the easement agreement was signed. For Lot Nos. 19, 18-A, and 17, the access drive would serve no purpose for the construction of anything on their lots." (Complaint, paragraph 49). Finally, Plaintiffs claimed because of the Construction Easement Agreement, they were "legally entitled to an easement which provides them with access to the cul-de-sac and, as such, the Court is being asked to provide an order that states that the owners of Lot Nos. 6, 7, and 18-B and their guests, heirs, successors, and assigns have the right to use the access drive for the purpose of traveling from their lots to the cul-de-sac, and the owners of Lot Nos. 19, 18-A, and 17 cannot prevent them from using the access drive in that manner." (Complaint, paragraph 50).



At issue is whether the Construction Easement Agreement created a license to use personal to the owners of Lot Numbers 6, 7 and 18-B, revocable at will, or an easement appurtenant to these lots transferable to subsequent owners. Plaintiffs are not parties to the construction agreement and are not specifically named in the agreement. Instead, the agreement names the owners of Lot Numbers 6, 7 and 18-B as having the right to use the construction easement. Nor does the agreement purport to create a new easement which previously did not exist, but appears more accurately to document and confirm the existence of an easement already in existence and to expand on its use for a limited purpose – for construction – to a means of access generally to and from the properties of the parties to the agreement.

The agreement is silent on whether any of the Plaintiffs or their predecessors in title held any easement rights in a 20 foot wide construction easement before April 9, 2017.<sup>11</sup> If they did, such rights were clearly not created by the construction easement, nor were they terminated by the termination agreement. As to any rights the Plaintiffs, or their predecessors in title, acquired by virtue of the construction easement, the most that can be said is that it granted Plaintiffs, or their predecessors in title, the right to use the construction easement without any stated consideration being required of them.

On its face, absent any contrary evidence, the right granted the owners of Lot Numbers 6, 7 and 18-B to use the construction easement appears to have been nothing more than a permissive use, a privilege to use subject to Defendants' power to revoke at will. Zivari v. Willis, 611 A.2d 293, 295-296 (Pa.Super. 1992); Kovach v. General Tel. Co. of Pa., 489 A.2d 883 (Pa.Super. 1985).<sup>12</sup> “[A] license is a mere personal or revocable privilege to perform an act or series of acts on the land of another, which conveys no

interest or estate." Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc., 761 A.2d 139, 144 (Pa. 2000). And since no further construction occurred after April 9, 2017, absent some evidence of reliance by Plaintiffs that they expended money and treated their own property in a manner they would not otherwise have done but for the license, the signatories to the Construction Easement Agreement retained the right to revoke such permission. Zivari, 611 A.2d at 296. Should the evidence establish that Plaintiffs or their predecessors in title relied on such license to their detriment such that the license is irrevocable, the signatories and/or their successors in title would take subject to the license only if they had notice of the license before purchase. Zivari, 611 A.2d at 296; Kovach, 489 A.2d at 885.<sup>13</sup> See also In re Laying Out and Opening a Private Road, 592 A.2d 343, 347 (Pa.Super. 1991), holding that an "irrevocable license" to an existing right-of-way does not necessarily run with the land since successors in interest to the servient estate take subject to the license only if they had notice of it.

**Whether as a Matter of Law Easements by Implication – by Prior Use and by Necessity – Can be Acquired by Lot Owners in a Subdivision Across the Properties of Other Lot Owners Rather Than Having Their Access Restricted to Those Means of Access Designated in the Subdivision Plan**

The location of the express easements which Plaintiffs claim across Lots 19, 18-A, 17 and 16 to access their properties from the Cul-de-Sac appear to be the same, with the exception that the Duelfer easement is forty feet in width and the construction easement twenty feet wide. This is the same location where Plaintiffs also claim easements by implication: by prior usage and by necessity.

Of Plaintiffs' properties, Lot 7 was the earliest to be conveyed by the Gilberts: on February 3, 1992, to Ralph R. Cortazzo and Carole A. Cortazzo. At that time, Plaintiffs

claim an open, visible, permanent and continuous dirt road led from the Cul-de-Sac to Lot 7 and that all property in between was then owned by the Gilberts. Plaintiffs also claim that at the time of severance and continuing to the present time, the grade and topography of each of their lots on the southern end where they front on La Montage Drive makes access to the top of their properties where their homes are located (or in the case of Ivanov, planned to be located) impossible and/or manifestly impracticable. Plaintiff's expert, a civil engineer, estimates the cost of construction of a driveway for Lot 6 to be not less than \$210,000, and for Lot 7 at not less than \$170,000.

