McDONALD LAW OFFICE, P.C.
EVERETT, EVERETT & McDONALD
18 SOUTH 5TH STREET
POST OFFICE BOX 8328
TERRE HAUTE, INDIANA 47808-8328

NON ADVERTISING TRIAL LAWYERS

JAMES O. McDONALD

EDWARD S. EVERETT
OF COUNSEL

WARREN R. EVERETT (1910-1985)

(812) 238-2456
FAX (812) 238-2458

Re: Purdue Road School
Wednesday, March 25, 1998 - 10:30 a.m. to 11:50 a.m.

Utilities and the Public Roadway - Just Whose Property is it, Anyway

State and County highway departments are constantly being approached by various utilities for permission to locate utilities in public right of ways. Nearly all county roads, the majority of which were originally laid out on section lines, but also including those meandering wagon roads, were never deeded to the county by the owners of the real estate who owned the property upon which the roads were located. And, in all but a few cases, no governmental entity has ever condemned any property comprising these roads. Therefore, in nearly all cases throughout unincorporated areas (and in some incorporated areas) a property owner owns to the center of a road.

Inasmuch as a great many of Indiana's state highways consist of only improved county roads, the maintenance of which were taken over by the state from the counties in years gone by, the ownership of property abutting these roads is the same as county roads.

The question then arises, when a utility seeks permission of a governmental entity to locate its utilities in the public right of way, just what is the "public right of way," and if the governmental entity grants the utility its consent to locate utilities in a public right of way; what is the effect of such a permit.

The courts of Indiana have consistently held that where a road runs through a landowner's

property, the landowner owns the road. However, such ownership is subject to the rights of the traveling public to use the road if said use has been open and notorious for the last twenty (20) years. Of course this still does not answer the question, where the landowner's title fails to contain any grant of record or description of the road, as to how much of the landowner's property is subject to the rights of the traveling public.

In determining how much of a landowner's property is subject to a public right of way, where there has been no condemnation or grant which describes that right of way, Indiana's court have consistently adopted a simple and straightforward rule. The public's right of way, and thus the limits of any governmental entity's permits given to utilities, is restricted to only that portion of the land which is "physically occupied by the road and no more."

In Anderson v. City of Huntington, 40 Ind.App. 130, 81 N.E. 223 (1907) in addressing this issue the court stated:

> That the Huntington and Goshen road is a public highway, and was a public highway in front of appellant's property prior to the action of the city of Huntington in establishing Jefferson street thereon, cannot be controverted. But its width and boundaries never having been established and determined by any competent authority, or recorded in any proper record, these boundaries must be determined by the use by the public. The way cannot be greater than the use. Where the boundary lines of a road never have been established by any competent authority, but the right of the public to travel over such road has been established by continuous usage, the width of such road is determined by the width of such use. McCreery v. Fallis (1904), 162 Ind. 255; Hart v. Trustees, etc. (1860), 15 Ind. 226; Board, etc., v. Huff (1883), 91 Ind. 333; Epler v. Niman (1854), 5 Ind. 459; Elliot, Roads and Sts. (2d ed.), §§376-386.
>
> . . . .
>
> As far back as anyone could remember, the east line of said road, as used by the public, had been defined by the fence along the west side of appellant's lot (emphasis supplied.)

Anderson, 40 Ind.App. at 133-134.

Epler v. Niman, 5 Ind. 459, 460 (1854), cited in Anderson, approved an instruction to the jury which read as follows:

> A road which by twenty years' use becomes a public highway is of no established width by law; but the width as used at the end of twenty years cannot legally be intruded upon by any one. (emphasis supplied)

McCreery v. Fallis, 162 Ind. 255, 67 N.E. 673 (1903) made it clear that the state could not simply decree a wider width for a road right of way than that which had been used by the public for twenty years. A statute authorizing county commissioners to establish the width of prescriptive highways, "which width shall not be less than thirty feet," was construed not to apply to a road where "the way had only been used to a width varying from twenty-two to twenty-eight feet." 162 Ind. at 256 (emphasis supplied). In McCreery the government contended:

> That it was an intended legislative authority to ascertain, describe, and enter of record highways established by user, regardless of the extent of the user, and to fix the width thereof at not less than thirty feet". 162 Ind. at 257 (emphasis suppled).

The Supreme Court stated, at 162 Ind. 257:

> We are forbidden the construction first above suggested, because, not only in this case but in a large number of cases, so to hold would be to sanction the confiscation of property. . . .

