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BEFORE THE ARIZONA POWER PLANT

AND TRANSMISSION LINE SITING COMMITTEE

IN THE MATTER OF THE APPLICATIONOF PINAL CENTRAL ENERGY CENTER LLC, IN CONFORMANCE WITH THE REQUIREMENTS OF ARIZONA REVISED STATUTES 40-360, ET SEQ., FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AUTHORIZING THE PINAL CENTRAL ENERGY CENTER 230KV GENERATION INTERTIE LINE PROJECT, WHICH INCLUDES THE CONSTRUCTIONOF A GENERATION TIE LINE ORIGINATING LESS THAN HALF A MILE TO THE SOUTHEASTOF PINAL CENTRAL SUBSTATION ON PRIVATE LAND UNDER JURISDICTION OF PINAL COUNTY AND THE CITY OF COOLIDGE, ARIZONA, AND TERMINATINGIN THE PINAL CENTRAL SUBSTATION IN PINAL COUNTY,ARIZONA.

Docket No. L-0000BBB-17-0073-00174

Case No. 174

MEMORANDUM OF LAW NUMBER TWO RE: DEED FOR 50'X50' EASEMENT

I. INTRODUCTION

Pursuant to Page 9, Paragraph 27, lines 25-27 of the March 23, 2017 Procedural Order signed by Chairman Thomas K. Chenal, Lynda Williams hereby submits her Legal Memorandum Number Two as to the issue of whether this Committee has jurisdiction to consider whether the fact that the Applicant has no legal access over her property to the west fields, where Applicant proposes to construct a 230kV gen-tie line, should result in denial of the CEC.

As the materials set forth below, including the five, exhibits demonstrate the 50'x50' easement on Ms. Williams' property which Applicant proposes to use for commercial and utility purposes is not any more than an a courtesy ingress and egress easement granted to Mr. Wuertz for farming purposes only. The history of use would establishes that the parties agreed to a limited use, (i.e. for farming), that there was no other use contemplated by the parties and that Applicant cannot, by sheer force, convert it to a commercial nor utility easement.

Based on the foregoing and what follows, the Committee must find it has jurisdiction to consider the lack of access issue and, on that ground alone, that it may deny the CEC requested by the Applicant.

II. FACTS:

By a Warranty Deed, dated March 29, 2005 (see Exhibit A, attached), the Marvin and Kathleen Wuertz Trust, dated March 9, 2001 ("Wuertz Trust") conveyed real property (the "WilliamsProperty") to Frank C. Williams and Lynda Williams ("Williams"), reserving to the Wuertz Trust, its successors, heirs and assignees, an easement over the 50' x 50' northwest corner of the Williams Property "for ingress and egress" (the "Easement"). At the time of the creation of the Easement, the only use was occasional agricultural ingress and egress between the Wuertz properties to the north and to the west of the Williams Property.

ISSUE:

Does the scope of the Easement accommodate ingress and egressfor a solar energy plant and/or utility lines for that plant?

RULE:

Where specific limitations of scope are specified, those limitations will control. Otherwise, the rule of circumstances, historical use and reasonableness will be applied to scope and to change in use.

APPLICATIONS:

No dominant estate is mentioned, though the word "easement" is used. The Wuertz Trust is the named benefitted party, together with successors, heirs and assignees of the Wuertz Trust. The Wuertzes were conveying a parcel, the Williams Property, and the Williams Property is adjacent to property owned by the Wuertzes to the north and to the west of the Williams Property, but the reservation of Easement was not specifically attached to any specific real property within the Easement reservation.

Nevertheless, given the purpose of the Easement, "ingress and egress," and that the Wuertzes, either personally or through their Wuertz Trust, owned the property to the west and to the north of the Williams Property, which would be connected by the Easement, the appurtenant nature of the Easement to the Wuertzes' property is apparent and will likely be confirmed by the courts. That the Easement is appurtenant to the Wuertzes' property is consistent with the language reserving the Easement, that it is reserved to the successors, heirs and assignees of the Wuertzes as well. (See Exhibits B and C, attached.) The scope of the Easement is physically defined at the northwest 50-foot-square corner of the Williams Property. The scope of the use of the Easement is defined as "for ingress and egress." At the outset it is clear that "ingress and egress" does not describe an easement for utility lines. (See Exhibit D.) As to the limitations on ingress and egress, that is to be interpreted,

per case law, by a reasonableness standard and by the conduct of the parties following the reservation of the easement. (See Exhibits D and E, attached.) For 12 years since the creation of the Easement, the use thereof by the Wuertzes has been very limited: sporadic use, primarily vehicular use, namely Mr. Wuertz in his pickup truck, driving over the Easement between his property north of the Williams Property and his property west of the Williams Property, in the course of pursuing his agricultural activities. Such limited use is precisely what was reasonably anticipated by the parties in 2005 – agricultural related, sporadic, limited use of the Easement. Moreover, a change of use of the dominant estate from farming to a solar energy plant could not have reasonably been anticipated. Given the uses in place in 2005 and the uses made in the 12 years hence, and the reasonable expectation those uses would continue, the scope of the Easement use is so defined: limited, sporadic, agricultural use.

Now, of late, we are informed of a sale of the Wuertz properties to NEE, or related entities, who propose developing a photovoltaic power plant on the Wuertz properties. NEE apparently intends to use the Easement for construction, operational, and maintenance use related to this proposed industrial plant. The frequency of the traffic and the nature of the vehicles and the use they are serving will create a much more intense use and negative impact upon the Williams Property. Quite clearly, the established scope of the Easement will be violated by the intended traffic. Since such an increase is outside the scope of the Easement, it is not allowed by the Easement and may be prohibited by Ms. Williams.

III. CONCLUSION

Although an easement for ingress and egress, appurtenant to the Wuertz properties north and west of the Williams Property, likely does exist, its scope is far too limited to accommodate a power line of any sort, nor does it accommodate NEE's industrial traffic.

Respectfully Submitted this 3rd day of April, 2017

By _____
Gilberto V. Figueroa

The Original and 25 copies of the foregoing Notice of Appearance will be filed this 3rd day of April, 2017, with Docket Control.

A copy of the foregoing will be hand-delivered or e-mailed this 2nd or 3rd day of April, 2017, to the following individuals:

Chairman Thomas K. Chenal
Arizona Power Plant and Transmission
Line Siting Committee
Arizona Attorney General's Office
1275 West Washington St.
Phoenix, Arizona 85007
Thomas.chenal@azag.gov

Jeffrey W. Crockett
Crockett Law Group. PLLC
2198 E. Camelback Rd. Suite 305
Phoenix, Arizona 85016
Attorney for Pinal Central Energy Center, LLC

Tim LaSota
Interim Chief Counsel
Legal Division
Arizona Corporation Commission
1200 W. Washington St.

Phoenix, Arizona 85007
Counsel for Legal Division Staff
tlasota@azag.gov

Elijah Abinah, Acting Director
Utilities Division
Arizona Corporation Commission
1200 W. Washington
Phoenix, Arizona 85007

Exhibit A

(Warranty Deed)

DOCKET 889 PAGE 100

I hereby certify that the within instrument was filed and recorded in DOCKET DOCKET 889 PAGE 100 and indexed in deeds, 8 NOV 1977 1400

Witness my hand and official seal.

WILLIAM S. TRUMAN, County Recorder

By Carolyn Jones Deputy Recorder

Fee No. 578007

Compared Photostated Fee: 5

OFFICIAL SEAL
PINAL COUNTY RECORDER
FLORENCE ARIZONA

JOINT TENANCY DEED

... Ten Dollars, and other valuable considerations, I or we, ... a single man

... C. FRANK WILLIAMS and ANN WILLIAMS, husband and wife,

... grantees and not as a community property estate, but as joint tenants with right of survivorship,

... property situated in the County of Pinal, State of Arizona:

... of land situate in Section Thirty (30), Township Six (6) ... Range Eight (8) East of the Gila and Salt River Base and ... Pinal County, Arizona, described as follows:
... at the East quarter corner of said Section 30; thence ... North 89° 08' 00" East, 47.60 feet; thence South 89° 36' 40" West, ... 43 feet; thence North 00° 30' 20" West, 121.69 feet; thence ... South 89° 03' 00" West, 337.57 feet; thence South 04° 15' 00" West, ... 24 feet; thence South 88° 25' 00" East, 328.51 feet; thence ... North 76° 09' 00" East, 553.42 feet; thence North 08° 00' 00" East, ... 167.00 feet to the Point of Beginning.
RESERVING THEREFROM an Easement for ingress and egress 10.00 feet ... with contiguous with and parallel to the entire perimeter of ... the hereinbefore described parcel of land.
EXCEPTING AND RESERVING from the above parcel one-half of all gas, oil, and other minerals, as reserved in Docket 742, page 51.
RESERVING unto the grantor the water rights to the above described property.

... warrant the title against all persons whomsoever, subject to the matters above set forth.

The grantees by signing the acceptance below evidence their intention to acquire said premises as joint ... with the right of survivorship, and not as community property or as tenants in common.