In deciding whether an easement by implication by usage has been created, Pennsylvania courts use two different tests: the traditional test and the Restatement test.

The traditional test has been described as follows: "Three things are regarded as essential to create an easement by implication on the severance of the unity of ownership in an estate: first a separation of title; second, that, before the separation takes place, the use which gives rise to the easement, shall have been so long continued, and so obvious or manifest, as to show that it was meant to be permanent; and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. To these three, another essential element is sometimes added, - that the servitude shall be continuous and self-acting, as distinguished from discontinuous and used only from time to time."

[Becker v. Rittenhouse], [297 Pa.] at 325, 147 A. at 53. See also DePietro v. Triano, 167 Pa.Super. 29, 31-32, 74 A.2d 710-11 (1950).

The view expressed in the RESTATEMENT OF PROPERTY §474, and expressly adopted in Pennsylvania in Thomas v. Deliere, 241 Pa.Super. 1, 359 A.2d 398 (1976), "emphasizes a balancing approach, designed to ascertain the actual or implied intention of the parties. No single fact under the Restatement approach is dispositive. Thus, the Restatement approach and the more restrictive tests ... co-exist in Pennsylvania." Id. at 5 n. 2, 359 A.2d at 400 n. 2. See also, Lerner v. Poulos, 412 Pa. 388, 194 A.2d 874 (1963); Schwoyer v. Smith, 388 Pa. 637, 131 A.2d 385 (1957); Spaeder v. Tabak, 170 Pa.Super. 392, 85 A.2d 654 (1952).

In the RESTATEMENT OF PROPERTY §476, the following factors are designated as important in determining whether the circumstances under which a conveyance of land is made can imply an easement:

- (a) whether the claimant is the conveyor or the conveyee,
- (b) the terms of the conveyance,
- (c) the consideration given for it,
- (d) whether the claim is made against a simultaneous conveyance,
- (e) the extent of necessity of the easement to the claimant,
- (f) whether reciprocal benefits result to the conveyor and the conveyee,
- (g) the manner on which the land was used prior to its conveyance, and
- (h) the extent to which the manner of prior use was or might have been known to the parties.

Owens v. Holzheid, 335 Pa.Super. 231, 484 A.2d 107 (1984) (Montemuro, J., dissenting). This court has further stated that an easement by implication can only be found “where the intent of the parties is clearly demonstrated by the terms of the grant, the surroundings of the property and other res gestae of the transaction.” See Hann v. Saylor, 386 Pa.Super. 248, 251-52, 562 A.2d 891, 893 (1989); Buffington v. Buffington, 390 Pa.Super. 61, 568 A.2d 194 (1989); Tomlinson v. Jones, 384 Pa.Super. 176, 557 A.2d 1103 (1989).

Mann-Hoff v. Boyer, 604 A.2d 703, 706-707 (Pa.Super. 1992), appeal denied, 613 A.2d 560 (Pa. 1992); See *a/so* Roman v. 4020 Mechanicsville Road, LLC, 334 A.3d 371, \*3 (Pa.Super. 2025) (Non-Precedential Decision) (listing elements required to find an easement by implication by prior usage); Bartkowski v. Ramando, 219 A.3d 1083, 1092 (Pa. 2019) (listing elements required to find an easement by necessity). In Bucciarelli v. DeLisa, 691 A.2d 446, 448 n.1 (Pa. 1997) the Pennsylvania Supreme Court noted that it

has never specifically adopted Restatement of Property §476, but that the factors it lists in determining whether an easement by implication at severance of title was created may be useful and even persuasive to a court in analyzing such cases.

