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Via email to jespotts@pa.gov CC'd irrc@state.pa.us

Jeffrey M. Spotts, Regulatory Counsel
Pennsylvania Department of Transportation
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

RE: Notice of Proposed Rulemaking, Department of Transportation
Regulation #18-479: Access to and Occupancy of Highways by Driveways and Local Roads

Dear Mr. Jeffrey M. Spotts:

I am submitting the following comment in regard to the aforementioned item that is being considered for promulgation as a regulation. I pray the formatting of this comment is acceptable for the record.

In several of the cases cited by PennDOT as support for there proposed regulation the issue at hand was previously acquired mineral rights verses the rights of the fee simple or surface rights property owner. Although useful to demonstrate the problem of competing property interests the Belden, Amoco, and the Chartiers Block coal cases seem not to be an apple to apples comparison with the immediate issue. In each of those cases the mineral rights to the property had been acquired by those companies prior to the acquisition of the fee simple property and the accompanying surface rights by a third party. Timing is important.

Surely a buyer of a property in which the mineral rights were not included as a matter of the recorded deed, the buyer would or should have expected the owner of the subsurface rights to, at some point in the future, require access to the surface of the property to exploit those owned rights. In other words, the entity that became the fee simple owner of the surface rights entered into the ownership understanding a separate entity had rights to access the property, or an easement to access those previously acquired rights would likely be attached at some point in the future. Indeed, the purchase of the fee simple property may well have bought the property at a discount for that very reason which is almost equivalent to having been compensated for those lost rights in advance. That is not the case with this issue.

The Hardees Food Systems Inc. is even further off point and in fact while doing some research on that HOP, the PA Supreme Court, while positing the rights of Hardees to apply for the HOP, referred the matter back to PennDOT for reconsideration. In speaking with an employee engaged in zoning matters in Lower Allen township this morning I came to find out that apparently either PennDOT did not issue the HOP allowing access to Old Gettysburg Road as the applicant had requested or Hardees themselves decided it was not in the company's interest to use the state road as an access point. It seems they ended up using a township road for access instead.

An issue at the core of this problem was stated by the proposed applicant for the HOP. In a letter sent to a 41st District landowner telling them they must sign the form M950-AA, the company stated *"In federal condemnation proceedings, title to the easements being condemned does not pass to Transco until compensation is paid."* At the time the letter was sent, the landowner had yet to be condemned, and in fact has yet to be paid "just compensation" for the easement, which raises the question does Transco have the necessary and legal possessory property interests to apply for the HOP even now.

Though this issue has nothing to do with surface or subsurface rights, the citations PennDOT referred to are mostly about those competing rights. That's an understandable comparison if not precisely apples to apples.

In both the Chartier and Belden cases the court seemed to assume that some sort of negotiation for the easement had taken place or could take place in a court of equity as access to property always has a monetary value. It's assumed that some sort of compensation has been arranged even when an owner of subsurface rights requires surface access to utilize those subsurface rights.

Justice Saylor's dissent in Belden sums up the argument nicely: The seminal decision in *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 25 A. 597 (1893), recognizes the reality that these types of land-rights disputes present complex matters involving the ordering of competing and compelling interests and are subject to litigation. *See Chartiers*, 152 Pa. at 298, 25 A. at 599.

[1] Other courts have recognized that surface and subsurface owners generally address the terms on which mineral rights holders' easements will be effectuated via agreements. *See, e.g., Amoco Production Co. v. Thunderhead Investments, Inc.*, 235 F. Supp. 2d 1163, 1167 (D.Colo.2002); *United States v. Minard Run Oil Co.*, Civ. No. 80-129 Erie, 1980 U.S. Dist. LEXIS 9570, at *14 (W.D.Pa. Dec. 16, 1980) (explaining that "the parties should attempt to reach a reasonable accommodation so that each may reasonably enjoy his respective property rights.").

As important as negotiating with the surface owner for the right to install a driveway, the indemnification of the fee simple surface owner against any and all liability is a must. In fact, a major point of having to apply for a HOP is so that sight distances, slope and grade are properly vetted to eliminate, to the greatest extent possible, the likelihood of an automobile accident as a result of the driveway being installed inappropriately and being used for ingress and egress onto a state-owned road. While PennDOT is indemnified against any claim for having issue the HOP, the fee simple property owner seems burdened with liability which is unacceptable.

For these reasons I ask the current regulation be left alone, with the addition of required indemnification of the property owner against any and all claims resulting from the use of the HOP.

Thank you IRRC and JCD for your time and your consideration of the confusing regulation which left some property owners bewildered as to their rights under the law.

Sincerely,

John Timothy Gross
41st District Constituent

Constituent of the 41st District