Dated this 25th day of July, 19 77

Accepted and approved:

C. Frank Williams

C. Frank Williams

Ann Williams

Grantees

Marvin W. Wuertz

Marvin W. Wuertz

Grantors

STATE OF ARIZONA, County of Pinal } ss.

This instrument was acknowledged before me this 4th day of November, 1977, by Marvin W. Wuertz

Margaret Gates

Notary Public

My commission will expire 7-2-81

STATE OF ARIZONA, County of Pinal } ss.

This instrument was acknowledged before me this 4th day of November, 1977, by C. Frank Williams and Ann Williams

Margaret Gates

Notary Public

My commission will expire 7-2-81

Recording Requested by:
First American Title Insurance Agency, Inc.

When recorded mail to:
Frank C. Williams and Lynda Williams
810 S. Sunshine Blvd.
Casa Grande, AZ 85222

OFFICIAL RECORDS OF
PINAL COUNTY RECORDER
LAURA DEAN-LYTLE

DATE/TIME: 04/06/05 1640
FEE: $17.00
PAGES: 6
FEE NUMBER: 2005-037665

WARRANTY DEED

Escrow No. **242-4271111** (lsm)

For the consideration of TEN AND NO/100 DOLLARS, and other valuable considerations, I or we,

Marvin W. Wuertz and Kathleen P. Wuertz, as Trustees of The Marvin and Kathleen Wuertz Trust dated March 9, 2001, the GRANTOR does hereby convey to

Frank C. Williams and Lynda Williams, husband and wife, the GRANTEE

The following described real property situate in **Pinal** County, **Arizona** with the title being conveyed to the grantee as set forth in the attached acceptance by the grantee:

PARCEL NO. 1:

A PARCEL OF LAND LOCATED IN THE EAST HALF OF SECTION 30, TOWNSHIP 6 SOUTH, RANGE 8 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, PINAL COUNTY, ARIZONA, DESCRIBED AS FOLLOWS:

COMMENCING AT THE EAST QUARTER CORNER OF SAID SECTION 30, FROM WHENCE THE NORTHEAST CORNER OF SECTION 30 BEARS NORTH 00 DEGREES 00 MINUTES 52 SECONDS EAST, 2645.16 FEET DISTANT THEREFROM;

THENCE NORTH 00 DEGREES 00 MINUTES 52 SECONDS EAST, A DISTANCE OF 47.60 FEET TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING NORTH 00 DEGREES 00 MINUTES 52 SECONDS EAST, A DISTANCE OF 174.20 FEET;

THENCE SOUTH 87 DEGREES 55 MINUTES 20 SECONDS WEST, A DISTANCE OF 850.85 FEET;

THENCE SOUTH 00 DEGREES 40 MINUTES 23 SECONDS WEST, A DISTANCE OF 38.90 FEET;

THENCE NORTH 87 DEGREES 55 MINUTES 52 SECONDS EAST, A DISTANCE OF 337.57 FEET;

THENCE SOUTH 00 DEGREES 23 MINUTES 12 SECONDS EAST, A DISTANCE OF 121.89 FEET;

THENCE NORTH 89 DEGREES 26 MINUTES 13 SECONDS EAST, A DISTANCE OF 512.56 FEET TO THE TRUE POINT OF BEGINNING;

EXCEPT ONE HALF OF ALL GAS, OIL AND OTHER MINERALS AS RESERVED IN DEED RECORDED IN DOCKET 742, PAGE 51, OFFICIAL RECORDS.

PARCEL NO. 2:

A PARCEL OF LAND LOCATED IN THE EAST HALF OF SECTION 30, TOWNSHIP 6 SOUTH, RANGE 8 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, PINAL COUNTY, ARIZONA, DESCRIBED AS FOLLOWS:

COMMENCING AT THE EAST QUARTER CORNER OF SAID SECTION 30, FROM WHENCE THE NORTHEAST CORNER OF SECTION 30 BEARS NORTH 00 DEGREES 00 MINUTES 52 SECONDS EAST, 2645.16 FEET DISTANT THEREFROM;

THENCE SOUTH 00 DEGREES 00 MINUTES 52 SECONDS WEST, A DISTANCE OF 166.89 FEET TO THE TRUE POINT OF BEGINNING;

THENCE CONTINUING SOUTH 00 DEGREES 00 MINUTES 52 SECONDS WEST, A DISTANCE OF 69.72 FEET;

THENCE SOUTH 80 DEGREES 53 MINUTES 07 SECONDS WEST, A DISTANCE OF 502.36 FEET;

THENCE SOUTH 88 DEGREES 17 MINUTES 26 SECONDS WEST, A DISTANCE OF 360.87 FEET;

THENCE NORTH 00 DEGREES 44 MINUTES 52 SECONDS EAST, A DISTANCE OF 53.94 FEET;

THENCE SOUTH 88 DEGREES 22 MINUTES 27 SECONDS EAST, A DISTANCE OF 328.51 FEET;

THENCE NORTH 77 DEGREES 39 MINUTES 30 SECONDS EAST, A DISTANCE OF 540.14 FEET TO THE TRUE POINT OF BEGINNING;

EXCEPT ONE HALF OF ALL GAS, OIL AND OTHER MINERALS AS RESERVED IN DEED RECORDED IN DOCKET 742, PAGE 51, OFFICIAL RECORDS.

PARCEL NO. 3:

A PARCEL OF LAND LOCATED IN THE EAST HALF OF SECTION 30, TOWNSHIP 6 SOUTH, RANGE 8 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, PINAL COUNTY, ARIZONA, DESCRIBED AS FOLLOWS:

COMMENCING AT THE EAST QUARTER CORNER OF SAID SECTION 30, FROM WHENCE THE NORTHEAST CORNER OF SECTION 30 BEARS NORTH 00 DEGREES 00 MINUTES 52 SECONDS EAST, 2645.16 FEET DISTANT THEREFROM;

THENCE NORTH 89 DEGREES 21 MINUTES 04 SECONDS WEST, ALONG THE EAST-WEST MID-SECTION LINE, A DISTANCE OF 852.44 FEET TO THE TRUE POINT OF BEGINNING;

THENCE SOUTH 00 DEGREES 44 MINUTES 52 SECONDS WEST, A DISTANCE OF 331.28 FEET TO A POINT ON THE NORTH LINE OF THE SAN CARLOS IRRIGATION CANAL;

THENCE SOUTH 87 DEGREES 11 MINUTES 47 SECONDS WEST, A DISTANCE OF 153.04 FEET;

THENCE SOUTH 50 DEGREES 23 MINUTES 57 SECONDS WEST, A DISTANCE OF 401.53 FEET TO A POINT OF INTERSECTION OF THE SAN CARLOS IRRIGATION CANAL AND THE WEST LINE OF THE EAST HALF OF THE SOUTHEAST QUARTER OF SAID SECTION 30;

THENCE NORTH 00 DEGREES 00 MINUTES 08 SECONDS WEST, ALONG SAID WEST LINE, A DISTANCE OF 599.97 FEET;

THENCE SOUTH 89 DEGREES 21 MINUTES 04 SECONDS EAST, ALONG THE EAST-WEST MID-SECTION LINE, A DISTANCE OF 466.61 FEET TO THE TRUE POINT OF BEGINNING;

EXCEPT ONE HALF OF ALL GAS, OIL AND OTHER MINERALS AS RESERVED IN DEED RECORDED IN DOCKET 742, PAGE 51, OFFICIAL RECORDS.

RESERVING UNTO THE GRANTOR(S), THEIR SUCCESSOR(S), HEIR(S) AND ASSIGN(S) AN EASEMENT FOR INGRESS AND EGRESS OVER THE NORTH 50.00 FEET OF THE WEST 50.00 FEET THEREOF.

Pursuant to ARS 33-404, Beneficiaries names and addresses under said trust(s) are disclosed in Trust Certification(s) attached hereto.

Subject To: Existing taxes, assessments, liens, encumbrances, covenants, conditions, restrictions, rights of way and easements of record.

And the GRANTOR binds itself and its successors to warrant the title as against its acts and none other, subject to the matters set forth.

DATED: March 29, 2005

SEE ACCEPTANCE ATTACHED HERETO

AND BY REFERENCE MADE A PART HEREOF.

Marvin W. Wuertz and Kathleen P. Wuertz, as Trustees of The Marvin and Kathleen Wuertz Trust dated March 9, 2001

Marvin W. Wuertz, Trustee

Kathleen P. Wuertz, Trustee

STATE OF Az)
)ss.
County of Pinal)

On 4/4/05, before me, the undersigned Notary Public, personally appeared **Marvin W. Wuertz and Kathleen P. Wuertz**, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Linda S. Myers
Notary Public

My Commission Expires:

"OFFICIAL SEAL"
Linda S. Myers
Notary Public-Arizona
Pinal County
My Commission Expires 11/15/06

Recording Requested by:
First American Title Insurance Agency, Inc.