The traditional test requires the claimant to “prove that at the time of separation of title, there was an open, visible, continuous and permanent use of the alleged easement, and that the easement is necessary to the beneficial enjoyment of the property conveyed.” Mann-Hoff, 604 A.2d at 708. Absolute necessity is not required. It is enough “that the easement [be] convenient or beneficial to the dominant estate.” Hann v. Saylor, 562 A.2d 891, 893 n. 1 (Pa.Super. 1989), quoted in Mann-Hoff, 604 A.2d at 711 (Wieand, J., dissenting).

On the question of whether an implied easement by usage has been “continuous and permanent,” the Pennsylvania Supreme Court in Bucciarelli, 691 A.2d at 449-450, quoted with approval the following language from Powell on Real Property:

The requirement that the quasi-easement must have been “permanent” or “continuous” simply means that the use involved shall not have been occasional, accidental or temporary. This means the use shall have been of such a character as to enable the claimant to rely reasonably upon the continuance of such use.... It is submitted that ... any well-defined route should be held to satisfy the “permanent” or “continuous” prerequisite for implication.

4 Powell on Real Property §34.08[2][c] (1996).

The Restatement test focuses entirely upon ascertaining the intent of the parties. Mann-Hoff, 604 A.2d at 708 (citing Thomas v. Deliere, 359 A.2d 398 (Pa.Super. 1976)). “Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected.”

Bucciarelli, 691 A.2d at 448 (quoting with approval from the Restatement of Properties, §476, Comment j).

“An easement by necessity may be implied when ‘after severance from adjoining property a piece of land is without access to a public highway.’” Graff v. Scanlan, 673 A.2d 1028, 1032 (Pa.Cmwlth. 1996) (quoting Burns Mfg. Co. v. Boehm, 356 A.2d 763, 767 n.4 (Pa. 1976) (citations and quotation marks omitted)). In order to establish an easement by necessity, three fundamental requirements must be met:

(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.

Phillippi, 748 A.2d at 760.

“An easement by necessity is always of strict necessity. An easement by necessity never exists as a mere matter of convenience.... [A]n easement by necessity is extinguished when the necessity from which it resulted ceases to exist.” Phillippi, 748 A.2d at 760 (citations and quotation marks omitted). Consequently, an easement by necessity does not exist when an alternate access to a public road exists. Id. at 760-761. Nor “when [the] owner can get to his own property through his own land.” Graff, 673 A.2d at 1032. Finally, “the necessity must not be created by the party claiming the easement.” Id. See *also* Graff, Id. at 1032 n.4 (distinguishing between implied easements from a prior use and implied easements on the grounds of necessity).

In Bartkowski v. Ramondo, 291 A.3d 1083 (Pa. 2019), the Pennsylvania Supreme Court held that “strict necessity” does not require a party to prove “utter impossibility of alternative access.” Id. at 1096. “Where it is manifestly impracticable, even though theoretically possible, to create ingress and egress across one's own property, the landowner may establish that a right of way over a neighboring property is ‘strictly necessary’ in the legal sense.” Id. at 1094. “The central inquiry is whether, absent the recognition of an easement, the proposed dominant estate will be left without a means of ingress and egress, rendering the property inaccessible and, thus, unusable.” Id. at 1096. See also Olszewski v. Parry, 283 A.3d 1257, 1263 (Pa.Super. 2022).

In recognizing that the two concepts of strict necessity and mere convenience are at opposite ends of a continuum and in analyzing where the tipping point lies, the Supreme Court in Bartkowski cited with approval a decision of the Idaho Court of Appeals where “the court was asked to determine whether an easement by necessity may arise where the property is landlocked, not for want of legal access, but because the topographical characteristics of the land make legal access impassable,” 219 A.3d at 1093, which is the precise question Plaintiffs raise. In answering this question, the Idaho Court reasoned that “there are cases where a tract of land, though not totally landlocked in a legal sense, cannot yield a beneficial use because the sole legal access is inadequate for the purposes to which the property naturally might be put,” and then continued:

Obviously, one seeking an easement need not show that a legally available route is absolutely impossible to use. There are few natural obstacles that could not be surmounted by modern engineering if unlimited resources were committed to the task. On the other hand, neither is it sufficient merely to show that the legally available route would be inconvenient or expensive. Rather, an easement by necessity should be granted only if the difficulty or

expense of using the legally available route is so great that it renders the parcel unfit for its reasonably anticipated use.

