COMMONWEALTH OF PENNSYLVANIA
BEFORE THE BOARD OF PROPERTY

Larry L. Lingle and Cynthia Lingle, his wife, Plaintiffs	: :	
	:	Docket No. BP 2006-0001
v.	:	
Commonwealth of Pennsylvania and Pennsylvania Game Commission Defendants	: : :	

ADJUDICATION AND ORDER

HISTORY

On June 1, 2006, Plaintiffs Larry J. Lingle and Cynthia A. Lingle (herein the Lingles), filed with the Board of Property (Board) a Complaint against the Commonwealth and the Pennsylvania Game Commission (PGC)[1] claiming an easement by implication or by necessity over PGC Game Land No. 97 in Centre County. On June 27, 2006, PGC filed an answer denying that an easement of either type had ever or currently exists.

On September 22, 2006, a pre-hearing conference was held with counsel for the Board and the parties. A Board order followed the conference, setting December 1, 2006 for the filing of pre-hearing statements. On December 19, 2006, after conferring with the parties, the Board issued a Notice of Hearing for January 11, 2007.

The Board held a hearing on that date, at the time and place scheduled. Presiding at the hearing were: Andrew Sislo, Chief of Staff, designee of Pedro A. Cortés, Chairman of the Board, and Secretary of the Commonwealth; Andrew Clark, Deputy General Counsel, designee of Barbara Adams, General Counsel; and Steven Fishman, Chief Counsel, designee of Dennis Yablonsky, Secretary of Community and Economic Development.

Charles Rosamilia, Esquire, represented the Lingles. Bradley C. Bechtel, Esquire, represented PGC.

Following the hearing, the Board directed simultaneous filing of briefs. PGC filed its post-hearing brief on February 15, 2007 and the Lingles filed their brief on February 16, 2007. The matter is now before the Board for adjudication.

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[1] In this proceeding the Commonwealth and PGC will be treated as a single entity.

FINDINGS OF FACT

1. Plaintiffs Larry J. and Cynthia Lingle, his wife, are the record owners of a 44-acre parcel of land in Howard and Boggs Townships, Centre County, which was conveyed to them by Shane M. McKinley and Diane M. McKinley, his wife, by deed dated March 25, 2005 and recorded in Centre County Deed Book Volume 1820, page 998. (Exhibit P-10)

2. The stated consideration for the property was $62,000. (*Id.*)

3. Defendant PGC is the owner of 156.6- acre tract of land in Boggs, Howard and Curtin Townships, Centre County, which was conveyed to it by deed from Balser and Catherine Weber, his wife, on May 16, 1941 and recorded in Centre County Deed Book Volume 169 page 195; the tract is now a part of State Game Lands No. 92. (Exhibit D-1)

4. Both the Lingle and PGC tracts were a part of the 1794 Jesse Brooks Warrant which was patented in the Commonwealth Land Office on April 24, 1795. (Exhibit P-10)

5. From the 1800s to a time prior to 1940 the Curtin family[2] held all of the Jesse Brooks Warrant which included the 200 acres ultimately conveyed to PGC and the Lingles . (N.T.48)

6. Both the Lingles and PGC trace their title to a deed of David Chambers, Centre County Treasurer, to Hugh Laird Curtin dated June 12, 1916 recorded in Deed Book 120, p.55. (Exhibit P-11-Exhibit A)

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[2] Andrew Gregg Curtin served as Governor of Pennsylvania during the Civil War. Governor Curtin was the son of Roland Curtin, the founder of Eagle Iron Works, which produced iron in Boggs and Howard Townships from 1810 to 1921. Governor Curtin's first state office was as Secretary of the Commonwealth in the 1850s.

7. Sometime between 1916 and 1940, 156.6 acres of this tract was conveyed by Curtin or his estate to a third party leaving a 44-acre tract to the rear still in Curtin ownership. (Exhibit P-11, Exhibit A)

8. The south line of the 156.6-acre tract of land adjoined a township road known as Woomer Divide Road; its conveyance landlocked the 44-acre tract at its north line then owned by the Estate of Hugh Laird Curtin. (Joint Exhibit J-1, N.T. 7, 8, 19)

9. Balser Weber acquired 156.6 acre property by deed dated December 10, 1940 from Julia Lucas, et al., recorded in Centre County Deed Book Volume 167, page 429. (Exhibit D- 1)

10. On May 16, 1941, Balser Weber and Catherine Weber conveyed the 156.6-acre tract to the Commonwealth of Pennsylvania for the use of the Pennsylvania Game Commission for a stated consideration of $352.35. (*Id.*)