When recorded mail to:
Wuertz Trust
2487 E. HIGHWAY 287
CASA GRANDE, AZ 85222

OFFICIAL RECORDS OF
PINAL COUNTY RECORDER
LAURA DEAN-LYTLE

DATE/TIME: 04/06/05 1640
FEE: $16.00
PAGES: 4
FEE NUMBER: 2005-037666

WARRANTY DEED

File No. **242-4271122 (lsm)**

For the consideration of TEN AND NO/100 DOLLARS, and other valuable considerations, I or we,

Frank Williams and Lynda Williams, husband and wife, the GRANTOR does hereby convey to

Marvin W. Wuertz and Kathleen P. Wuertz, as Trustees of The Marvin and Kathleen Wuertz Trust dated March 9, 2001, the GRANTEE

the following described property situate in **Pinal** County, **Arizona**:

A PARCEL OF LAND LOCATED IN THE WEST HALF OF THE SOUTHEAST QUARTER OF SECTION 30, TOWNSHIP 6 SOUTH, RANGE 8 EAST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, PINAL COUNTY, ARIZONA, DESCRIBED AS FOLLOWS:

COMMENCING AT THE CENTER OF SAID SECTION 30;

THENCE SOUTH 00 DEGREES 15 MINUTES 00 SECONDS EAST ALONG THE NORTH-SOUTH MID-SECTION LINE, A DISTANCE OF 1062.00 FEET TO THE TRUE POINT OF BEGINNING;

THENCE SOUTH 83 DEGREES 15 MINUTES 00 SECONDS EAST, A DISTANCE OF 323.95 FEET;

THENCE SOUTH 00 DEGREES 15 MINUTES 00 SECONDS EAST, A DISTANCE OF 694.73 FEET TO A POINT ON THE SAN CARLOS IRRIGATION CANAL;

THENCE NORTH 77 DEGREES 15 MINUTES 00 SECONDS WEST, A DISTANCE OF 330.00 FEET TO A POINT OF INTERSECTION OF THE NORTH-SOUTH MID-SECTION LINE AND THE SAN CARLOS IRRIGATION CANAL;

THENCE NORTH 00 DEGREES 15 MINUTES 00 SECONDS WEST ALONG THE NORTH-SOUTH MID-SECTION LINE, A DISTANCE OF 660.00 FEET TO THE TRUE POINT OF BEGINNING.

Pursuant to ARS 33-404, Beneficiaries names and addresses under said trust(s) are disclosed in Trust Certification(s) attached hereto.

Subject To: Existing taxes, assessments, liens, encumbrances, covenants, conditions, restrictions, rights of way and easements of record.

And the GRANTOR binds itself and its successors to warrant the title as against its acts and none other, subject to the matters set forth.

DATED: March 28, 2005

Frank Williams

Lynda Williams

STATE OF Az)
)ss.
County of Pinal)

On 4/4/05, before me, the undersigned Notary Public, personally appeared **Frank Williams and Lynda Williams**, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies) and that his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Linda S. Myers
Notary Public

My Commission Expires:

"OFFICIAL SEAL"
[illegible] Notary Public - Arizona
Pinal County
My Commission Expires 11/15/06

TRUST CERTIFICATION

April 04, 2005

First American Title Insurance Agency, Inc.
1729 North Trekell Road, Suite 120
Casa Grande, AZ 85222

RE: Escrow No. 242-4271122

The undersigned, being the Trustee(s) of the Wuertz Trust, do(es) hereby certify that as of this date said Trust Agreement is in full force and effect and has not been amended, modified or revoked.

The names and addresses of the beneficiaries of the trust, which must be disclosed on the deed, are as follows:

NAME: WAYLON R. WUERTZ

ADDRESS: 2487 E Hwy 287 Casa Grande Az 85222

NAME: TRAVIS J. WUERTZ

ADDRESS: 2487 E HWY 287, CASA GRANDE, Az 85222

NAME: _____

ADDRESS: _____

Wuertz Trust

Marvin W Wuertz

Trustee

Exhibit B

(Definition of Appurtenant Easement. See page 3.)

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818 P.2d 190

169 Ariz. 205

Philip C. AMMER and Dolores J. Ammer, husband and wife, Plaintiffs, Counter Defendants-Appellants,
v.
ARIZONA WATER COMPANY, an Arizona corporation, Defendant, Counter Plaintiff-Appellee.

No. 1 CA-CV 90-023.

Court of Appeals of Arizona, Division 1--Department A.

Aug. 27, 1991.

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[169 Ariz. 207] Wallace J. Baker, Jr., Phoenix, for plaintiffs, counter defendants-appellants.

Robert W. Geake, Phoenix, and Linden, Chapa and Fields by Hugh A. Holub, Tucson, for defendant, counter plaintiff-appellee.

OPINION

BROOKS, Presiding Judge.

Philip and Dolores Ammer appeal from a summary judgment quieting title to a parcel of real property in the Arizona Water Company (AWC). On appeal, they argue that the trial court erred in holding that it was necessary for them to show that they had exclusive possession of AWC's property in order to establish a prescriptive easement. They also argue that the trial court erred in granting summary judgment when genuine issues of material fact existed. We reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

In reviewing the trial court's grant of a motion for summary judgment, we state the facts in the light most favorable to the parties who opposed the motion. Wright v. Hills, 161 Ariz. 583, 780 P.2d 416 (App.1989). In 1971, the Ammers leased a lot located in Munds Park, Arizona, from Douglas and Frances Jackson and Russell and Barbara Faulkner. In the same year, the Ammers built a general store on the property and created a graveled parking lot

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[169 Ariz. 208] for it. The graveled area encompassed land owned by AWC. The Ammers' lease was amended in 1974 so that they could expand the store onto an adjacent lot that the Jacksons and the Faulkners also owned. In 1975, the Ammers paved the parking lot, including all of AWC's portion of it, with asphalt.

The Ammers bought the two lots that they had been leasing in 1979. They continued to operate the store until 1984, when they sold their business to Richard and Shirley Bishop and leased the Bishops the store building and the land. In 1987, the Bishops sold the business to Wesley and Margaret Measday. The Ammers then leased the building and the land to the Measdays.

In a letter dated February 3, 1988, AWC informed the Ammers that part of the store's parking lot was encroaching upon its property. The parties were unable to reach a mutually satisfactory resolution of the problem, and AWC ultimately fenced the portion of the lot that encompassed its property. The Ammers filed a complaint against AWC and the company that had erected the fence. They asked the court to declare that they had a prescriptive right to use the section of AWC's property in question as a parking lot. They also asked that AWC and the fence company be temporarily and permanently restrained from interfering with that use. The trial court granted the preliminary injunction, and the fence was removed. The Ammers subsequently dismissed their complaint against the fence company.

AWC answered the Ammers' complaint and filed a counterclaim in which it alleged trespass to its property and sought quiet title to the property and reasonable rent for the Ammers' use of it. AWC then filed a motion for partial summary judgment in which it contended that the Ammers were not entitled to a prescriptive easement because they had not established continuous adverse use of the property for the ten-year period required by Arizona's adverse possession statute. In response, the Ammers argued that they and their lessees had continuously used the property for parking since 1971. They also argued that these successive interests could be tacked to meet the ten-year requirement and that the other elements of adverse use had been established.

The trial court granted AWC's motion for partial summary judgment, finding that the Ammers had not been in possession of AWC's property for a continuous period of ten years. AWC subsequently filed a motion for summary judgment on its counterclaim. The trial court granted the motion, quieting title to the disputed property in AWC and awarding it nominal damages. This appeal followed.

DISCUSSION

We will affirm the trial court's grant of a motion for summary judgment if there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law. Orme School v. Reeves, 166 Ariz. 301, 802 P.2d 1000 (1990). We begin our discussion by noting that an easement is a right that one person has to use the land of another for a specific purpose. Etz v. Mamerow, 72 Ariz. 228, 233 P.2d 442 (1951). Such a right may be created by prescription. Gusheroski v. Lewis, 64 Ariz. 192, 167 P.2d 390 (1946). Although prescription and adverse possession are not identical theories, the rules of law that govern the acquisition of title by adverse possession generally apply to the creation

of easements by prescription. Lewis v. Farrah, 65 Ariz. 320, 180 P.2d 578 (1947). [1] In order to establish a prescriptive easement, a party must demonstrate that the land which is allegedly subject to the easement has been actually and visibly used for a specific purpose for ten years and that the use was commenced and continued under a claim of right inconsistent with and hostile to the claim of another. LaRue v. Kosich, 66 Ariz. 299,

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[169 Ariz. 209] 187 P.2d 642 (1947); A.R.S. §§ 12-521(A), -526(A). [2]

The use need not have been carried out by the same person for the entire ten years. Cheatham v. Vanderwey, 18 Ariz.App. 35, 499 P.2d 986 (1972). The doctrine of tacking permits successive segments of use to be combined to establish the continuous ten-year period. Id.; A.R.S. § 12-521(B). [3] However, tacking is only allowed when there is privity of estate between the successive users. A.R.S. § 12-521(B). In the prescription context, privity of estate is created by a conveyance, agreement, or understanding that refers the successive adverse use to the original adverse use and is accompanied by a transfer of the use. See Santos v. Simon, 60 Ariz. 426, 138 P.2d 896 (1943).