Bartkowski, 219 A.3d at 1093, citing and quoting MacCaskill v. Ebbert, 739 P.2d 414, 418-419 (Idaho Ct. App. 1987). Thus, “[t]he expense of constructing alternative access may be one of many relevant factors in determining whether access across a neighboring property is ‘strictly necessary.’” Bartkowski, 219 A.3d at 1094. “The burden to establish the necessity for an easement across the property of one’s neighbor falls squarely upon the shoulders of the party seeking it.” Id. at 1095.

As is evident from the foregoing, whether the elements for either an easement by necessity or by prior usage over subdivided lots can be established by Plaintiffs, is a fact intensive question which cannot be determined at this state of the proceedings. What concerns us, however, is the legal question of whether easements by implication of the type asserted by Plaintiffs set forth a valid cause of action for an alternate means of access across other private lots in the same subdivision, or whether such access is restricted to the roads designated in the subdivision plan.

At first glance, the answer appears obvious: No. Here, Plaintiffs’ properties were purchased pursuant to a recorded subdivision plan with each lot abutting on and having direct access to a subdivision road; each owner in the Subdivision has a right to use the entire matrix of roads in the Subdivision, Potis, 496 A.2d at 1193; each purchaser from the Gilberts had the opportunity to visually view each lot, its topography and its location relative to platted subdivision roads before purchase; and why should other lot owners in the subdivision be subject to easements not depicted on the plan of lots referenced in their deeds and of which they may well have been unaware. This is particularly true of



easements by necessity in contrast to those predicated on prior usage which, to exist, must be open, visible, permanent and continuous “irrespective of whether or not the easement constituted a necessary right of way.” Burns Manufacturing Co., 356 A.2d at 767 (quoting Tosh v. Witts, 113 A.2d 226, 228 (Pa. 1955)).

Easements by implied reservation ... are based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.

Burns Manufacturing Co., 356 A.2d at 767 n.4.<sup>14</sup>

Although all of the foregoing are true and augur against the claim, there appears to be a narrow exception under restrictive circumstances, at least when the claim is based on necessity. See Price v. Musselman, 493 A.2d 1389 (Pa.Super. 1985), recognizing a valid cause of action for an easement by necessity across other subdivided lots where the affected properties at one time had all been under common ownership and absent the easement, claimants’ property was landlocked; see also Potis, 496 A.2d at 1192 n.9. Similarly, while an implied easement from prior use across other lots appears to pose a high bar for a lot owner seeking access across neighboring lots in a recorded subdivision which, on its face, depicts access routes laid out within the subdivision, especially given the focus on intent under the Restatement approach, it is not one the law says with certainty is barred.

### **CONCLUSION**

The legal issues identified and addressed above are by no means the only issues in this litigation. They are, however, critical and unavoidable issues apparent from the pleadings and facts that are not in dispute (e.g., the contents of recorded deeds,

agreements and subdivision plans, their dates and when recorded). They involve questions not frequently encountered in easement cases within an approved, recorded residential subdivision for which few appellate decisions exist, and those that do, provide little discussion of the impact on other lot owners within the subdivision and the expectations of those owners flowing from conveyances made pursuant to a recorded plan depicting common areas and designated rights-of-way. Within this framework, it's important to always keep in mind that: "The law is jealous of a claim to an easement, and the burden is on the party asserting such a claim to prove it clearly." Becker v. Rittenhouse, 147 A. 51, 53 (Pa. 1929) (citation omitted).

In addressing the questions of law which we have, we appreciate that many of the facts in this case have yet to be fully developed and that on disputed questions of fact findings need to be made which are necessary before a final resolution of Plaintiffs' claims can be made. The questions of law decided here are simply a step in that direction.

**BY THE COURT:**

**/s/ President Judge Roger N. Nanovic**  
**Roger N. Nanovic, P.J.**

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<sup>1</sup> The notes to the Revised Subdivision Plan indicate that Towamensing Township refused to accept dedication of the former recreation area, Lot Number 18.

