

## *Old Easements May Never Die, Or Even Fade Away*



Easements are important to most public utility systems. On occasion, a question may arise concerning the continued validity of an old easement that may never have been used, or an easement in which a main has been constructed but subsequently has been removed or abandoned in place.

This type of question confronted a court in the recent case of *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 740 N.E. 2d 328 (Ohio App. 4th Dist. 2000).

According to the court's opinion, a fuel supply company acquired the easement in question in 1916 and installed a buried natural gas pipeline in the easement that year. The pipeline was used for transportation of natural gas from 1916 until 1986, when its owner capped off portions due to deterioration. That owner later conveyed the easement and pipeline to the current easement owner. Subsequently, the current owner notified the underlying landowners of its intent to replace the pipeline with a modern liquid petroleum pipeline, that it would remove all trees within seventy-five feet of the pipeline and would maintain a fifty foot clearing for maintenance. The landowners sued to enjoin the project.

The court set forth what it deemed to be the applicable general principles in construing easements, including the following.

- "An easement is an interest in the land of another, created by prescription or express or implied grant, that entitles the owner of the easement, the dominant estate, to a limited use of the land in which the interest exists, the servient estate." *Id.* at 334.
- "When an easement is created by an express grant, the extent and limitations upon the dominant estate's use of the land depend upon the language in the grant." *Id.*
- "The grant of an easement includes the grant of all things necessary for the dominant estate to use and enjoy the easement." *Id.*
- "Where the dimensions of the easement are not expressed in the granting instrument, the court determines the dimensions from the language of the grant, the circumstances surrounding the transaction and that which is reasonably necessary and convenient to serve the purpose for which the easement was granted." *Id.*
- "Generally, the court should presume that the parties contemplated that normal development would result in some changes in the mode of use of the easement, even if it were unlikely that the parties anticipated the specific developmental changes." *Id.* at 335.
- "[I]f the language of the grant clearly gives the easement holder a right in excess of the one actually used, such right still exists notwithstanding the easement holder's exercise of a lesser privilege." *Id.*
- "To demonstrate that a dominant estate has abandoned its easement, the servient estate must establish both nonuse of the easement and an intent to abandon the easement." *Id.* at 338.

The court concluded that the then owner of the natural gas pipeline who stopped using portions of it did not intend to abandon the easement. Although the landowners presented evidence that the owner stopped using portions of the pipeline, the court said that this evidence did not demonstrate unequivocal and decisive acts inconsistent with the continued use of the easement.

The court noted that an employee of the pipeline owner made an effort to keep the easement clear even after he capped the pipeline and diverted customers to a newer, safer line. Further, that such owner assigned the easement to the current owner evidenced a belief that it still possessed the easement and had not abandoned it.

A second issue in the case concerned the width of the easement. The original granting document did not specify a width.

The current easement owner argued that a fifty-foot easement was established by use and acquiescence. The landowners presented evidence that large trees predating the easement continue to grow in the easement's path. However, the current owner responded that tree growth did not establish acquiescence in this case. It presented historical evidence that the large trees were saved to be used as forms for putting fire bends in pipes and as leverage anchors for moving heavy sections of pipe. In addition, there was evidence that the easement owners maintained a width of fifty feet by bulldozing brush and spraying herbicides. The court held that the easement was fifty feet.

The court also concluded that a construction easement of seventy-five feet was established by use and acquiescence. "Curves and wrinkles in the [pipeline] prove that the fire bends and brace and tackle type leverage anchors were used in its installation. These processes required large groups of men, teams of horses and oxen, and large trees. The evidence further reveals that these men and animals would have required a working and camping area approximately seventy-five feet wide." *Id.* at 336-337.

One of the judges wrote an interesting concurring opinion: "When these easements were granted almost a hundred years ago, the idea of progress was dominant. The common ecological concept was the balance of nature (i.e., that nature was self healing and that whatever was done, the land would eventually restore itself). The language of the easements reflects this attitude in the way the grantee is given a very broad range of permissible activity. The fact that the easement does not even include a specified width demonstrates the laissez faire attitude toward the land.

"Today, of course, no one would grant an easement as broad as the one at issue here. The courts and the parties, however, are bound to follow the terms of the easement as originally granted and to construe it as the original parties intended. The current landowners took their property subject to what the prior landowners in 1916 would have deemed acceptable. Even though what the current landowners regard as acceptable is much more restrictive, they can no more rewrite history than this court can rewrite the terms of the easement." *Id.* at 341. ■