In order to acquire title by adverse possession, a person must demonstrate that he had exclusive possession of the property at issue throughout the ten-year period. Overson v. Cowley, 136 Ariz. 60, 664 P.2d 210 (App.1982). The same showing is not required of a person seeking to establish an easement by prescription. Etz, 72 Ariz. at 231, 233 P.2d at 444. A person may establish a prescriptive right even though other people, including the holder of fee title in the servient tenement, use the property in the same way that he does. 2 G. Thompson, Commentaries On The Modern Law of Real Property § 343 (1980). His use need only be exclusive in the sense that it is based upon a right that he claims as an individual rather than as a member of the general public. [4]

An easement may be appurtenant or in gross. See Solana Land Co. v. Murphey, 69 Ariz. 117, 210 P.2d 593 (1949). An easement appurtenant involves two parcels of land--the dominant tenement, to which the right of use belongs, and the servient tenement, which is subject to the use. An easement appurtenant is created to benefit the owner of the dominant tenement in the use of his land. 3 R. Powell, J. Backman, The Law Of Real Property p 405 (1991). An easement in gross, on the other hand, is created to benefit its owner independently of his ownership or possession of specific land. Id. In determining whether a prescriptive easement is appurtenant or in gross, courts consider whether the adverse use took place in connection with and for the benefit of a particular parcel of land. 3 H. Tiffany, B. Jones, The Law Of Real Property § 759 (3d ed. 1939). They also consider whether the easement would have any value apart from its use in connection with the land in question. In the instant case, the Ammers used AWC's property for parking in connection with and for the benefit of the land on which the store was located. The easement that they seek to acquire would have no value apart from its use in connection with this property. We therefore conclude that they are attempting to establish an easement appurtenant.

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[169 Ariz. 210] A prescriptive easement appurtenant to a dominant tenement can only be created in favor of the person who has a fee simple estate in the dominant tenement. 2 G. Thompson, Commentaries On The Modern Law Of Real Property § 321 (1980); 4 H. Tiffany, The Law Of Real Property § 1193 (1975). A tenant for life or for years cannot establish such a right in his own behalf. Deregibus v. Silberman Furniture Co., 121 Conn. 633, 186 A. 553 (1936); Bell v. Bomes, 78 R.I. 37, 78 A.2d 362 (1951). His adverse use of adjacent property will only ripen into a prescriptive right if it occurs by virtue of a lease, agreement, or understanding with a landlord who holds fee title in the dominant tenement. See Deregibus, 121 Conn. at 637-39, 186 A. at 555-56; Toto v. Gravino, 37 Del.Ch. 431, 144 A.2d 237 (1958); Coggins v. Shilling, 30 N.J. Super. 26, 103 A.2d 171 (1954). Such an agreement or understanding need not be in writing. See Toto, 37 Del.Ch. at 433-34, 144 A.2d at 239.

When a tenant's adverse use is within the terms of his tenancy, it inures to the benefit of his landlord. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953). The landlord will then be permitted to tack the period of his tenant's adverse use to periods of his own adverse use for the purpose of establishing an easement by prescription. See Chandler v. Jackson, 148 Ariz. 307, 714 P.2d 477 (App.1986); Cheatham, 18 Ariz.App. at 39, 499 P.2d at 990; Annotation, Tacking As Applied To Prescriptive Easements, 72 A.L.R.3d 648, § 12 (1976). If a tenant whose adverse use is within the terms of his tenancy subsequently purchases the leased property, he will be permitted to tack the periods of his adverse use as a tenant to the periods of his adverse use as holder of fee title to establish a prescriptive right. Toto, 37 Del.Ch. at 432-34, 144 A.2d at 238-40; 4 H. Tiffany, The Law Of Real Property § 1207 (1975).

If a tenant initiates an adverse use that is not within the terms of his tenancy, the use will remain a trespass and will not ripen into a prescriptive right no matter how long it continues. Bell, 78 R.I. at 41-42, 78 A.2d at 364. Some courts explain this rule by noting that it is the landlord, the holder of fee title, who must assert any prescriptive rights that accrue as a result of the tenant's adverse use. If the tenant's adverse use is not within the terms of his tenancy, the landlord will not be liable for the tenant's trespass in a suit brought by the owner of the property that is being adversely used. The courts reason that where there is no basis for subjecting the landlord to the penalties that arise from the trespass, there is no basis for according him the benefits that arise from it either. Id.; Deregibus, 121 Conn. at 639, 186 A. at 555-56.

In the present case, the Ammers leased the property on which the store was located from May of 1971 until September of 1979, a period of more than eight years. They then occupied the property as its owners from September of 1979 until April of 1984, a period of four and one-half years. They subsequently leased the property to the Bishops from April of 1984 until October of 1987, a period of three and one-half years. Finally, they leased the property to the Measdays in October of 1987. The Measdays had been occupying the property for approximately four

months when AWC asserted its ownership of a portion of the parking lot in February of 1988.

From the foregoing facts, it is evident that the Ammers could not demonstrate the continuous ten-year period of adverse use necessary to establish a prescriptive easement unless they were entitled to tack at least a portion of the time in which they used AWC's property as tenants of the Jacksons and the Faulkners. In order to tack this period, it was necessary for them to show that their use of AWC's property fell within the terms of a lease, agreement, or understanding between themselves and their lessors. Unfortunately, however, neither side addressed this prerequisite in the trial court. The lease does not contain any reference to AWC's property, and the Ammers did not present any evidence of an agreement or understanding that encompassed its use. Although AWC argues on appeal that the Ammers cannot tack the

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[169 Ariz. 211] period during which they used its property as tenants of the Jacksons and the Faulkners, it did not raise this argument in the trial court.

We will affirm a grant of summary judgment on an issue raised for the first time on appeal only if no conceivable facts exist under which the nonmoving party could prevail on the issue. Rhoads v. Harvey Publications, Inc., 131 Ariz. 267, 640 P.2d 198 (App.1981). Therefore, if we were to find that the Ammers could not establish a prescriptive easement for any of the other reasons that AWC advances on appeal, the parties' failure to present the trial court with the issue of whether the Ammers could tack the period during which they used AWC's property as tenants would not be significant. However, in the following discussion, we find that AWC's remaining arguments are without merit and that it was not entitled to summary judgment on the grounds that it raised in its motion.

AWC argues that the Ammers did not show that they had used its property for parking prior to 1979. We disagree. In response to AWC's motion for summary judgment, the Ammers submitted an affidavit in which they stated that they had been using a portion of AWC's property for parking since 1971 and that they had blacktopped that portion in 1975. They also submitted an affidavit by Wilson and Lucille Palmer. The Palmers stated that the parking lot was graveled when they first became customers of the Ammers' store in 1971. They further stated that the lot had been blacktopped in 1975 and that they had seen hundreds of the store's customers park in the lot each year since 1971. AWC did not controvert these facts.

AWC next argues that the Ammers did not establish their right to tack the periods during which they leased their land to the Bishops and the Measdays. We initially note that since the Ammers occupied the land adjacent to AWC's property as tenants for over eight years and as owners for four and one-half years, their inability to tack the periods during which they leased the land to the Bishops and the Measdays would not necessarily prove fatal to their claim. However, we also believe that the Ammers demonstrated the right to tack the periods in question.

As we have explained, a landlord may tack a period of his tenant's adverse use to periods of his own adverse use as long as there is privity of estate between him and his tenant with regard to the adverse use. See Chandler, 148 Ariz. at 313, 714 P.2d at 483. Privity exists where the terms of a lease, agreement, or understanding between the landlord and the tenant transfer the adverse use from the landlord to the tenant and the tenant continues the adverse use. See Santos, 60 Ariz. at 428, 138 P.2d at 897. See also King Ranch Properties Ltd. Partnership v. Smith, 158 Ariz. 271, 762 P.2d 558 (App.1988) (finding that privity existed where landlord had adversely possessed property at issue, property had been referred to in the lease, and tenants had continued the adverse possession). The express terms of the Ammers' leases with the Bishops and the Measdays did not address the use of AWC's property, and AWC argues that the Ammers failed to present any evidence of an understanding or agreement that encompassed the use. We disagree.

In response to AWC's motion for summary judgment, the Ammers presented the affidavits of Richard Bishop and Wesley Measday. Bishop and Measday both stated that they had treated the entire paved parking area as part of the leased premises. Bishop said that he had always believed that the whole parking area was included in the lease, and Measday said that Philip Ammer had told him that the entire area was included before he rented the property. AWC argues that these affidavits should not be considered because they violate the parol evidence rule by adding to the terms of the lease. We disagree.