Indiana courts have uniformly protected landowners from confiscation of their property by governmental entities attempts to widen roads beyond the limits of the public's actual use. In Elder v. Board of County Comm'rs of Clark County, 490 N.E.2d 362 (Ind.App. 1986), where there was "no evidence of any conveyance or condemnation, or of documents to create, locate or fix the width off the road, or of any public usage of the road exceeding its previous 21 foot width;" and after the county, without permission, took approximately 15 feet of Elder's yard and

cut down trees and shrubs to widen the road, Elder sued in inverse condemnation. The trial court ruled against him, stating that he had not proven the location of his property boundaries. Elder, 490 N.E.2d at 363.

The court of Appeals first noted, at 490 N.E.2d 363:

> [T]here is no question that Elder owns the land in fee, though there is a dispute as to the exact location of its northern boundary. Thus, the real issue is whether or not, at some point in time, the land was properly appropriated by the County.

The Court then observed that the county admitted it had not condemned the land, but claimed a 40 foot right of way existed (whereas the road was 20 to 21 feet wide), based upon evidence that the county's engineer and the county surveyor thought the road, originally a private turnpike, had a 40 foot right of way, and two unrecorded survey maps of other land crossed by the same road indicated a 40 foot right of way. 490 N.E.2d at 363-364.

The Court of Appeals held that such evidence could not be a lawful basis for finding the right of way was wider than the road. The Court concluded:

> Elder's title may not be defeated by the evidence adduced by the County. None of that evidence was recorded in a proper record which would be brought into Elder's abstract as notice of the County's claim of a 40 foot right of way. A contrary ruling would drastically disturb settled land titles. We further hold that the county owned only that land physically occupied by the road and no more. (emphasis suppled)

490 N.E.2d at 365.

Occasional mowing of the berm or side ditches by a governmental entity does not extend the use of the "traveled way" to include the berm or side ditches.

In Board of Comm'rs. of Monroe County v. Hatton 427 N.E.2d 696, (Ind.App. 1981) there was evidence that the county had a policy of mowing a strip about three feet wide alongside

the road at least twice a year. The Court held that this maintenance work beyond the traveled area was insufficient to overcome the basic rule, stating:

> Where boundary lines have never been established by competent authority, the width of the road established by use is limited to that portion actually traveled and excludes any berm or shoulder.

Hatton, 427 N.E.2d at 699.

Thus, the court held, the county did not own (and was not responsible for) the weedy area where a 14 year old bicyclist pulled off the road to wait for traffic to clear, even though he was a user of the road.

While the issue here involves utilities and the public roadway, as an aside, Hatton poignantly illustrates the wisdom of the old adage that one should be careful what one asks for, it may be granted. In Hatton, had the court ruled other than as it did, Monroe County could well have had to pay for the injuries sustained by the bicyclist. Therefore, prior to a governmental entity laying claim to all property between crop rows or fence rows on each side of a road, consideration should be given to the fact that with ownership of property comes responsibility and legal accountability for injuries sustained on that property - and for environmental contaminations which might be located there.

If a governmental entity chooses to permit a public utility (not a private utility) to locate its improvements within the boundaries of the traveled roadway, it clearly has the right to do so. Colburn v. New Telephone Co., 156 Ind. 90, 59 N.E. 324 (1901). Therefore, a permit issued by the county or state to allow a utility to bore under a road is clearly effective with respect to the width of the traveled portion of the road. Likewise, a governmental entity would be within its right to permit a public utility to place its utilities parallel with the road, so long as the same are located on or in the traveled portion of the road. Were the governmental entity to permit such

acts however, the potential liability for people being injured as a consequence of those acts is staggering.

However, any such permit is ineffective as to that portion of the landowner's property which lies outside the traveled way of the public road and any such permit affords the utility no refuge as shown by the latest Indiana case on this subject, Contel of Indiana, Inc. v. Coulson, 659 N.E.2d 224 (1995), attached.

In view of recent technological advances which have resulted in utilities being desirous of burying fiber optic communication lines (some of which produce millions of dollars in revenue a day) along side public roads, this issue is going to confront governmental entities more frequently in the future. And, given: (1) the fact that Indiana law has consistently limited the definition of a public road, or public right of way, only to the traveled portion of the road, (2) the inherent liability imposed on a landowner who might accidentally interrupt service of the utility, (3) the inherent burden such a utility imposes on future use and development of the property and (4) the constraints placed on both corporations and the government by Article 1, Section 21 of Indiana's Constitution:

> No person's property shall be taken by law, without just compensation; nor, except in the case of the State, without such compensation first assessed and tendered.

governmental entities had better acquaint themselves with this body of law and act accordingly in issuing permits to utilities.