11. By deed dated December 18, 1942, Balser Weber acquired the 44-acre tract (the Lingle property) from Thomazine Potter Curtin, Executrix of the Estate of Hugh Laird Curtin. (Exhibit P-11, Exhibit A)

12. In 1956, Balser Weber asked PGC to allow him to use a trail on the 156-acre tract for an indefinite period of time to remove wood products from the 44-acre (now Lingle) tract to Woomer Divide Road. (Exhibit D-4)

13. PGC authorities described the right of way as "old road" 16 feet wide and 800 feet long. (*Id.*)

14. PGC records show that in reviewing the request PGC also reviewed a portion of an undated survey map of the Jesse Brooks Warrant map which showed the location of a

road or trail (presumably Weber's proposed access) from the township road to the Lingle tract. (*Id.*)

15. On October 11, 1956, PGC informed Weber that his "request to use a road on the above lands" was subject to a $25 yearly license fee. (*Id.*)

16. Baxter and Peggy Ann Weber acquired the 44-acre Lingle tract through the estates of Balser S. Weber and Catherine Weber. (*Id.*)

17. The McKinleys acquired the property by deed dated January 22, 1999 from Baxter and Peggy Ann Weber recorded at RB 1063, page 328. 4. (*Id.*)

18. In 1999 the McKinleys attempted to negotiate a right-of-way from PGC but were unsuccessful; the McKinleys were also unsuccessful in obtaining access over the land over other properties at the north line under the Private Roads Act. (Exhibit P-11-Exhibit A)

19. Larry Lingle accesses his property from Woomer Divide Road, which is the nearest public road to the 44–acre tract by traversing an 856-foot Jeep or woods trail on foot. (N.T. 15)

20. Lingle has identified a second access route at the north line of the 44-acre tract that would cross the properties of five private owners and cover approximately 4,220 feet (8/10ths of a mile) to the public road known as Township Route TR 460. (N.T. 16)

21. Although deeds and maps indicate that other wood trails once existed on the former Jesse Brooks Warrant Lingle is not aware of any that exist today. (N.T. 20-21)

22. The existing trail traverses two streams; it is in some places able to accommodate motorized vehicles and in others, such as approaches to streams, suitable as footpaths. (Exhibits P-1-9)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter under Section 1207 of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. § 337.

2. The facts establish sufficient grounds for granting an easement by necessity over a former logging road, a distance of approximately 486 feet and 16 feet wide, over State Game Lands No. 92 from Woomer Divide Road.

3. The facts establish sufficient grounds for concluding that an easement by implication was created on the logging trail when the 156 –acre tract now owned by PGC was conveyed by the common grantor.

DISCUSSION

The issue in this case is whether there exists an easement by necessity or implication on PGC Game Lands No. 97 in favor of the landlocked[3] property of the Lingles.

Summary of Evidence

The parties have stipulated to the authenticity of deeds and other records relating to the two properties. They have also stipulated that no deed in either chain of title references the existence of a right-of-way or an easement for the landlocked property.

Plaintiffs' evidence included 9 photographs (Exhibits P-1-9) showing various parts of the trail which the Lingles use to access their property from Woomer Divide Road consisting of about 856 feet, their deed (Exhibit P-10) from the McKinleys dated March 25, 2005, reciting a consideration of $62,000 for the property, and Plaintiffs' Prehearing Statement (P-11) setting forth the chains of title of the Lingles and PGC to a common grantor in a Board of View Hearing Memorandum in *IN RE: Appointment of Board of Viewers to establish the location for private road to Landlocked premises situate in Howard Township Centre County Pennsylvania.*[4]

Defendants' evidence included the deeds of the parties (Exhibits- D-1 and D-2), copied pages of the 1874 Pomeroy Atlas showing a map of the area of the Lingle property (Exhibit D-3), correspondence in the files of PGC indicating that in 1956 Balsa Weber—who once owned both properties at different times in the 1940s—requested and received

[3] Black's Law Dictionary (7 edition 1999), at 883, defines "landlocked" as "[s]urrounded by land, often with the suggestion that there is little or no way to get in or out without crossing the land of another."
[4] This matter was filed in the Court of Common Pleas of Centre County by Plaintiffs predecessors the McKinleys, at Docket No. 99-2881.

permission from PGC to use an 800 foot 16 foot wide "old road"[5] to remove wood from the Lingle property over PGC land to Woomer Divide Road (Exhibit D-4), and deeds of other adjoining property owners of the Lingles (Exhibits D-5-7).