The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict the terms of a written contract that is meant to be the final and complete statement of the parties' agreement. Lambros Metals v. Tannous, 71

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[169 Ariz. 212] Ariz. 53, 223 P.2d 570 (1950). However, the rule only applies when the parties to an action are seeking to enforce rights or obligations that arise out of the contract. Doelle v. Ireco Chemicals, 391 F.2d 6 (10th Cir.1968); Suciu v. Amfac Distrib. Corp., 138 Ariz. 514, 675 P.2d 1333 (App.1983); 3 B. Jones, S. Gard, Jones On Evidence § 16.17 (6th ed. 1972). The parties in the present case are not attempting to enforce any rights or obligations that stem from the leases between the Ammers and their tenants. As a result, the parol evidence rule is inapplicable.

AWC next points out that the Bishops' lease, by its terms, expired on April 2, 1987, and that the Measdays' lease did not begin until October 12, 1987. It contends that this gap between the termination of the Bishops' lease and the commencement of the Measdays' lease broke the continuity of the adverse use. However, Richard Bishop stated in his affidavit that he and his wife actually leased the property until October 12, 1987. AWC maintains that Bishop's affidavit cannot be considered because it violates the parol evidence rule by adding to or varying the terms of the lease. Again, we disagree.

As we have explained, the parol evidence rule is not applicable in this case. In addition, we note that while the rule generally prohibits the admission of oral statements or written agreements that were made prior to or contemporaneously

with the execution of a contract, it does not prohibit the admission of evidence that the parties to a contract subsequently modified it or entered into a new agreement. Eng v. Stein, 123 Ariz. 343, 599 P.2d 796 (1979); In re Estate of MacDonald, 4 Ariz.App. 94, 417 P.2d 728 (1966). Consequently, even if the rule was applicable here, it would not bar the admission of evidence that the Bishops either extended their lease or remained as month-to-month tenants until October 12, 1987.

In their affidavit, the Ammers essentially stated that they had transferred their adverse use of AWC's property to the Bishops and the Measdays. The affidavits of Richard Bishop and Wesley Measday confirm that the transfer actually occurred and that both sets of tenants understood that they were to continue the use of the entire parking lot, including the disputed area, as part of their tenancies. We note that under Arizona law, a person does not have to know that the property that he is using belongs to another in order to establish a prescriptive easement. See Kay v. Biggs, 13 Ariz.App. 172, 475 P.2d 1 (1970); Rorebeck v. Christe, 1 Ariz.App. 1, 398 P.2d 678 (1965). We therefore conclude that it was not necessary for the Ammers to establish that the Bishops and the Measdays knew that the use that they were continuing was adverse.

We also note that an understanding on the part of a tenant that the use of certain property is included in the terms of his tenancy may be inferred from the circumstances. Deregibus, 121 Conn. at 639, 186 A. at 555; Toto, 37 Del.Ch. at 433, 144 A.2d at 239; Coggins, 30 N.J. Super. at 30, 103 A.2d at 173. It is reasonable to assume that anyone leasing the Ammers' property would have concluded that the portion of AWC's parcel that was covered by the parking lot was included in the tenancy. We therefore find that the facts presented would have been sufficient to establish the Ammers' right to tack the periods of time in question, even in the absence of the statements by Richard Bishop and Wesley Measday.

CONCLUSION

The Ammers could not demonstrate the continuous ten-year period of adverse use necessary to establish a prescriptive easement unless they were entitled to tack at least a portion of the time during which they used AWC's property as tenants of the Jacksons and the Faulkners. Since the record before us indicates that AWC's property was never adversely used until the Ammers built the store and created the parking lot, it seems unlikely that there was such an agreement or understanding between the Ammers and their lessors. However, because the trial court did not consider this issue, the Ammers are entitled

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[169 Ariz. 213] to an opportunity on remand to present whatever evidence they may have concerning it.

The judgment of the trial court is reversed and the matter is remanded for proceedings consistent with this opinion.

CONTRERAS and JACOBSON, JJ., concur.

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1 Prescription is based upon the use of land and results in the acquisition of a nonexclusive right to continue to use it, while adverse possession is based upon the possession of land and results in the acquisition of fee title to it. See 2 G. Thompson, Commentaries On The Modern Law Of Real Property § 340 (1980); Etz v. Mamerow, 72 Ariz. 228, 233 P.2d 442 (1951).

2 Arizona Revised Statutes section 12-521(A) provides in pertinent part as follows:

1. "Adverse possession" means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

2. "Peaceable possession" means possession which is continuous, and not interrupted by an adverse action to recover the estate.

Arizona Revised Statutes section 12-526(A) provides as follows:

A person who has a cause of action for recovery of any lands, tenements or hereditaments from a person having peaceable and adverse possession thereof, cultivating, using and enjoying such property, shall commence an action therefor within ten years after the cause of action accrues, and not afterward.

3 Arizona Revised Statutes section 12-521(B) provides as follows:

"Peaceable and adverse possession" need not be continued in the same person, but when held by different persons successively, there must be privity of estate between them.

4 The trial court appears to have granted summary judgment in AWC's favor on the ground that the Ammers had not shown the ten-year period of continuous use necessary to create a prescriptive easement. However, the court also found that the Ammers had not been in "exclusive" possession of AWC's property for ten years. The court erred in listing exclusive possession as one of the prerequisites for establishing an easement by prescription.

Exhibit C

(Determining Easement as Appurtenant by Intent of Parties, Language of Easement, in light of Circumstances. See pages 1, 3 and 4.)

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188 W.Va. 408

John N. RATINO, M.D., Plaintiff Below, Appellant,
v.
Charles HART, Donald R. McNemar, and Judith A. McNemar, Defendants Below, Appellees.
CENTRAL SUPPLY COMPANY OF WEST VIRGINIA, A West Virginia Corporation
v.
John M. RATINO.

No. 20920.

Supreme Court of Appeals of West Virginia.

Submitted Sept. 23, 1992.
Decided Dec. 11, 1992.

Syllabus by the Court

1. "Whether an easement is appurtenant or in gross is to be determined by the

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[188 W.Va. 409] intent of the parties as gathered from the language employed, considered in the light of surrounding circumstances." Syl. pt. 2, Post v. Bailey, 110 W.Va. 504, 159 S.E. 524 (1931).

2. "In such action [for forcible entry and detainer] the plaintiff carries the burden of proof, and cannot prevail, unless, by a preponderance of the evidence, he shows a possessory right superior to that of the defendant." Syl. pt. 4, Wiles v. Walker, 88 W.Va. 147, 106 S.E. 423 (1921).

3. " ' "A motion for summary judgment may only be granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Syllabus point 2, Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978).' Syllabus Point 3, Thomas v. Raleigh General Hospital, 178 W.Va. 138, 358 S.E.2d 222 (1987)." Syl. pt. 4, Benson v. Kutsch, 181 W.Va. 1, 380 S.E.2d 36 (1989).

David J. Romano, Gregory H. Shillace, Law Offices of David J. Romano, Clarksburg, for appellant.

Robert G. Steele, James L. Cole, Steptoe & Johnson, Clarksburg, for appellees Donald R. McNemar and Judith A. McNemar.

PER CURIAM.

John M. Ratino appeals the August 2, 1991 order entered by the Circuit Court of Harrison County granting summary judgment in favor of Donald R. McNemar and his wife, Judith A. McNemar. Mr. Ratino, the appellant, had previously filed a complaint against Mr. and Mrs. McNemar, the appellees, [1] contending that they had committed "unlawful detainer" of a right-of-way claimed by the appellant across the property of appellees in violation of W.Va.Code, 55-3-1 [1923]. [2] The trial court found that no genuine issue of material fact was presented, and, as a matter of law, the appellees were entitled to judgment in their favor.

The appellant and appellees own adjoining tracts of land in Harrison County. This case arises from a controversy surrounding the granting of a right-of-way by the appellees' predecessors in title to the appellant's predecessor in title in 1906. The 1906 grant was stated as follows:

The said parties of the first part [the appellees' predecessors in title] grant to the said party of the second part [the appellant's predecessors in title] a right of ingress and egress from the Fairmont turnpike through their land by the same route that is now used to his land. With the understanding that there is to be no sawmilling or lumbering or hauling for oil wells machinery or fixtures for gas wells or anything else outside of regular farm purposes, and the party of the second part is to help keep up road and bridge from the Fairmont turnpike to said land of second party; to be used only as a family right of way with the understanding that hay, straw and coal is to be hauled when the ground is dry enough to not cut ditches in the field or when it is frozen hard enough to not cut in. This will no longer hold good if the second party injures any stock of the first parties.

This grant was specifically included in each conveyance in the appellant's chain of title.

The appellant purchased his property in 1987. The appellees have owned their property since 1979. About the time of the appellant's purchase, he visited the appellees and informed them of the alleged right-of-way and asserted his intent to make use of it. The appellees denied the existence of a right-of-way and prevented the appellant from entering upon their property.

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[188 W.Va. 410] After the appellees' refusal of access to the alleged right-of-way, the appellant wrote and informed the appellees that, unless he was allowed usage of the alleged right-of-way, he would construct an alternate route to his property, by-passing the appellees' property. He demanded permission to use the alleged right-of-way "within twenty-four hours," and asserted that failure to allow usage of the alleged right-of-way would force him to "institute measures to recover damages." [3] Thereafter, in May of 1989, the appellant filed the complaint in this action in the Circuit Court of Harrison County.