Should a governmental entity choose to grant a utility a permit, this writer recommends one similar to that used by the Morgan County Highway Commission, copy attached. Morgan County's permit provides for indemnification of the county as well as requiring notice to adjoining property owners by the utility which receives the permit.

While the writer believes this paper represents an accurate and unbiased representation of the state of the law with respect to roads which have not been condemned or conveyed, the law is not the same with respect to roads where the road is located on property obtained by condemnation or conveyance. As to those roads, any permit issued to a public utility by a governmental entity would be effective, so long as the utilities are placed within the boundaries of the governmentally owned property. Fox v. Ohio Valley Gas Corporation, 250 Ind. 111, 235 N.E.2d 168 (1968).

The writer wishes to further inform the reader that he currently and in the past has represented landowners in various parts of Indiana who are involved in litigation involving various utilities, counties and the State of Indiana, where these matters have been or are being litigated.

659 N.E.2d 224

CONTEL OF INDIANA, INC., Appellant-Defendant,
v.
Lee COULSON, Beverly Coulson and Zoe Coulson, Appellees-Plaintiffs.

No. 11A01-9503-CV-74.
Court of Appeals of Indiana.
Dec. 22, 1995.
Rehearing Denied Feb. 13, 1996.

Property owners brought trespass action against telephone company, after company buried fiber optic telephone cable adjacent to public roadway on owners' property under state permit. Parties cross-moved for partial summary judgment. The Clay Circuit Court, Ernest E. Yelton, J., granted partial summary judgment for owners, concluding that state had no right-of-way or easement beyond traveled portion of roadway. Company appealed. The Court of Appeals, Najam, J., held that: (1) state's right-of-way for state road over owners' property was coextensive with road and did not extend to adjacent property, and (2) fact issue, as to whether and, if so, where company might have acquired easement by prescription respecting its telephone lines in areas outside state road on owners' property, precluded summary judgment.

STATEMENT OF THE CASE

Contel of Indiana, Inc. ("Contel") appeals from the trial court's grant of partial summary judgment in favor of Lee Coulson, Beverly Coulson and Zoe Coulson (the "Coulsons") on the Coulsons' complaint for trespass. The Coulsons filed suit against Contel after Contel buried fiber optic telephone cable adjacent to a public roadway on property owned by the Coulsons. The parties filed cross-motions for partial summary judgment. Following a hearing, the trial court entered partial summary judgment in favor of the Coulsons and concluded, as a matter of law, that the State of Indiana has no right-of-way or easement beyond the traveled portion of the roadway. (FN1)

We affirm.

ISSUE

The sole issue presented for our review is whether the trial court erred when it held that the State's right-of-way included only the traveled portion of the road.

FACTS

The Coulsons own property in Sullivan County, the boundary of which extends to the center of State Road 63, which was formerly a county road. No fee or easement for a right-of-way was ever conveyed to the County or the State, but the motoring public has traveled along the roadway for many years. The Indiana Department of Transportation issued a permit to Contel to lay telephone cable in the State Road 63 right-of-way. In its permit, the State did not indicate the width of the right-of-way. Contel dug trenches and buried approximately two and one-half miles of fiber optic telephone cable along the road in areas which at all times were

beyond the paved roadway.

The Coulsons filed their complaint against Contel for trespass seeking compensatory and punitive damages for Contel's conduct in burying the cable after the Coulsons had advised Contel that they owned the property in question. Contel moved for partial summary judgment and sought a ruling to determine the width of the State Road 63 right-of-way. The Coulsons filed a cross-motion for partial summary judgment. The trial court concluded that the State of Indiana's right-of-way easement over the Coulsons' property included only the traveled portion of the road, excluding any berm or shoulder and, thus, entered partial summary judgment in favor of the Coulsons. At Contel's request, and finding no just reason for delay, the trial court entered final judgment on its entry of partial summary judgment. Contel now appeals.

DISCUSSION AND DECISION

Standard of Review

[1] [2] Summary judgment may be rendered upon less than all of the issues or claims. Ind.Trial Rule 56(C). In reviewing a trial court's ruling on a motion for summary judgment, the appellate court is required to apply the same standard applied by the trial court. Farm Equip. Store, Inc. v. White Farm Equip. Co. (1992), Ind.App., 596 N.E.2d 274, 275. Summary judgment is appropriate only if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Ind.Trial Rule 56(C); Lucas v. Stavos (1993), Ind.App., 609 N.E.2d 1114, 1116, trans. denied. We resolve any doubt as to fact, or an inference to be drawn therefrom, in favor of the non-moving party. Gilliam v. Contractors United, Inc. (1995), Ind.App., 648 N.E.2d 1236, 1238, trans. denied.

