

Introduction



Wireless Facilities in the Right of Way (ROW)

Granting Access to the ROW Statutory Basics



Edward Purcell, Esq.

Tel. (908) 757-7800

epurcell@newjerseylaw.net



DiFrancesco Bateman
Kunzman, Davis, Lehrer & Flaum, P.C.

Overview of What We'll Cover



- What is the ROW?
- Granting Access to the ROW
- Landowner Considerations
- The CLEC/Public Utility Issue
- Revenue

What is the ROW?

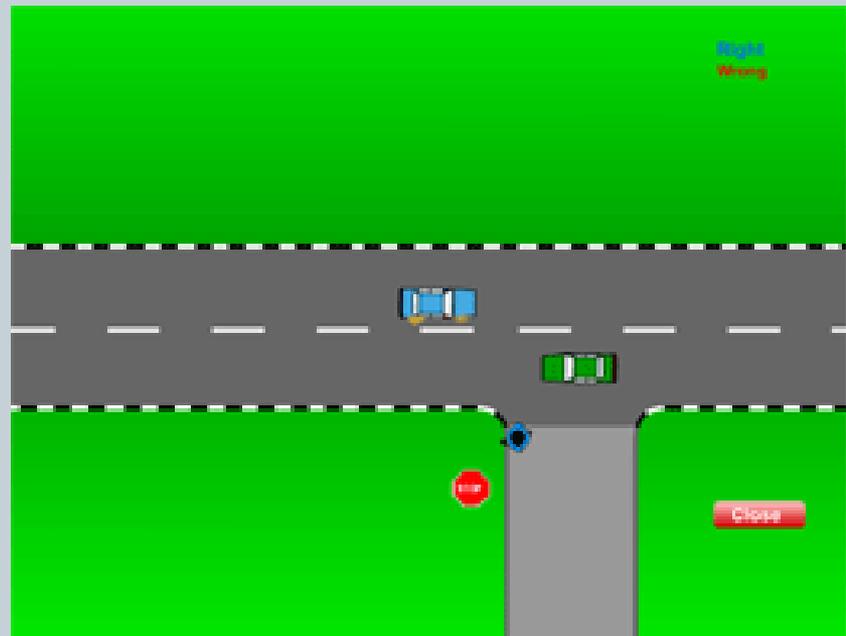


“A legal right of passage over another person's ground.” Merriam Webster

A “right of way” has long been held in New Jersey to be a form of easement over another's property. Stuyvessant v. Woodruff, 21 N.J.L. 133 (Sup. Ct. 1847)

Two Questions:

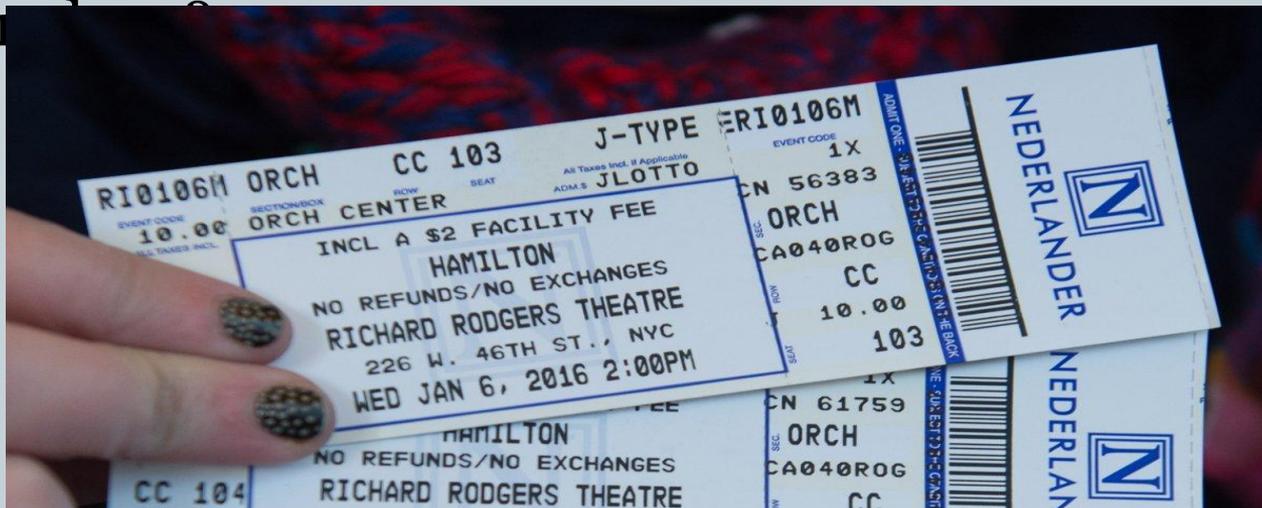
1. What are the limits of the easement?
2. Where does the adjoining landowner's real property end?