In April of 1991, the appellees filed their motion for summary judgment pursuant to Rule 56 of the W.Va.R.Civ.P. In their complaint, the appellees argued that the appellant's assertion of "unlawful detainer" was inappropriate because: (1) it should have been brought in magistrate court pursuant to W.VA.CODE, 50-2-1 [1985], AND (2)[4] that "unlawful detainer" actions are only brought in landlord/tenant disputes.

The appellees also argued that, as a matter of law, no right-of-way existed upon their property. They contended that the deed granting the right-of-way is unambiguous and clearly granted only a right of personal use in the original grantee and his family.

The summary judgment motion was orally argued before the trial court on June 24, 1991. After hearing argument from counsel for both the appellant and appellees, the trial court granted the appellees' motion for summary judgment. The trial court stated: "I think that no reasonable construction [of the 1906 deed granting the right of way] could be construed of that language [in the 1906 deed to mean that the right-of-way was to pass with the land] and as a matter of law no right of way exists. Also on the grounds of the unlawful detainer is inappropriate [I am ruling against the appellant] and I am granting the [appellees'] motion for summary judgement." This appeal followed.

Upon appeal to this Court, the appellant contends that the trial court erred in ruling that, as a matter of law, the 1906 deed did not create a right-of-way. The appellant also asserts that an action for "unlawful detainer" may be brought under W.Va.Code, 55-3-1 [1923] when any interest in property is detained. On their behalf, the appellees contend that an action for "unlawful detainer" under W.Va.Code, 55-3-1 [1923] may not be brought when the property right involved is a right-of-way.

I

The trial court ruled, as a matter of law, that no right-of-way exists in favor of the appellant. [5] Because we find that this deed, on its face, lacks ambiguity and clearly does not confer more than a mere personal right-of-way upon the original grantee, we agree with the conclusion of the trial court.

We have stated in the syllabus of Mays v. Hogue, 163 W.Va. 746, 260 S.E.2d 291 (1979) that:

'If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intention of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate.' Syl. pt. 1, Jones v. Island Creek Coal Company, 79 W.Va. 532, 91 S.E. 391 (1917).

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[188 W.Va. 411] However, we have also stated in syllabus point 2 of Post v. Bailey, 110 W.Va. 504, 159 S.E. 524 (1931) that: "Whether an easement is appurtenant or in gross is to be determined by the intent of the parties as gathered from the language employed, considered in the light of surrounding circumstances."

In this case the language of the deed granting the right-of-way is clear and requires no interpretation. The deed unequivocally states that it is "to be used only as a family right of way[.]" Mr. Ratino is clearly not a member of the family of the grantee of the 1906 deed. Nor does he so assert.

Black's Law Dictionary 510 (6th ed. 1990) defines an "easement in gross" as follows:

An easement in gross is not appurtenant to any estate in land or does not belong to any person by virtue of ownership of estate in other land but is mere personal interest in or right to use land of another; it is purely personal and usually ends with death of grantee.

(citation omitted). See also Holland v. Flanagan, 139 W.Va. 884, 81 S.E.2d 908 (1954). Because, on its face, the right-of-way granted in the 1906 deed was clearly an easement in gross, and did not attach to the land, the trial court did not err in holding that, as a matter of law, no right-of-way existed for the benefit of the appellant. However, as the following discussion reveals, even if the right granted by the 1906 deed had been appurtenant, and attached to the land, the appellant's action for unlawful detainer would not lie.

II

The appellant sought to determine the existence of the right-of-way on the basis that the appellees unlawfully detained the alleged right-of-way in violation of W.Va.Code, 55-3-1 [1923]. W.Va.Code, 55-3-1 [1923] states, in pertinent part:

If any forcible or unlawful entry be made upon any land, building, structure, or any part thereof, or if, when the entry is lawful or peaceable, the tenant shall detain the possession of any land, building, structure, or any part thereof after his right has expired, without the consent of him who is entitled to the possession, the party so turned out of possession, no matter what right or title he had thereto, or the party against whom such possession is unlawfully detained, may, within three years after such forcible or unlawful entry, or such unlawful detainer, sue out of the clerk's office of the circuit court, or of any court of record empowered to try common-law actions, of the county in which the land, building, structure, or some part thereof may be[.]

The trial court specifically ruled that an action for unlawful detainer was "inappropriate" in this case.

The appellant asserts that the words "no matter what right or title he had thereto" in reference to the "party so turned out of possession," (in W.Va.Code, 55-3-1 [1923]) extend to his alleged right-of-way. To the contrary, the appellees

assert that an "unlawful detainer" action may not be brought by one who claims a right-of-way, and argue that such an action may properly be brought only by one asserting a possessory right or title.

In Feder v. Hager, 64 W.Va. 452, 454, 63 S.E. 285, 286 (1908), we described an action for unlawful detainer as follows: "True it is that this action relates only to possession, and determines only the right to possession. It does not settle or adjudicate title." We have also stated the following in Duff v. Good, 24 W.Va. 682 (1884): "The remedy by unlawful detainer is a summary proceeding designed to protect the actual possession, whether rightful or wrongful, against unlawful invasion and afford speedy restitution." 24 W.Va. at 685. We went on to state that:

The owner or he who has the right to the possession, if he acquires the possession peaceably and without force, will not be compelled by this action to restore the possession to an actual occupant who has no right to the possession-- Olinger v. Shepherd, 12 Gratt. 462. The possession to which this summary remedy applies is

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[188 W.Va. 412] not confined to the pedis positio [6] or actual enclosure of the occupant. It applies to any possession which is sufficient to sustain an action of trespass. [7]

Id. at 685.

We have gone so far as to state that an action for unlawful detainer is determinative only of a party's right to possession of disputed property. As we stated in Wiles v. Walker, 88 W.Va. 147, 150, 106 S.E. 423, 424 (1921):

The action of forcible entry and detainer is solely possessory in nature. By it the one instituting the proceedings seeks merely to regain possession of land which he claims another is wrongfully withholding from him. The action does not permit or sanction a binding investigation or finding as to the true title or ownership of the property in dispute.

(emphasis added). And in syllabus point 4 of Wiles we held that: "In such action [for forcible entry and detainer] the plaintiff carries the burden of proof, and cannot prevail, unless, by a preponderance of the evidence, he shows a possessory right superior to that of the defendant." Clearly, syllabus point 4 of Wiles contemplates that one must present a superior possessory right to prevail in an action for unlawful detainer of property. [8]

Although we have not specifically addressed this issue, our case law is consistent with holdings in other jurisdictions where it has been held that an action for unlawful detainer may not be brought by one who claims only a right-of-way on the property in question. The Supreme Court of New Mexico has held that even where a plaintiff alleges he is entitled to a right-of-way over property:

An action of ejectment or forcible entry and detainer does not lie to enforce such a right. Child v. Chappell, 9 N.Y. 246. It is incorporeal, and, of course, could

not be delivered by the sheriff. An action on case may be sustained for its obstruction, (Allen v. Ormond, 8 East, 4,) or equity may be invoked to restrain interference, but no relief can be granted on the present form of action.

3 N.M. 87, 1 P. 855, 856 (1884). And in 1906, the Supreme Court of Alabama noted the general rule that "neither ejectment nor forcible entry and detainer will lie for an easement or by a plaintiff who seeks to be let into the use or occupation of a servitude. An ordinary right of way or of common is given as an illustration of the principle." Moye v. Thurber, 146 Ala. 180, 40 [188 W.Va. 413] So. 822,

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824 (1906). [9] See also Becher v. City of New York, 102 A.D. 269, 92 N.Y.S. 460 (1905); 35 Am.Jur.2d 897 Forcible Entry and Detainer § 9.

In support of his argument in this case, the appellant cites to this Court Lewis v. Welch Wholesale Flour & Feed Co., 90 W.Va. 471, 111 S.E. 158 (1922). In that case we described the unlawful detainer statute of West Virginia as "very liberal." 90 W.Va. at 477, 111 S.E. at 160. However, it is clear that this statement was in reference to a plaintiff's right to possession, for we stated:

Our statute giving it [an action for unlawful detainer] is very liberal. Any person against whom possession of land is unlawfully detained, no matter what his right or title may be, can invoke it. Code, c. 89, § 1 (sec. 4065). It lies between lessees of the same land, in favor of him who has superior right of possession thereof. Guffy [Guffey] v. Hukill, 34 W.Va. 49, 61, 11 S.E. 754, 8 L.R.A. 759, 26 Am.St.Rep. 901.

90 W.Va. at 477, 111 S.E. at 160.

It is abundantly clear from the foregoing that an action for unlawful detainer may not be brought by one claiming a mere nonexclusive right-of-way. As the appellant is in such a position, we find no error in the trial court's conclusion that summary judgment against the appellant was warranted in regard to the action for unlawful detainer because such an action is inappropriate in this case.

