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DRAINS, EASEMENTS AND RIGHTS OF WAY

I. DRAINS: IC 36-9-27

A. Private Drains – on single landowner’s property.

1. By use

2. By agreement

B. Mutual Drains – crosses property owned by different persons.

1. By use

2. By Agreement

C. Legal Drains

1. County Drainage Board

D. Common Enemy Doctrine - Relief for drainage issues may be sought under Common Law theories or under the Indiana Drainage Law. Cornett v. Bamish, 2009 Ind. App. **Unpub.** LEXIS 1932. Here, Bamish laid a 40’ pipe through a RR ROW to discharge his surface water into a legal drain (the Harris Ditch) on the other side of the abandoned RR ROW berm on Cornett’s property. Cornett claimed trespass. Since the pipe emptied into a legal drain and not onto Cornett’s property, no relief was granted. The Court noted that Cornett did not bring any action under the Drainage Law and waived any arguments under that Law. Interesting fact is that the RR ROW was abandoned so the Bamish and Cornett owned to the center of the old ROW. The Harris Ditch was on Cornett’s property, but stopping the pipe so that the water drained directly into the Harris Ditch did not violate the Common Enemy Doctrine. This is an unpublished Memorandum Decision which cannot be cited as authority.

II. UTILITY EASEMENTS

A. Creation

1. By grant, agreement, dedication

2. By implication – necessity/prior use/prescription

a. Unity of title

b. Example for access – Landlocked parcel

B. Types

- 1.Appurtenant – runs with the land
- 2.In Gross – personal

C. Limitations

1. Limited to the purpose for which they are created. Howard v. United States (Ind. 2012), 964 N.E.2d 779. [A rails to trails case.]
 - a. Size
 - b. Use

D. Right to use ROW

1. Consent of adjoining landowner is not required if the utility is located within the road ROW. Ritz v. Indiana and Ohio R.R. (Ind. App. 1984) 632 N.E.2d 769; Contel of Ind. V. Coulson (Ind. App. 1995), 659 NE2d 224; Fox v. Ohio Valley Gas Corp. (Ind. 1968), 250 Ind. 111, 235 N.E.2d 168. There is no additional burden and no additional servitude entitling the adjoining landowner to any compensation.
2. Consent is required if utility is not located in road ROW (ROW established by use, not by grant. Contel of Ind. V. Coulson (Ind. App. 1995), 659 NE2d 224.
3. Easement vs. License - licenses are typically more restrictive and cannot be assignable or extended to a sub-licensee; a license merely confers a personal privilege to do some act or acts on land without conveying an estate in the land. Contel of Ind. V. Coulson (Ind. App. 1995), 659 NE2d 224; Mattingly v. Warrick County Drainage Bd. (Ind. App. 2001), 743 N.E.2d 1245; Industrial Disposal Corp. v. East Chicago, Dep't of Water Works (Ind. App. 1980), 407 N.E.2d 1203.

III. RIGHTS OF WAY – a form of easement

A. By grant, conveyance or dedication (may include a fee).

B. By use – the area is limited to that which is actually used.

- 1.Contel of Ind. V. Coulson (Ind. App. 1995), 659 NE2d 224. Action in trespass by landowner against telephone company that installed lines adjacent to state highway (SR 63) on landowner's property. SR 63 was formerly a county road before being taken over by the State. Adjoining property owners to a County Road own to the center of the Road. Contel had obtained a permit from INDOT to install the telephone lines in the

ROW. The permit, however, did not state the width of the ROW. Since the State (County) had acquired the ROW by use and not by grant or condemnation, the width of the ROW was limited to the paved traveled portion actually used and did not extend to the adjoining land necessary for periodic maintenance, the berm or shoulder. Contel further argued that the State's periodic use of the adjoining land for maintenance purposes established the width of the ROW. The Court rejected this argument and found that the rights of the State to use the adjoining land for maintenance of the road was based on an implied license of necessity, not an easement. The Court sent the case back to the trial court to determine if the utility had acquired an easement by prescription. While not part of the Court's holding on the facts of the case, the Court did state the legal premise that when a fee is already subject to an easement for roadway purposes, a utility may use the public right of way without the consent of the servient estate holder. It is not an additional burden on the fee.

2. IC 8-20-1-15 – prior to July 1, 1995, the “20-year road law” established the road width by use – “(a) All county highways laid out before April 15, 1905, according to law, or used as such for twenty (20) years or more, shall continue as originally located and as of their original width, respectively, until changed according to law. (b) From and after January 1, 1962, no county highway shall be laid out which is less than twenty (20) feet on each side of the centerline of said county highway, exclusive of such additional width as may be required for cuts and fills.” Elder v. Board of County Comm’rs (Ind. App. 1986), 490 N.E.2d 362. This statute was amended in 1995 to remove subsection (a), the 20-year portion of this statute, effective July 1, 1995 (PL 112-1995, sec. 2).