Each party presented a single witness at the hearing.

Larry Lingle testified in his own behalf. He identified his property on a PGC State Game Lands No. 92 cartographic map (Joint Exhibit 1) as a rectangular shaped tract annotated as "l-1705, Tract No. 1, Balser Weber, 44.4 acres." He testified that his south and east property lines share a common boundary with PGC and that the Lingles' southern line is the nearest line to a public road—Woomer Divide Road—a township road. (N.T. 15) Lingle presently accesses his property from this road on a Jeep or woods trail. He has had the trail measured and he estimates that it is 485-86 feet from Woomer Divide Road to his property line. (N.T. 16) On the north line, he testified that the nearest access to a public road would be 8/10 of a mile in length crossing lands of five private property owners. (N.T. 16-17) Lingle introduced pictures he took of the existing trail from Woomer Divide Road to his property line showing it wide enough for a 4-wheel vehicle in some parts and a narrow footpath at others, such as crossing a stream. (Exhibits P-2-9) On cross-examination, Lingle testified that he did not know what the property was like in the 1940s and 50s. (N.T. 29)

Shirlene Knopsnyder, a real estate specialist for PGC testified regarding her examination of the properties and property records. She described the trail on PGC land as initially "quite steep" before it gradually levels off and crosses two streams before reaching the Lingle property. (N.T. 36) None of the deeds she examined in the PGC or Lingle chains

[5] The description and the distances were apparently determined by PGC officials. There is no writing or other evidence in the record from any other owner concerning the nature of the road or its characteristics.

of title reference a right-of-way on PGC property. (N.T. 39) Mrs. Knopsnyder testified that she believed that the Jeep trail Lingle now uses to access his property dates from 1956 because PGC allowed Balser Weber to use the trail to access the 44-acre Lingle tract at that time. (N.T. 48) She acknowledged that the trail has not become overgrown with vegetation over that time but stated that the trail was very narrow and showed no evidence that vehicles had been used on the trail since 1956. (N.T. 49)

The Lingles contend that they should be granted an easement by necessity or by implication. The law and evidence pertaining to each will be discussed *seriatim.*

Easement by necessity

An easement by necessity may be created when after severance from an adjoining property, a piece of land is without access to a public road. *See Soltis v, Miller*, 444 Pa. 357, 359, 282 A.2d 369, 370 (1971). In order to establish an easement by necessity a property owner must prove:

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 and at the time of the exercise of the easement.

Graff v. Scanlan, 673 A.2d 1028, 1032 (Pa. Cmwlth. 1996).

A grantor is entitled to an easement by necessity when he grants away a part of his

land and by doing so leaves a remaining tract without access to a public road. *Ogden v. Grove,* 38 Pa. 487 (1861).

Although both the Lingles and PGC derive their title from Balser Weber, their deeds indicate that Balser Weber acquired the Lingle property in 1942 after he conveyed the 156.6 acre tract to PGC on May 16, 1941. Thus, there was no unity of title in his ownership. Although no deed was introduced, PGC stipulated that the Curtin family was the common grantor of the two tracts. (N.T. 48) In the report of the Board of View, *supra*, both chains of title are sourced to a deed dated June 12, 1916 recorded in Centre County Deed Book Vol. 120, p. 55 from David Chambers, Treasurer to Hugh Laird Curtin. Curtin severed the common ownership by conveying the 156.6 acre PGC tract some prior to the 1940s.[6] Ultimately Julia Lucas and others on December 10, 1940 conveyed the property to Balser Weber, who sold it to PGC six months later. After this conveyance, Curtin or his estate, continued to own the 44-acre tract until it was conveyed to Balser Weber by the administratrix estate of Hugh Laird Curtin in 1942.[7]

No evidence was introduced showing what either tract was used for in 1941 or 1942, nor is there anything in the record to show what Weber or his predecessor did with the landlocked 44 acres prior to 1956. PGC argues that at the time of severance the Lingle property was not landlocked because the Curtin family owned property to the north and east and access could be had to a public road through this commonly held property.

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[6] There is no direct evidence of this transfer. It can be inferred from the chain of title and the stipulation of the parties. (Exhibit-P-11, N.T. 39, 48)

[7] In its post hearing brief, PGC argues that the Curtin family owned other parts of the Jesse Brooks Warrant and had other access to the property. The first prong of the test for an easement either by necessity or implication is the determination that the two tracts were once held by a common grantor; the second prong is that the unity of title was severed when the grantor conveyed one of the tracts. In this analysis, the fact that

The Board does not believe that the fact that other family members own adjacent property negates the finding of a necessity to a tract landlocked by severance of a part of a tract owned by a common grantor. Although the evidence is not voluminous, the Board believes it must look to documents and records that do exist to determine whether an easement by necessity or by implication has been shown by sufficient evidence.