III

In syllabus point 4 of Benson v. Kutsch, 181 W.Va. 1, 380 S.E.2d 36 (1989), we stated:

' "A motion for summary judgment may only be granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Syllabus point 2, Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978).' Syllabus Point 3, Thomas v. Raleigh General Hospital, W.Va. , 358 S.E.2d 222 (1987).

In this case it is clear that no right-of-way exists in favor of the appellant. Furthermore, the appellant has complained of unlawful detainer, but has not alleged any facts under which an action for unlawful detainer may lie. Therefore, no

genuine issue as to any material fact exists, and the appellees were appropriately granted judgment as a matter of law.

Based upon the foregoing, the August 2, 1991 order of the Circuit Court of Harrison County is affirmed.

Affirmed.

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1 The complaint was also filed against Charles M. Hart, but Mr. Hart was not a party to the summary judgment issues in this appeal. This case was then consolidated with a civil action styled Central Supply Co. of West Virginia v. John M. Ratino, Civil Action No. 88-C-AP-797-2, in May of 1990. That case also has no relevance to this decision.

2 The appellant also claimed the tort of "outrageous conduct" against the appellees, but dropped that allegation at the summary judgment proceeding.

3 The appellant's property was accessible from other routes apparently less convenient than the one provided for by the alleged right-of-way.

4 This assertion was not argued before this Court, nor was it addressed by the trial court. Therefore, we decline to address it as well. W.Va.Code, 50-2-1 was revised and amended in 1992.

5 This ruling was made orally at the summary judgment proceeding of June, 1991. In its August 1, 1991, written order granting summary judgment, the trial court gave no reasons for its order, stating simply: "The Court GRANTS [the appellees'] motion for summary judgment since the Court is of the opinion that there is no genuine issue as to any material fact and that those defendants are entitled to judgment as a matter of law."

6 Black's Law Dictionary (6th ed. 1990) defines pedis positio as follows: "In the civil and old English law, a putting or placing of the foot. A term used to denote the possession of lands by actual corporal entry upon them." Id. at 1132.

7 In this regard, it should be noted that an action for trespass is defined by W.Va.Code, 61-3B-1(8) (1978) as: " 'Trespass' under this article is the willful unauthorized entry upon, in or under the property of another[.]" Clearly, in this case, the appellant could not sustain an action of trespass against the appellees.

8 Black's Law Dictionary 1163 (6th ed. 1990) defines "possession" as follows:

Possession. Having control over a thing with the intent to have and to exercise such control. Oswald v. Weigel, 219 Kan. 616, 549 P.2d 568, 569. The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name. Act or state of possessing. That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

(emphasis added). Such a definition denies the inclusion of incorporeal things, such as easements and rights-of-way, from becoming subject to possession.

We also note that Black's Law Dictionary 1536 (6th ed. 1990) defines "unlawful detainer" as follows:

Unlawful detainer. The unjustifiable retention of the possession of real property by one whose original entry was lawful and of right, but whose right to the possession has terminated and who refuses to quit, as in the case of a tenant holding over after the termination of the lease and in spite of a demand for possession by the landlord. Brandley v. Lewis, 97 Utah 217, 92 P.2d 338, 339. Actions of 'unlawful detainer' concern only right of possession of realty, and differ from ejectment in

that no ultimate question of title or estate can be determined. McCracken v. Wright, 159 Kan. 615, 157 P.2d 814, 817.

9 Moye also noted that one may bring an action for unlawful detainer when the use of a right-of-way is exclusive, as in the case of a railroad or toll road. This view is supported in Iron Mountain, Etc. R.R. Co. v. Johnson, 119 U.S. 608, 7 S.Ct. 339, 30 L.Ed. 504 (1887). In that case the Supreme Court of the United States expounded on "the general purpose" of forcible entry and detainer statutes:

The general purpose of these statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title, or may have the better right to the present possession, but the policy of the law in this class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and then, when the parties are in status quo, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer, which are declared not to have relation to the condition of the title, or to the absolute right of possession, but to compelling the party out of possession, who desires to recover it of a person in the peaceable possession, to respect and resort to the law alone to obtain what he claims.

119 U.S. at 611, 7 S.Ct. at 340, 30 L.Ed. at 505.

Exhibit D

(Scope as defined by language of easement circumstances history and reasonableness. See pages 1 and 2.)

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463 S.E.2d 785

120 N.C.App. 863, Util. L. Rep. P 26,499

Rickey A. SWAIM
v.
Elmer Larry SIMPSON and wife, Joan K. Simpson.

No. COA94-1205.

Court of Appeals of North Carolina.

Nov. 21, 1995.

Morrow, Alexander, Tash & Long by C.R. "Skip" Long, Jr., Winston-Salem, for defendant-appellants.

Shore Hudspeth & Harding, P.A. by N. Lawrence Hudspeth, III, and Douglas P. Mayo, Yadkinville, for plaintiff-appellee.

ARNOLD, Chief Judge.

Defendants argue that the trial court erred by increasing the extent and scope of the easement. They maintain that "[n]o language [120 N.C.App. 864] exists in any of the deeds of record which suggest that the scope of easement was anything other than an access easement to and from the state road." Conversely, plaintiff argues that the grantors clearly "intended to provide the owners ... with an easement sufficient to maintain a residence, which would logically include access and utilities."

The purpose of an easement "should be set forth precisely." I Patrick K. Hetrick & James B. McLaughlin, Jr., Webster's Real Estate Law in North Carolina § 15-9 (4th ed. 1994). When the scope and extent of an easement is in debate, the following rules apply:

First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is

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silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied.

Id. at § 15-21; see also Williams v. Abernethy, 102 N.C.App. 462, 464-65, 402 S.E.2d 438, 440 (1991) (stating that "[w]hen an easement is created by an express conveyance and the conveyance is 'perfectly precise' as to the extent of the easement, the terms of the conveyance control").

Here, plaintiff was granted an express easement over Lot Six. The grant states that "[a]lso conveyed herewith is an easement of right of way for ingress and egress to the above described tract to N.C.S.R. # 1146, and which easement is more fully described in that conveyance recorded in Book 233, page 210 ... on April 30, 1982." The easement, in Book 233, page 210, is described as "providing access of ingress and egress to and from" plaintiff's lots.

Generally, "once an easement has been established, the easement holder must not change the use for which the easement was created so as to increase the burden of the servient tract." Webster's, supra, § 15-21 (italics omitted). In construing the easement to provide for the location, installation, and maintenance of facilities for domestic utilities, the trial court increased the use of the easement and the burden on the servient estate. Had the grantors intended a greater use, such [120 N.C.App. 865] use should have been specified. See Weyerhaeuser Co. v. Light Co., 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962) (stating that "[w]hen the language ... is clear and unambiguous, effect must be given to its terms, and the court, under the guise of constructions, cannot reject what the parties inserted or insert what the parties elected to omit"). Because the deed identified the easement as one for ingress and egress, the trial court erred in expanding its use.

The trial court's order is reversed and this case is remanded for entry of summary judgment for defendants.

Reversed and remanded.

MARK D. MARTIN, concurs.

JOHNSON, J., dissents with a separate opinion.

JOHNSON, Judge, dissenting.

I respectfully dissent from the majority's opinion in which they contend that a burden would be placed upon the servient estate by providing domestic utilities. This Court has previously held that a buried septic tank system does not constitute an encumbrance on the property of another; accordingly, the installation of underground utility lines would not increase the burden on the servient estate, nor the use of the easement. See Commonwealth Land Title Ins. Co. v. Stephenson, 101 N.C.App. 379, 399 S.E.2d 380 (1991).

Moreover, employing the principles of ordinary reasoning and common sense leads one to conclude that a deed, which included an easement restricting a lot to residential use sufficient to maintain a residence, would necessarily provide the right to install utilities to the residential lot. In Sparrow v. Dixie Leaf Tobacco Co., 232 N.C. 589, 61 S.E.2d 700 (1950), the Court held that, when determining what uses of an easement are reasonably necessary, consideration must be given to the

purposes or uses for which the easement was granted. It would be reasonably necessary that an easement for residential use include, not only the right to ingress and egress, but also the right to lay utility lines. Any other conclusion would render the lot restricted for residential use basically inhabitable.

I therefore vote to affirm the trial court's judgment.

Exhibit E

(General Rule: Language of Easement controls; if not specific, rules of reasonableness apply. See pages 3 and 4.)

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719 P.2d 295

149 Ariz. 409

SQUAW PEAK COMMUNITY COVENANT CHURCH OF PHOENIX, Arizona, an Arizona corporation, Plaintiff-Appellant, Cross-Appellee,
v.
ANOZIRA DEVELOPMENT, INC. an Arizona corporation, Defendant-Appellee, Cross-Appellant.

No. 1 CA-CIV 8202.

Court of Appeals of Arizona,
Division 1, Department B.

April 8, 1986.

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[149 Ariz. 410] Robbins & Green, P.A. by Charlotte A. Ortlund, Phoenix, for plaintiff-appellant, cross-appellee.