[3] The fact that both parties request summary judgment does not alter our standard of review. Laudig v. Marion County Bd of Voters Registration (1992), Ind.App., 585 N.E.2d 700, 704. Rather, "we must separately consider each motion to determine whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." Id.

Right-of-Way

[4] Contel contends the trial court erred when it entered partial summary judgment in favor of the Coulsons. Specifically, Contel argues that the court erroneously concluded that the State's right-of-way covered only the traveled portion of the road, excluding the land adjacent to the paved road. We cannot agree.

[5] State Road 63 is a former county road, the maintenance of which was assumed by the State many years ago. No public easement or right-of-way over the Coulsons' property has ever been conveyed by instrument or acquired by condemnation. As with most county roads, the property rights of abutting landowners extend to the center of the roadway subject only to an easement of the public to use the street or highway. See Gorby v. McEndarfer (1963), 135 Ind.App. 74, 82, 191 N.E.2d 786, 791 (citing Street, Indiana Title to Real Property, § 789). The Coulsons do not dispute that the State has a public road right-of-way over a portion of their property. The parties disagree, however, on the extent of that right-of-way.

Since there is no record indicating that the State has acquired a right-of-way over the Coulsons' property by purchase or condemnation, Indiana law dictates that the State Road 63 right-of-way must be determined by public use. In Anderson v. City of Huntington (1907), 40 Ind.App. 130, 81 N.E. 223, our supreme court recognized that the public right-of-way "cannot be greater than the use" and stated:

Where the boundary lines of a road have never been established by any competent authority, but the right of the public to travel over such road has been established by continuous usage, the width of such road is determined by the width of such use.

Id. at 133, 81 N.E. at 224; see Evans v. Bowman (1915), 183 Ind. 264, 267, 108 N.E. 956, 958. More recently, this court has recognized that the width of a road established by use is limited to that portion actually traveled and excludes any berm or shoulder. Bd. of Comm'rs of Monroe County v. Hatton (1981), Ind.App., 427 N.E.2d 696, 699. In Hatton, the plaintiff sought to establish that the County either owned or had assumed responsibility to maintain an area adjacent to a county road and had a corresponding common law duty in negligence in connection with the land. We noted that neither a record of county ownership of the adjacent areas nor any legal description of the road itself could be found, "which is a common situation for highways established by use." Id. at 699. Thus, we determined that there was no evidence to support a reasonable inference of County ownership or responsibility for the areas adjacent to the traveled portion of the roadway. Id.

Similar to the present case, in Elder v. Bd. of County Comm'rs of Clark County (1986), Ind.App., 490 N.E.2d 362, trans. denied, a landowner sued the County in inverse condemnation. The County had cut down trees and shrubs on the plaintiff's property adjacent to a public road in an attempt to widen the paved roadway from approximately 20 feet to 40 feet. The County asserted it had a 40 foot right-of-way in the area despite the fact that the width of the paved road had always been 20 feet. In Elder, we noted the longstanding Indiana precedent that the width of the right-of-way is determined by the public use. Id. at 364; Anderson, at 133, 81 N.E. at 224; McCreery v. Fallis (1903), 162 Ind. 255, 67 N.E. 673; Bd of Comm'rs v. Huff (1883), 91 Ind. 333; Hart v. Trustees (1860), 15 Ind. 226; Epler v. Niman (1854), 5 Ind. 459. Although the County produced the testimony of the county surveyor and several survey maps in support of its claimed right-of-way, we held that the evidence presented by the County was insufficient as none was recorded in a proper record which would be brought into the landowner's abstract as notice of the County's claim of a 40 foot right-of-way. Elder, 490 N.E.2d at 365. We decided that a contrary ruling would drastically disturb settled land titles. Id. (FN2)

Here, we agree with the trial court and conclude that the State Road 63 right-of-way is coextensive with the paved roadway. There is no evidence to show that the public has ever "traveled" on the land adjacent to the roadway. See Hatton, 427 N.E.2d at 699. Neither the State nor the County has ever acquired a right-of-way to property adjacent to the roadway by conveyance or condemnation, and no additional right-of-way has been acquired by use. No markers have ever been placed on the Coulsons' property to show that the State claimed a right-of-way beyond the pavement. Indeed, when it granted Contel the permit to bury telephone lines, the State did not indicate the actual extent of its right-of-way. The State merely granted Contel permission to bury its telephone cable within the public road right-of-way, which we have determined includes only the paved road.