Various deeds indicated that prior to 1941 much of the land in Centre County had previously been used for the operations of the Eagle Iron Works owned by the Curtin Family. The deeds of the property owners at the north line of the Lingle property state that the interests were part of the business entity known as the Eagle Iron Works and were vested in H. Laird Curtin and reference the deed of Centre County Treasurer Cook to Curtin. (Exhibits D-5-D-7) These tracts were acquired, utilized, and held under a business entity known as Eagle Iron Works. The property that the Historical records of Centre County indicate that Eagle Iron Works started iron production in 1810 in Boggs and Howard Townships and ceased operations in 1921. Land holdings of the Curtin family in Centre County in the 1800s were estimated to exceed 11,000 acres, much of it forested land. Wood from these forests fueled the furnaces of the iron works.[8] This history would indicate that the old roads on these properties were likely built and used for logging activities necessary for the operation of the iron works. In 1956, when Weber asked PGC to allow him access to his property from Woomer Divide Road through State Game Lands PGC officials referred to a map showing the location of an "old road" which Weber

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the grantor or his family held title to land from which access could be allowed to the dominant estate (i.e. the tract burdened by the severance of the tract.

[8] Centre County historical documents are maintained at various libraries in the county and state. A summary of the logging and iron making activities are available at www.co.centre.pa.us and www.boggstownship.org.

wished to use to remove wood from his property. Based on the documents in PGC records of this request, the old road is the same 800 feet woods trail over which Lingle now accesses his property. Thus, it seems reasonable to infer that the logging road was created by Curtin sometime prior to 1916 and that it was continued in use as a logging or woods trail both before and after the conveyance of the 156.6 acre tract out of the Curtin ownership.

It is undisputed that the only alternative access to this 800 foot road to the Lingle land would be a newly established private road under the Private Road Act[9] of nearly one mile over the lands of five property owners. As against this alternative, the Board believes that the requirement of "strict necessity" over the PGC land has been met.

Easement by implication[10]

Black's Law Dictionary, Fifth Edition, defines "implied easement" as:

> One which the law imposes by inferring the parties to a transaction intended that result, although they did not express it. An easement resting upon the principle that, where the owner of two or more adjacent lots sells a part thereof, he grants by implication to the grantee all those apparent and visible easements which are necessary for the reasonable use of the property granted, which at the time of the grant are used by the owner of the entirety for the benefit of the part granted. One not expressed by parties in writing but arises out of existence of certain facts implied from the transaction.
> *Id.*, p. 458.

In *Burns Manufacturing Co., Inc. v. Boehm*, 467 Pa. 307, 356 A.2d 763 (1976), relied on by Plaintiffs, the Court stated:

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[9] *See* Section 11 of the Private Road Act, Act of June 13, 1836, P.L. 551, *as amended,* 36 P.S. § 2731.
[10] Easements by necessity and by implication are distinguished by the third element of proof. An easement by necessity is dependent on a showing that the landowner has not reasonable access to a public highway after severance by the grantor. An easement by implication (implied reservation) requires proof of a prior use of a right of way that is open, continuous and permanent in manner that gives rise to the implication that the parties intended that such use would continue, irrespective of the necessity for the use. See Powell on

> It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is so notwithstanding that the easement is not essential for the beneficial use of the property. The circumstances which will give rise to an impliedly reserved easement have been concisely put by Chief Justice Horace Stern speaking for the Court in *Tosh v. Witts*, 381 Pa. 225, 258, 113 A.2d 226, 228 (1955),:
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> > [W]here an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either the purchaser takes subject to the burden or the benefit as the case may be , and this is irrespective of whether or not the easement constitutes a necessary right of way.

Id. at 313-314, 356, A.2d at 767 (Citations omitted).

In deciding whether an easement has been created by implication, the Pennsylvania courts have used two different tests, the traditional test and the Restatement test. *Mann-Hoff v. Boyer*, 413 Pa. Superior Ct. 1, 604 A.2d 703 (1992). There the Court described the two tests :

> [In t]he traditional test ..."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."
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> [While] the "less restrictive test" of the Restatement of Property, § 476 expressly adopted in Pennsylvania in *Thomas v. Deliere*, 241 Pa. Superior Ct. 1, 5 n. 2, 359 A.2d 398, 400 n.2 (1976) "emphasizes a balancing approach, designed to ascertain the actual or implied intention of the parties. Id. at , 604 A.2d 606-07(Citations omitted).