Meyer, Hendricks, Victor, Osborn & Maledon, P.A. by Larry A. Hammond, Phoenix, for defendant-appellee, cross-appellant.

OPINION

CONTRERAS, Judge.

This is an appeal from a judgment in favor of the defendant-appellee Anozira Development, Inc. (Anozira) denying plaintiff-appellant Squaw Peak Community Covenant Church of Phoenix (Church) injunctive relief to prevent the construction of curbs across a portion of the Church's easement. Because we determine that the trial judge abused his discretion in denying injunctive relief, we reverse and remand for entry of a permanent injunction in favor of the appellant Church.

Appellant brought this action to enjoin the appellee from obstructing the Church's easement for ingress and egress to certain property located just east of 32nd Street and Campbell Avenue in Phoenix, Arizona. A trial to the court was conducted on October 9, 1984, and formal judgment was entered in favor of Anozira on December 28, 1984. The Church has appealed from the judgment, and Anozira has filed a cross-appeal

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[149 Ariz. 411] from the trial court's denial of its request for attorney's fees.

Briefly stated, the facts giving rise to this litigation are as follows. In 1956, the Church acquired title to a parcel of property by warranty deed. In addition to granting fee simple title to the land, the deed granted the Church the following easement appurtenant upon the land of the grantor:

PARCEL NO. 2: An easement for ingress and egress 40 feet in width, lying 20 feet on either side of a line which extends from the North right-of-way line of East Campbell Avenue North to the South line of Parcel No. 1, and which line lies 170 feet East of and parallel to the West line of the East half of the Southwest quarter of the Northwest quarter of Section Twenty-four (24), Township Two (2) North, Range Three (3) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

Shortly after receiving title to the property, the Church constructed a 28-foot wide paved roadway running north and south from the Church property to Campbell Avenue, through the approximate middle of the 40-foot easement. The remaining portions of the easement consisted of an unpaved 7-foot strip west of the paved roadway, and an unpaved 5-foot strip east of the roadway. The Church landscaped and maintained grass berms on the unpaved sides of the easement.

In 1984, Anozira purchased the servient estate. Anozira's property borders on Campbell Avenue, and is adjacent to the Church's southern property line. The Church also owns the parcel immediately east of Anozira's land, however, at the time of trial the Church had constructed buildings only upon the parcel north of Anozira's property. The Church's easement runs along the eastern side of Anozira's property from Campbell Avenue to the Church's property line to the north.

The record reflects that the parties negotiated over a period of several months concerning Anozira's desire that the Church relinquish part of its easement. Anozira's initial site plan called for moving and repaving the 28-foot driveway five feet to the eastern side of the easement, and placing landscaping and a retaining wall on the resulting 12-foot wide strip on the west side of the easement. The Church, however, refused to relinquish any portion of the easement.

At the time of trial, it was stipulated that Anozira had withdrawn any intention to place walls and landscaping on the easement. Instead, Anozira sought to pave an area between the eastern entrance to the condominiums and the existing paved roadway, perpendicular to the easement. Additionally, it planned to install curbs, approximately six inches in height, curving outward and running for several feet along the edge of the proposed paved east-west entryway to the existing north-south roadway. Anozira contended that the curbs would improve traffic safety along the easement where vehicles entering and leaving the condominium area crossed into the existing paved roadway between the condominium entrance and Campbell Avenue. Anozira also contended that the 7-foot strip of the easement upon which the curbs would lie had not been paved by the Church, was not presently used for ingress and egress by the Church and that, therefore, the Church did not need the strip. Finally, Anozira argued that the proposed buffer curbs were reasonable and necessary to its development, were consistent with sound engineering principles, and would serve to direct cars safely into the Anozira development.

The Church sought to enjoin construction of the curbs as an encroachment inconsistent with its valuable right to use the entire 40-foot width for ingress and egress.

In entering judgment in favor of Anozira, the trial court made the following findings:

THE COURT FINDS that the proposed use by Anozira, to wit: the placement of permanent six-inch (6"') high buffer curbs, to extend no more than seven (7) feet into and on plaintiff's easement, will not unreasonably interfere with the plaintiff's right of ingress and egress.

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[149 Ariz. 412] The curbs will in no way interfere with the plaintiff's present or prospective use. Furthermore, the curbs are desirable from an engineering and safety point of view.

The Church argues that the trial court improperly considered the reasonableness and desirability of the buffer curbs to Anozira, as well as the Church's own "non-use" of the unpaved 7-foot strip in determining whether to enjoin installation of the curbs. It contends that the deed was unambiguous and gave the Church the right to use the entire 40-foot width for ingress and egress as a matter of law. Additionally, it argues that the width of its right-of-way could not be decreased irrespective of actual use or its need to use the entire width. It also asserts that as a matter of law the installation of the curbs obstructed the easement.

Anozira argues that the issue of whether the curbs are compatible with the easement was a factual determination such that our review is limited to determining whether the trial court's findings were clearly erroneous.

The Church's easement was created by an express grant in a warranty deed. Thus, the extent of the Church's right must be determined by construction of the language of the deed. See 3 Tiffany, Real Property § 802 (3d Ed.1939); 3 Powell, Real Property § 415 at 34-183 (Rev.1985). The interpretation of an instrument is a question of law to be determined by this court independent of the findings of the trial court. See Cecil Lawter Real Estate School, Inc. v. Town & Country Shopping Center Co., Ltd., 143 Ariz. 527, 533, 694 P.2d 815, 821 (App.1984).

We have found no Arizona decisions addressing the scope of the use of a right-of-way easement under circumstances similar to the instant case. The general rule accepted in other jurisdictions has been stated in Aladdin Petroleum Corp. v. Gold Crown Properties, 221 Kan. 579, 584, 561 P.2d 818, 822 (1977), as follows:

The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling in such case and consideration of what may be necessary or reasonable to a present use of the dominant estate are not

controlling. If, however, the width, length and location of an easement for ingress and egress are not fixed by the terms of the grant or reservation the dominant estate is ordinarily entitled to a way of such width, length and location as is sufficient to afford necessary or reasonable ingress and egress.

See also Andersen v. Edwards, 625 P.2d 282 (Alaska 1981); Flower v. Valentine, 135 Ill.App.3d 1034, 90 Ill.Dec. 703, 482 N.E.2d 682 (1985); Lindhorst v. Wright, 616 P.2d 450 (Okla.App.1980). See generally Restatement of Property § 486 (1939); 3 Tiffany, Real Property § 805 (3d Ed.1939); 28 C.J.S. Easements § 75, p. 753 (1941).

Our first inquiry, therefore, is whether the language creating the easement is ambiguous. If, as the Church claims, the deed is unambiguous and grants the Church the right of ingress and egress over the entire 40-foot width of the easement, the deed governs and considerations of what is reasonable and necessary for ingress and egress are not controlling. See 3 Tiffany, Real Property § 805 (3d Ed.1939). If the language is ambiguous, a reasonably convenient and suitable way across the servient land is presumed to be intended. See 3 Tiffany, Real Property § 805 (3d Ed.1939). What is reasonable becomes a question of fact to be determined by the trial court considering all the surrounding circumstances. See, e.g., Andersen v. Edwards, 625 P.2d at 286-87; Barton's Motel, Inc. v. Saymore Trophy Co., Inc., 113 N.H. 333, 335, 306 A.2d 774, 776 (1973); Boss v. Rockland Electric Co., 95 N.J. 33, 39-40, 468 A.2d 1055, 1058-59 (1983).

In the case before us, the deed provides that the Church is granted "[a]n easement

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[149 Ariz. 413] for ingress and egress 40 feet in width" and then sets forth the legal description of the location of that easement. There is authority that the width of an easement for ingress and egress is not necessarily coextensive with the parcel or area over which the easement is granted. Some cases hold that a grant or reservation of a right-of-way "over" a particular area, strip or parcel is not ordinarily to be construed as providing for a way as broad as the ground referred to. See generally Annot., 28 A.L.R.2d 253 § 7 (1953). Without deciding whether Arizona would follow this line of authority, we conclude that the language at issue here unambiguously creates an easement that is 40 feet in width. Compare Schaefer v. Burnstine, 13 Ill.2d 464, 150 N.E.2d 113 (1958) ["right-of-way for ingress and egress over a strip of land 40 feet in width" held to be unambiguous]; Hester v. Johnson, 335 S.W.2d 574 (Ky.1960) ["said right-of-way to be at least 30 feet in width" held to be unambiguous]; Lindhorst v. Wright, 616 P.2d 450 (Okla.App.1980) ["a perpetual right of ingress and egress on and across 40 feet of the SW/4 of the SW/4" held to be unambiguous]. But see Andersen v. Edwards, id.; Barton's Motel, Inc. v. Saymore Trophy Co., id.; Hyland v. Fonda, 44 N.J.Super. 180, 129 A.2d 899 (N.J.App.Div.1957).

Apparently, Anozira does not assert that the deed is ambiguous. Nevertheless, it contends that whether the installation of curbs across a 7-foot strip of the easement obstructs the existing right-of-way is an issue of fact. From this