Granting Access to the ROW



- Access to the municipal ROW requires municipal consent. Period. Conditions can be imposed
- But, the statutory authority to grant consent is different for different proposals.
- 19th/early 20th century statutes for 21st century tech



Placing a Small Cell onto an Existing Pole



- The pole's owner must give consent.
- Local Government gives consent pursuant to N.J.S.A. 48:3-19:

The consent of the municipality shall be obtained for the use by a person of the poles of another person unless each person has a lawful right to maintain poles in such street, highway or other public place.

Erecting a New Pole



- Some facility developers and wireless providers wish to place new poles in the ROW. A monopole would be an example of this type of installation. Also, due to some structural deterioration among older utility poles, new poles must be constructed to allow for small cell placement.
- In these cases, local government would grant access to the ROW pursuant to N.J.S.A. 48:17-10:

No pole, conduit, wire or other fixture, except such as are a part of a through line of any such telegraph or telephone company as distinguished from a local line, shall be constructed or erected in, upon, along, over or under any public road, street or highway of any municipality without first obtaining permission by ordinance or resolution from the governing body of the municipality, nor in, upon, along, over or under any public road, street or highway of any county without first obtaining permission by resolution from the board of freeholders of the county.

Consent by Ordinance or Resolution?



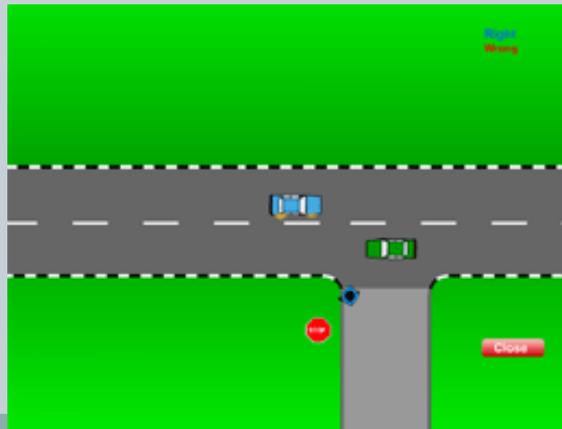
- Both do the job.
- But, if you wish to clearly supersede local zoning or if an alternative process to site these facilities is agreed upon through a master license—an ordinance is preferred.

Landowner Considerations



- In order to construct a new pole, “consent in writing” by the “owner of the soil is required.” N.J.S.A. 48:17-8 provides:

Any telegraph or telephone company organized under the laws of this or any other State, or of the United States may erect, construct and maintain the necessary poles, wires, conduits, and other fixtures for its lines, in, upon, along, over or under any public street, road or highway, upon first obtaining the consent in writing of the owner of the soil to the erection of such poles, and through, across or under any of the waters within this State and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same.



Landowner Considerations Cont'd



- This means companies that wish to install new poles in the ROW, will need the permission of an adjoining landowner, if that landowner's property includes the ROW.
- Broome v. New York & New Jersey Telephone Co., 42 N.J. Eq. 141, 142 (Ct. Chancery NJ 1887). An underlying landowner successfully ejected telephone poles placed on their land without their consent.
- **Bottom Line**- Lack of consent would prevent the zoning process from proceeding.

Landowner Considerations Cont'd



- Slight Wrinkle Regarding the Placement of small cells onto existing poles.
- Duess v. PSE&G, 3 N.J. Super. 439 (Chanc. Div. 1949)
 - Landowners must give their approval if there is an addition to an existing pole that puts an “additional burden on the land.” In this case it was a new set of cross arms.

Does a small cell place an additional burden on the land? This is unclear.