Real Property § 411(1975). Proof of one does not necessarily exclude proof of the other.

The Restatement designates the following factors are important whether the circumstances 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 conveyee,
(e) the extent of the necessity to the claimant,
(f) whether reciprocal benefits result to the conveyor or conveyee,
(g) the manner in 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.

Comment g., states: "In the greater number of cases, its necessity to the use of land of the claimant is the circumstance that contributes most to the implication of an easement. If no use can be made of the land conveyed or retained without the benefit of an easement, it is assumed that the parties intend the easement to be created." Conversely, as the degree of necessity decreases, the need to refer to other factors suggestive of an intent to create an easement increases substantially.

Our Supreme Court's most recent discussion of easements by implication at severance of title appears in *Bucciarelli v. DeLisa*, 457 Pa. 431, 436, 691 A.2d 446, 448 (1997), a case relied upon by PGC. There the Court stated:

> [P]rior use as a circumstance in implying, upon a severance of possession by conveyance, an easement results from an inference as to the intention of the parties. To draw such an inference the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at that time. 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. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in considerable degree necessary to the continued usefulness of the land. Also, they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so

> altered the premises as to make them apparent upon reasonably prudent investigation....

The Board concludes that in addition to an easement by necessity sufficient proof exists to show an easement by implication at severance of title. With regard to the parties' intent, use of the entire 200-acre Jesse Brooks Warrant and other land depended on operations of logging and the iron works. Logging in turn depended on the existence and continuance of logging roads to move forest product to the saw mill. It is likely that the parties anticipated that Curtin would continue to have access to the remaining 44 acres by the short distance on an existing logging road rather than acquiring a new egress to the north.

In considering whether the use of the easement was open, visible, permanent and continuous, the Board considers the photographic evidence, and the circumstances existing when logging was one of the primary industries in Centre County in 1916 through the 1930s and in the 1940s when logging activities were on the wane and the land was being converted to recreational or other public use. The Board concludes that it is reasonable that the easement would be maintained in a manner consistence with its present recreational use, as opposed to original logging use.

In *Bucciarelli* the Court noted:

> 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.

The last evidence of the use of this trail or road to access the Lingle property was in 1956 when it was owned by Balser Weber. PGC officials then noted the old road was 800 feet long and 16 feet wide. The parties have stipulated that a pipe was probably used at one time to create a bridge over at least one of the streams. (N.T. 31, 54) Common experience would indicate that the removal of wood in the 1940s and 1956 would involve motorized vehicles which could be accommodated by a 16 foot road as opposed to a narrow foot path. The present condition of the trail shows that it has not been maintained as a road for log removal for a number of years. Although now narrower than 16 feet, the road is no less well defined, and no less necessary for the use and enjoyment of the Lingle tract. In this regard the Lingles have acknowledged that they must obtain the necessary permits from township and state agencies to improve the road and that PGC would be entitled to erect a gate or other impediment to limit access to the right-of-way "in their sole discretion."[11]

Based on the forgoing, the Board concludes that the tests for an easement by implication have been met.

[11] See Proposed Findings of Fact 13 and 14 of Proposed Findings of Fact and Conclusions of Law and Brief on Behalf of Plaintiffs Larry J. and Cynthia A. Lingle.

COMMONWEALTH OF PENNSYLVANIA
BEFORE THE BOARD OF PROPERTY

Larry L. Lingle and Cynthia Lingle, his wife, Plaintiffs	:	
	:	**Docket No. BP 2006-0001**
v.	:	
Commonwealth of Pennsylvania and Pennsylvania Game Commission	:	
Defendants	:	

ORDER

AND NOW, this 17th day of August, 2007, the Board of Property of the Commonwealth, in consideration of the record in the above matter, finds that the Plaintiffs, Larry L. Lingle and Cynthia Lingle have an easement by necessity and by implication.

Andrew Sislo, Chief of Staff
Pennsylvania Department of State
Designee of Pedro A. Cortés
Secretary of the Commonwealth
Chairman, Board of Property

Plaintiffs' Counsel:

Charles Rosamilia, Esquire
Rosamilia & Brungard
241 West Main Street
Lock Haven PA 17745

Defendant's Counsel:

Bradley C. Bechtel, Esquire
Assistant Counsel
Pennsylvania Game Commission
2001 Elmerton Avenue
Harrisburg, PA 17110-9797

Date of Mailing: August 20, 2007