<sup>2</sup> In doing so, it is not our intent to render an advisory opinion. See Assalita v. Chestnut Ridge Homeowners Ass'n., 866 A.2d 1214, 1220 (Pa.Cmwlt. 2005) (citing Borough of Marcus Hook v. Pennsylvania Municipal Retirement Board, 720 A.2d 803, 804 (Pa.Cmwlt. 1998) ("It is well established that a judicial determination that is unnecessary to decide an actual dispute constitutes an advisory opinion and has no legal effect... . In general, the courts of this Commonwealth may not exercise jurisdiction to decide issue[s] that do not determine the resolution of an actual case or controversy.")). Cf. Maiella v. Joseph, 307 A.3d 638, \*5 (Pa.Super. 2023) (Non-Precedential Decision) (noting that a court is not later bound by the findings it makes during the preliminary injunction stage of proceedings) (citing Porter v. Chevron Appalachia, LLC, 204 A.3d 411, 419 n.2 (Pa.Super. 2019)).

<sup>3</sup> To date, other than Lot Numbers 6 and 7, and Lot Numbers 16 and 17, we have received no information whether any additional lots were conveyed by the Gilberts prior to the 2005 revision. Lot 16 was originally conveyed by the Gilberts in 1991 to Dennis K. Smith and Kimberlee Smith and is now owned by Defendants Andrew P. Hines, Sr. and Wendy J. Hines; Lot Number 17 was originally conveyed in 1997 by the Gilberts to themselves and is now owned by the Sheridans.

<sup>4</sup> In Reed v. Reese, 374 A.2d 665 (Pa. 1976), the Supreme Court noted the following regarding the nature of an easement:

‘It is the traditionally established doctrine that there can be no easement, no incorporeal right, binding the servient tenement, the effect of which would be to deprive its owner of the right of use or possession thereof. “An easement is a liberty, privilege or advantage which one may have in the lands of another without profit ... It may be merely negative ... and may be created by a covenant or agreement not to use land in a certain way ... . *But it cannot be an estate or interest in the land itself, or a right to any part of it.*” (italics supplied) Siegel v. Lauer, 148 Pa. 236 240, 23 A. 996, 997, 15 L.R.A. 547. “An easement is a right in the owner of one parcel of land by reason of such ownership to use the land of another for a special *purpose not inconsistent with a general property in the owner*” ... .’

Id. at 667 n.3.

<sup>5</sup> Paragraph 26 of the Covenants, Conditions and Restrictions recorded in Miscellaneous Book Volume 62, Page 978 on January 8, 1990, which allows the Gilberts in their sole discretion to modify, amend or add to the restrictions recorded at Miscellaneous Book Volume 62, Page 978 so long as the intent thereof is not changed, is insufficient to support a change in use for Lot Number 18 from recreational to residential construction, a change in intent, and is further insufficient to terminate property rights arising out of the recorded subdivision plan, in contrast to those arising out of the recorded Covenants, Conditions and Restrictions, after they have vested.

<sup>6</sup> Moreover, in approving a revised subdivision plan, a governing body is not permitted to consider the private property rights of individuals; the protection of a private easement is a title concern, not a zoning or land development concern. Gulla v North Strabane Township, 676 A.2d 709, 710-711 (Pa.Cmwth. 1996), *aff’d*, 712 A.2d 281 (Pa. 1998); In Re AMA/American Marketing Ass’n., Inc., 142 A.3d 923, 936, 940 (Pa.Cmwth. 2016).

<sup>7</sup> Whether the area over which the claimed access road crosses qualifies as an “unenclosed woodland” and is therefore barred by statute from being acquired adversely, see 68 P.S. §411, is a separate question raised in defense.

<sup>8</sup> With respect to Lot 16 and the access this easement might otherwise provide to Lot 7, we note the obvious, that “... one may not grant an easement over property he does not own.” Woodlawn Trustees, Inc. v. Michel, 211 A.2d 454, 456 (Pa. 1965). In addition to relying on the Duelfer easement to provide access to Lot 7, Plaintiffs’ Amended Complaint includes a claim for a prescriptive easement across Lot 16. (Amended Complaint, Paragraph 51).