Landowner Considerations Cont'd



- **IMO Complaint of the Village of Ridgewood, Docket No. E013080751 (N.J. BPU 2013).**
 - Village of Ridgewood opposed PSE&G's installation of new, and much taller, telephone poles. The Village had granted access to the ROW many years ago. Town raised zoning concerns. BPU acknowledged the validity of local zoning to distribution lines in the ROW and overruled them pursuant to N.J.S.A. 40:55D-19 because the improvement was necessary for the “service, welfare and convenience” of the public.”
 - Dicta in the decision indicates that the BPU read Duess only apply to private property, not the ROW. I think this misreads the decision because in Duess, the pole at issue was located, “at the curb line,” i.e. in the ROW. See Duess, Supra. at 440.

- **Summary**
 - Due to issues of standing, if the adjoining landowner owns the property beneath the ROW, special considerations must be considered if a town wants to send this through zoning.
 - For the erection of a new pole, if a municipality chooses to send these applications to zoning--an initial matter will be whether the adjoining landowner has granted consent.
 - Slight wrinkle here regarding placing small cells onto an existing pole.

CLEC/Public Utility Issue



- **Background**
 - Most Facility Developers have received Competitive Local Exchange Carrier (CLEC) status from the BPU.
 - Many have made statements to towns that municipal consent to the ROW is required because they are “public utilities.”
 - Historically, CLECs were wire-line providers that competed with the Incumbent Local Exchange Carrier (ILECs) by stringing up their own wires or by renting the ILECs’.
- **Is a CLEC a Public Utility?**
 - CLECs are authorized *and somewhat* regulated by the BPU for the provision of competitive telecommunications services. They are a competitive, as opposed to a fully regulated, public utility.
 - Open question whether facility developers are providing telecommunications services.

CLEC/Public Utility Issue (Cont'd)



- **Bottom Line**- their status does not, in and of itself, mandate access. These entities can be treated like wireless service providers.
- However, in order to be valid, any grant of access to the ROW to a CLEC has to be approved by the BPU. N.J.S.A. 48:2-14 provides:

No privilege or franchise granted after May first, one thousand nine hundred and eleven, to any public utility by a political subdivision of this state shall be valid until approved by the board. Such approval shall be given when, after hearing, the board determines that the privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests. In granting its approval the board may impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interests may reasonably require

Revenue



- Towns Can recover the costs of processing applications but cannot seek revenue for telecommunications facilities in the ROW.

N.J.S.A. 54:30A-124 provides:

a. No municipal, regional or county governmental agency may impose any fees, taxes, levies or assessments in the nature of a local franchise, right of way, or gross receipts fee, tax, levy or assessment against energy companies subject to the provisions of P.L. 1940, c.5 (C.54:30A-49 et seq.) prior to January 1, 1998 **or telecommunications companies**. Nothing in this section shall be construed as a bar to reasonable fees for actual services made by any municipal, regional or county governmental agency. [emphasis added] N.J.S.A. 54:30A-124.

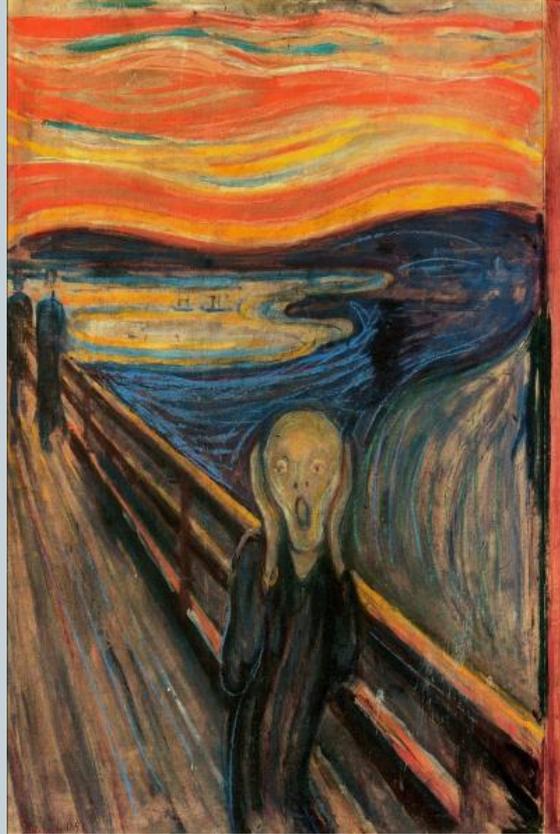
Question



Ed's Recommendations



○ Don't Panic.



Ed's Recommendations



- Speak to your Attorney.
- Ask the company questions and **verify** their answers.
- Consider approvals with conditions that will help provide your citizens with upgraded wireless service while maintaining municipal control over the ROW.