C. Condemnation – cannot be “re”- condemned to change the use.

1. Land taken for one ROW use cannot be taken/condemned for a second different use. Baltimore & O. & C. R. Co. v. North (Ind. 1885), 103 Ind. 486, 3 N.E. 144 (Marshall County drainage board attempted to install a ditch along RR ROW; RR sought an injunction to prevent the construction; injunction was granted). This specific holding is limited by its facts in that the construction of the open ditch in the RR ROW along the ROW would greatly endanger and possibly destroy the railroad's use of its ROW. See Baltimore & O. S. W. R. Co. v. Board of Comm’rs (Ind. 1900), 156 Ind. 260, 58 N.E. 837. *The 1885 decision was overturned to the extent its holding went failed to require the destruction of the first easement to find the second invalid.* Postal Tel. Cable Co. v. Chicago, I. & L. R. Co. (Ind. App. 1903), 30 Ind. App. 654, 66 N.E. 919.
2. Damage to drainage systems is a proper element of damages to be considered in a condemnation proceeding to establish a ROW. Chicago, I. & L. R. Co. v. Ader (1915), 184 Ind. 235, 110 N.E. 67.

D. Order of County Commissioners – 1905 Highway Act (IC 8-20-1) (apparent right of way)

1. Worldcom Network Servs. v. Thompson (Ind. App. 1998), 698 N.E.2d 1233. Worldcom sought an easement from Thompson, who refused. Worldcom obtain a permit from Morgan County Highway Dept to install its cabling within the County Road ROW. Thompson cut the line. The County Commissioners' Order establishing the road under the 1903 Act as filed in the board of commissioner's order book in the Auditor's office was notice of the existence of the road. The road had a 30' ROW and was not limited to the pavement traveled. The Section line was the center of the road from which the width measure was to be taken.

IV. WHEN A DRAIN MEETS AN EASEMENT OR A ROW.

A. Railroad:

1. Baltimore & O. S. W. R. Co. v. Board of Comm'rs (Ind. 1900), 156 Ind. 260, 58 N.E. 837. Baltimore & O. & C. R. Co. v. North (Ind. 1885), 103 Ind. 486, 3 N.E. 144. RR ROW cannot be taken for drainage if the drainage project will destroy or adversely affect the RR ROW.
2. IC 36-9-27-71: Drains crossing RR ROW. This statute establishes procedure and allocation of costs. RR must pay ½ of the cost for the work on the crossing in a construction or reconstruction of a regulated drain. The other ½ is included in the cost for the work on the drain.
3. IC 8-20-1-26 gives a RR the right to cross a stream or watercourse, but the RR must restore the stream or watercourse to its original state.

B. Highway:

1. IC36-9-27-71: Drains crossing highways. Establishes procedure and allocation of costs. Owner of highway row must pay 100% of the cost for the work on the crossing in a construction or reconstruction of a regulated drain. However, if a new crossing is required do to cut off for the purpose of shortening or straightening a regulated drain, the owner of the highway row must pay ½ of the cost of the new crossing. The balance shall be included in the cost of the construction or reconstruction.

C. Public Utility:

1. IC 36-9-27-48: If the Board determines that the public utility facilities must be relocated as part of the construction or reconstruction of the regulated drain, the public utility must pay the cost of the relocation of the facilities.
2. PIPELINE: Panhandle E. Pipe Line Co. v. Madison County Drainage Bd. (USDC SD Ind. 1995), 898 F. Supp. 1302. Madison County Drainage Board

ordered the reconstruction of the John Dugan Drain, which was crossed by Panhandle's pipe line. The drainage board attempted to require Panhandle to incur the cost to lower its gas pipes some 15 to 25 feet. Panhandle sought an injunction. The District Court ruled that if the John Dugan Drain had pre-existed Panhandle's pipe line, Panhandle would have had to incur the cost to move its pipe line. However, because there was no evidence of when the John Dugan Drain was established, the Court applied the Kansas highway case (*Panhandle Eastern Pipe Lien Co. v. State Highway Comm'n*, 294 US 613, 79 L. Ed. 1090, 55 S. Ct. 563 (1935)) ruling to find that Section 48 did not apply to Panhandle in this set of facts and the County would have to incur the cost to move the pipe line if it desired to proceed. Such would be a taking without just compensation under the *Fourteenth Amendment*.

D. Obstructions or damage to regulated drain: IC 36-9-27-46 does not specifically identify a public utility or railroad, but subsection (d) provides for the recovery of costs and attorneys' fees by the county surveyor if the acts or omissions of any person (other than an owner of land benefited by the drain) causes damage or an obstruction to a regulated drain.

E. Relocation of Easement:

1. The relocation of a fixed easement requires the consent of all affected estate-holders. *Town of Ellettsville v. DeSpirito* (Ind. 2018), 111 N.E.3d 987 (*a good case to read for a review of easements*). Lot owner sought authority from Plan Commission to relocate platted easement in which a private sewer line was located in order to increase the buildable space on the lot, and agreed to pay all costs. The owner of the adjacent lot, which was benefited by the easement, objected to the relocation. The Plan Commission granted the request. The trial court agreed that the easement was a fixed easement and could not be moved without consent of all parties concerned. The Court of Appeals followed the Third Restatement of Property and reversed the trial court. The Indiana Supreme Court's opinion provides an excellent review of easements. "An easement is fixed if the instrument creating it specifies its location or if the law requires it to be maintained in a specific position." *Id.*, at 990. The Court found this easement was "fixed" and could not be moved without consent of all parties.

F. Utility may cross RR ROW by use of existing City or County ROW without having to compensate RR for crossing, as long as placing utility under the RR ROW did not cause harm to the RR's use of the RR ROW. Should be able to extend this holding to any kind of utility, including drainage. *Louisville & Ind. R.R. Co. v. Ind. Gas Co.* (Ind. 2005), 829 N.E.2d 7.