<sup>9</sup> In Nolt v. TS Calkins & Associates, LP, 96 A.3d 1042, 1048 n.5 (Pa.Super. 2014) the Court stated the following:

We note that conveyances of interests in property must be recorded in the county in which the property is situated. 21 P.S. §444 (“All deeds and conveyances ... shall be recorded in the office for the recording of deeds where such lands lie[.]”). “The legal effect of the recording of such agreements shall be to give constructive notice to subsequent purchasers, mortgagees, and/or judgment creditors of the parties to said agreements[.]” 21 P.S. §357. A subsequent purchaser is entitled to rely on the information contained in these records. Lesnick v. Chartiers Natural Gas Co., 889 A.2d 1283, 1286 (Pa.Super. 2005).

Id. at 1048 n.5.

More recently, in Towamencin Sumneytown Pike, LLC v. Philadelphia Suburban Development Corporation, 283 A.3d 394 (Pa.Super. 2022) (Non-Precedential Decision), the Pennsylvania Superior Court stated:

Sections 356 to 358 of Pennsylvania’s recording statute set forth the recording requirements to bind a subsequent purchaser of a property to an agreement entered into by a prior owner. See 21 P.S. §§ 356-358. First, Section 356 [ ] requires that “[a]ll agreements in writing relating to real property situate in this Commonwealth” must be recorded in the county in which the property is located. 21

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P.S. §356. Next, Section 357 provides that “[t]he legal effect of the recording of such agreements shall be to give **constructive notice** to subsequent purchasers” of the fact of the agreements, as well as the fact that their rights will be limited by such agreements as if they had, themselves, executed the agreements. 21 P.S. §357 (emphasis added). Lastly, Section 358 delineates the conditions necessary to impose constructive notice on a subsequent purchaser.

In order for a document presented for record to the office of a recorder of deeds of a county to be constructive notice for the purpose of this act ... the document shall be recorded, and **one of the following conditions** shall be satisfied:

(1) In counties where ... the “Uniform Parcel Identifier Law[ ]” applies, the uniform parcel identifier is endorsed or included on the document, and it is indexed properly in an index arranged by uniform parcel identifiers.

(2) The document is indexed properly as to the party in all alphabetical indices.... For purposes of this section, the term “**document**” means a document that is eligible to be recorded in the office of the recorder of deeds, including, but not limited to deeds, mortgages, quitclaim deeds, memoranda of lease and **easements**, and includes documents presented for record in person, by mail, electronically or in any other manner.

21 P.S. §358 (emphasis added).

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As the trial court points out, Section 358 requires that only **one of the two** listed conditions be met in order to find a subsequent purchaser had constructive notice of an agreement. See Id.; 21 P.S. §358.

Id. at \*14 (emphasis in original).

In addition to claiming he had no knowledge of the termination agreement before he purchased Lot 6, Ivanov contends that the termination agreement was the culmination of fraud committed on him by Defendant, Ronald F. Gilbert, and the Cronks, alleging (1) that on page 13 of his agreement of sale for the purchase of Lot 6 from the Cronks which he signed on July 27, 2020, Paragraph four provides that “the seller’s current deed includes usage of the dirt road [purportedly referencing the Duelfer easement], however, all properties located on La Montage Drive[ ] with frontage on La Montage Drive have been required to bring driveways off of La Montage Drive,” (2) that in the listing information provided by the Cronks to their real estate agent, it states that the Cronks’ deed “includes the right of use of LaBelle Place (upper dirt road behind the lot) as use for a permanent access eliminating cutting in a driveway off La Montage Dr.,” and (3) that Mr. Gilbert intentionally misrepresented to him that it would be inexpensive and easy for Ivanov to construct a driveway from La Montage Drive to Lot Number 6. (Amended Complaint, Paragraphs 24, 26, 27 and 35).

In this context we note, “[a]s a general rule, an agreement of sale merges into the deed conveying the premises.” Mann-Hoff v. Boyer, 604 A.2d 703, 711 (Pa.Super. 1992) (Wieand J., dissenting) (citing Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972); Stoeber v. Gowen, 124 A. 684 (1924)). Conversely, the Cronks real estate agent testified that she met with Gilbert, Ivanov and Ivanov’s agent on August 1, 2020, where they did a walk-through of Lot 6, that Ivanov was specifically told by Gilbert he would need to build a driveway from La Montage Drive to his chosen homesite, and that Ivanov was advised multiple times during this walk-through that the Duelfer easement was going to be removed. Obviously, these are questions of fact which cannot be determined at this time.