[6] Still, Contel, a public utility which provides telephone service, maintains that the use of modern fiber optic cable creates a common good and that the State's grant of authority to Contel was sufficient to allow its utility installation along State Road 63. Contel cites several Indiana cases in support of its position, each of which is distinguishable from the instant case in that, the utility or governmental entity had established an easement or right-of-way over the property in question. In its argument, Contel circumvents the central issue of this appeal by assuming that its actions were done within the public right-of-way and with authority of the State. Where a fee is already subject to an easement for highway purposes, a utility may use a public right-of-way without the consent of the servient landowner who claims that such utility work is an additional burden on the fee. Ritz v. Indiana and Ohio R.R. (1994), Ind.App., 632 N.E.2d 769, 775, trans. denied. Here, however, the public right-of-way extends only to the paved roadway. Contel received from the State's permit only those rights which the State had and no more. Therefore, Contel could not have obtained from the State, without the Coulsons' consent, authority to bury its cable beyond the traveled portion of State Road 63.

Finally, Contel asserts that the Coulsons have specifically recognized that the State has an easement beyond that of the roadway. Contel argues that the Coulsons have failed to object to prior acts by the State in mowing and maintaining the shoulder areas along the road on their property. The State's authority and responsibility to maintain public roads gives rise to an occasional need to enter the property adjacent to the traveled roadway to mow and to maintain ditches and culverts. Its authority, however, is not derived from an easement or right-of-way. Rather, the State's authority is based on an implied license to enter the land for a limited purpose.

[7] [8] [9] Unlike an easement or right-of-way, a license merely confers a personal privilege to do some act or acts on land without conveying an estate in the land. See Industrial Disposal v. City of East Chicago (1980), Ind.App., 407 N.E.2d 1203, 1205. While an easement possesses the qualities of inheritability and assignability, these qualities are generally inconsistent with a license. Id. Further, use of land under a mere license cannot ripen into an easement, regardless of how long that use is continued. Greenco, Inc. v. May (1987), Ind.App., 506 N.E.2d 42, 46. The occasional, intermittent entry by the State on the property adjacent to the roadway merely to maintain areas appurtenant to the roadway did not establish a public right-of-way in those areas.

Based on the undisputed facts, we conclude that the State Road 63 right-of-way as established by public use extends only to the paved portion of the roadway. The trial court's partial summary judgment was correct on the issue presented by the cross-motions of the parties. However, a determination of the width of the State's right-of-way does not necessarily resolve the issue of whether Contel had an independent prescriptive right to bury its long distance cable on the Coulsons' property.

Prescriptive Easement

[10] [11] [12] A prescriptive easement is established by actual, open, notorious, continuous, uninterrupted, adverse use for 20 years under a claim of right, or by continuous adverse use with the knowledge and acquiescence of the servient landowner. See IND.CODE § 32-5-1-1; Bauer v. Harris (1993), Ind.App., 617 N.E.2d 923, 927. We agree with the Coulsons that the presence of other utilities in the area adjacent to the road does not establish an easement

in favor of Contel. A prescriptive easement is limited to the purpose for which it is created and cannot be extended by implication. Id. at 931. However, it is undisputed that Contel had previously buried local telephone lines between State Road 63 and the Coulsons' fence or crop line prior to Contel's action of burying the fiber optic long distance lines. (FN3) Although the Coulsons maintain that they do not object to the local lines, in determining whether Contel has a prescriptive easement, we decline to recognize a distinction between its local cable and long distance cable.

It is unclear from the record how long the Contel local lines have existed on the Coulsons' property or the exact location of the local lines in relation to the new fiber optic cable. (FN4) At trial, it remains to be determined whether or not Contel or its predecessor in interest acquired a prescriptive easement for telephone lines over any part of the Coulsons' property.

We affirm the trial court's entry of partial summary judgment on the issue of the width of the State Road 63 right-of-way, noting, however, that genuine issues of material fact remain for trial concerning whether and, if so, where Contel may have acquired an easement by prescription.

Affirmed.

BAKER and GARRARD, JJ., concur.

FN1. We heard oral argument on November 28, 1995, at Indiana State University in Terre Haute.

FN2. In Elder, this court further held that the County owned only that land physically occupied by the road and no more. Id. at 365. We note that in Elder, unlike here, the landowner's property line did not extend to the center of the roadway. He had significantly fewer rights than do the Coulsons as he owned only that land lying south of the southern edge of the road.

FN3. The record also shows that Contel replaced some of the old local lines at the same time as it was burying the long distance lines.

FN4. The Coulsons assert that while Contel placed its long distance lines next to the pre-existing local line in some areas, in other areas the long distance cable is not even on the same side of State Road 63 as the pre-existing lines.