<sup>10</sup> With respect to Plaintiffs’ claims relying upon the Construction Easement Agreement, we cite to Plaintiffs’ original complaint, rather than the amended complaint which makes similar claims, finding the language of the original complaint clearer in expressing the factual basis for these claims.

<sup>11</sup> Each of the current Plaintiffs became owners of their properties after the Agreement to Terminate the Construction Easement Agreement was filed on April 22, 2019, and of which they had constructive notice: Lot Number 7 was acquired by Plaintiff, Gary M. Panik, by deed dated January 31, 2023, recorded February 13, 2023; Lot Number 18-B was acquired by Vitaly Vjunichenko by deed dated May 6, 2019, recorded May 20, 2019; and Lot Number 6 was acquired by Gueorgui Ivanov by deed dated August 28, 2020, recorded September 1, 2020.

<sup>12</sup> Although the evidence once presented may prove differently, Plaintiffs might also be viewed as third-party beneficiaries of the April 9, 2017 contract between the Hornes, Gilberts and Mr. D’Ambrosio. In Spires v. Hanover Fire Insurance Co., 70 A.2d 828 (Pa. 1950) (plurality opinion), the Pennsylvania Supreme Court held that “in order for a

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third party beneficiary to have *standing* to recover on a contract, both contracting parties must have expressed an intention that the third party be a beneficiary, and that intention must have affirmatively appeared in the contract itself." *Id.* at 830-31 (emphasis added). But in *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983) the Court carved out an exception to the *Spies* rule that both parties to the contract express an intention to benefit the third party in the contract itself by adopting Section 302 of the Restatement (Second) of Contracts.

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intentions of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

See *Guy* 459 A.2d at 751. Accordingly, in *Scarpitti v. Weborg*, 609 A.2d 147 (Pa. 1992), the Court held that "a party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, *Spies*, *supra*, unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Guy*, *supra*." *Scarpitti*, 609 A.2d at 150-151.

As adopted by the Supreme Court in its application of Section 302 of the Restatement (Second) of Contracts, a two-part test is employed:

for determining whether a person is an intended third party beneficiary of a contract between others, such that the third party may enforce the contract:

(1) the recognition of the beneficiary's right [to performance] must be 'appropriate to effectuate the intention of the parties,' and

(2) the performance must 'satisfy an obligation of the promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'

*Estate of Agnew v. Ross*, 152 A.3d 247, 253 (Pa. 2017) (citing *Guy*, 459 A.2d at 751). "[T]he first part of the test sets forth a standing requirement, which restricts application of the second part of the test, 'which defines the intended beneficiary as either a creditor beneficiary (§302(1)(a)) or a donee beneficiary (§302(1)(b)).'" *Estate of Agnew*, 152 A.3d at 253.

"The first part of the Section 302 test requires a court to determine whether the grant of standing would be 'appropriate to effectuate the intentions of the parties.'" *Estate of Agnew*, 152 A.3d at 261. "Whether third-party beneficiaries status is appropriate to carry out the intention of the parties is left to the trial court's discretion." *Drummond v. University of Pennsylvania*, 651 A.2d 572, 578 (Pa.Cmwlt. 1994), appeal denied, 661 A.2d 875 (Pa. 1995); see *also Estate of Agnew*, 152 A.3d at 253. Cf. *Scarpitti* (holding homeowners in a residential subdivision had standing under Section 302 as intended third-party beneficiaries of an implied contract between the developer and an architect because the very purpose of that agreement was to ensure compliance with certain standards within the development, and thus the homeowners clearly were intended to benefit from the establishment of a vehicle to enforce those standards).

In the case *sub judice*, while Plaintiffs are not expressly named as beneficiaries in the contract itself, they are part of a limited class ascertainable and identifiable by reference to their status as the owners of specifically numbered lots, thus establishing standing to bring suit under *Spies*. Whether this alone creates actionable rights in Plaintiffs to succeed in enforcing performance – that is, whether the intent of the parties to the contract was to vest Plaintiffs with the right to bring suit in the event of nonperformance given that nothing within the Construction Easement Agreement evidences that at the time the agreement was entered the parties intended they would be liable to the owners of Lot Numbers 6, 7 and 18-B if they did not grant such owners use of the construction easement – is another question which we do not answer at this time. Stated differently: Does a non-contracting party have standing to enforce performance of a contract as a third-party beneficiary only where "the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intentions of the parties?" *Scarpatti*, 609 A.2d at 150. Even if this is the case, as donee beneficiaries who are not parties to the contract and who provided no consideration of their own

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such that they sustained legally cognizable damages for breach of a contract to which they were a party, we are unaware of the basis on which Plaintiffs rely to prevent the actual parties to the contract from mutually terminating that contract.

<sup>13</sup> With respect to licenses generally,

Licenses are ordinarily revocable at will. Pennsylvania, however, has adopted the equitable doctrine of irrevocable licenses. This doctrine, based upon the equitable principle of estoppel, recognizes that, if a license, ... is given by parol, then followed by the expenditure of money, on the faith of the parol agreement, it is irrevocable and is treated as a binding contract.

Kovach v. General Telephone Co. of Pennsylvania, 489 A.2d 883, 885 (Pa.Super. 1985). (citation and quotation marks omitted).

Under Pennsylvania law:

[e]quitable estoppel arises when one by his acts, representation, of admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. In this situation, the person inducing the belief in the existence of a certain state of facts is estopped to deny that the state of facts does in truth exist, aver a different or contrary state of facts as existing at the same time, or deny or repudiate his acts, conduct or statements.

Zaveri v. Willis, 611 A.2d 293, 295 (Pa.Super. 1992) (quoting Northwestern Nat. Bank v. Commonwealth, 27 A.2d 20, 23 (Pa. 1942)) (quotation marks omitted).

In Lehman v. Smith, the Pennsylvania Superior Court described easements by estoppel as follows:

An easement by estoppel – traditionally considered an irrevocable license in Pennsylvania – will arise when a landowner permits a use of property under circumstances suggesting that the permission will not be revoked, and the user changes his or her position in reasonable reliance on that permission. Knapp v. Norfolk Southern Railway Co., 350 F.Supp.2d 597, 611-12 (M.D. Pa. 2004); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §2.10. The permission does not need to be express, but may be inferred through the owner's acquiescence in an open and obvious use of the land. See Turnway Corp. v. Soffer, 336 A.2d 871, 878 (Pa. 1975); see also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §2.10 cmt. e. An owner who allows use of the land to continue 'under circumstances in which it is reasonable to foresee that the [user] will substantially change position' is estopped from denying the existence of an easement in favor of the user. *Id.* §2.10(1); accord Morning Call, 761 A.2d at 144.

270 A.3d 1128 at \*3 (Pa.Super. 2021) (Non-Precedential Decision).

Finally, in Township of Radnor v. Goshen Holding Company, Inc., 238 A.3d 545 \*21 (Pa.Cmwlt. 2020) (Memorandum Opinion), the Pennsylvania Commonwealth stated:

Generally, "the elements of [equitable] estoppel are 1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; 2) *unambiguous proof of reasonable reliance* upon the misrepresentation by the party asserting the estoppel; and 3) the lack of a duty to inquire on the party asserting the estoppel." Chester Extended Care Ctr. v. Dep't of Pub. Welfare, 586 A.2d 379, 382 (Pa. 1991) (emphasis added). In the context of land use matters, we have stated that a landowner can only invoke equitable estoppel by showing, in good faith, "1) that he relies to his detriment, *such as making substantial expenditures*, 2) *based upon an innocent belief that the use is permitted*, and 3) that enforcement of the [land use regulation] would result in hardship, *ordinarily that the value of the expenditures would be lost.*" *In Re: Kreider*, 808 A.2d 340, 343 (Pa.Cmwlt. 2002) (emphasis added). "[Equitable e]stoppel ... is an unusual remedy granted only in extraordinary circumstances and the [party seeking to invoke it] bears the burden of proving [their] entitlement to [such] relief."

*Id.* at \*21.

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Accord, Restatement of Property, §476, Comment a:

a. Rationale. An easement created by implication arises as an inference of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. To draw an inference of intention from such circumstances, they must be or must be assumed to be within the knowledge of the parties. The Inference drawn represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words....