

STATE OF VERMONT
WASHINGTON COUNTY, SS.

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HOWARD FLETCHER

v.

HENRY W. FERRY

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SUPERIOR COURT
WASHINGTON COUNTY

Washington Superior Court
Docket No. S 376-7-01 Wncv

Decision on Location of Right of Way for purposes of Final Order

Following the Entry Order of February 26, 2003, a status conference was held on March 31, 2003 concerning the process to use to fix the location of the right of way burdening Fletcher's land and benefitting Ferry's land, pursuant to the Findings of Fact and Conclusions of Law entered December 2, 2002. At the March 31, 2003 status conference, the parties' both sought a continuation of the evidentiary hearing in order to present additional evidence pertaining to the location of the right of way, and they both asked the court to take a second view. The continued evidentiary hearing took place on April 25, 2003, and the court took a second view on May 9, 2003.

In the Findings of Fact and Conclusions of Law entered December 2, 2002, the court was primarily focused on the issue of whether or not a right of way burdened the Fletcher property. While the Defendant asserted a location for the right of way, the court concluded that Defendant had proved the location of only a portion of the right of way, and had not proved its location in full as he asserted. The court found as follows: "[Ferry's] surveyor attempted to locate the right of way on the ground. From the Moscow Woods Road, there is only one route possible on the Fletcher parcel for the first third of the length of the Fletcher parcel. It was visible on the ground to the surveyor, and corresponded to the length of the driveway that passes to the right of the dwelling on the Fletcher residence. Beyond the dwelling, the surveyor could no longer locate a right of way on the ground." (Findings of Fact and Conclusions of Law, page 4.) The court concluded as follows: "the easement. . . continues to burden the Fletcher lot in the location of the surveyed 'Proposed ROW Route.'"

Based on the additional evidence, the court clarifies its prior finding and conclusion, and further makes the following additional findings of fact and decision.

Clarification. In the December 2, 2002 findings, the court used the portion of the "proposed ROW route" that the surveyor could establish as the portion of the location of the right of way that was proved. This is shown on Defendant's CC as a double line of dashes. (The portion of the "proposed ROW route" that the surveyor could not establish but proposed is

shown as a single dotted line.) The surveyor did not depict on Defendant's CC the location of the dwelling on the Fletcher lot. At the time of the first view, it appeared to the court that the double line of dashes reflected the "visible gravel" portion of the driveway on the Fletcher lot, and that this "visible gravel" portion of the driveway ended in the vicinity of the dwelling. Thus, in the initial Findings and Conclusions, the court understood that the "visible gravel" and "double line of dashes" ended in the same place, and that it was at or near the dwelling house.

Subsequent to December 2, 2002, once it was determined that the legal right of way existed, the exact location has become much more important to both parties. On the second view, the court had the opportunity to review where the proven right of way ends. The court attempted to reconcile the "double line of dashes" shown on Defendant's CC with what exists on the ground. There are three difficulties. First, as noted above, the location of the dwelling is not shown on Defendant's CC, so it cannot be used as a point of reference (as the court had previously attempted to do). Second, Defendant's CC does not include a scale, so it was not possible to determine the length of the "double line of dashes" and fix that spot on the ground, or compare it with the end of the "visible gravel." Third, the "visible gravel" does not actually come to an abrupt end, but fades out. Thus, even though the evidence supports a conclusion that the surveyor, upon which the court relied, used the end of the visible gravel to show the end of the double line of dashes, there is some lack of clarity as to where the end of the proven right of way is if the "visible gravel" standard is used.

In order to reconcile this more or less consistent--albeit somewhat imprecise--evidence, the court, on the second view, measured to a spot that it has selected as marking the end of the proven right of way. That spot is 136 feet from the centerline of the Moscow Woods Road, measuring along the centerline of the "double line of dashes." This is the spot the court has selected as marking the end of the "visible gravel," and it is in the vicinity of the dwelling, although below it. Whether or not it corresponds to the end of the "double line of dashes" cannot be determined because of the lack of a scale on Defendant's CC. In any event, the court hereby clarifies that this is the spot that marks the extent to which Defendant proved the prior location of the right of way. The court's task is now to exercise its equitable powers to fix the location of the remainder of the right of way, for the reasons set forth in the opinion entered February 26, 2003.

Additional Findings of Fact. Fletcher asks the court to locate the right of way as follows: starting from the Moscow Woods Road, proceed up the driveway approximately 40-45 feet, and turn right, leaving the Fletcher lot and entering into the Ferry lot. Ferry asks the court to locate the right of way along the route marked as the "Proposed Right of Way Route" on Defendant's CC.

Fletcher's proposal would route the right of way through a Class II wetlands that is located near the Moscow Woods Road. Any development in a Class II wetlands, or in an area including a 50 foot buffer surrounding a Class II wetlands, would require engineering studies, a conditional use determination, and significantly increased expense for items such as special

culverts, if a permit could be obtained at all. The benefit to Fletcher is that it would locate Ferry's access road to his lot as far away from Fletcher's dwelling as possible in order to maintain privacy, and it would maximize Fletcher's options for future development of his property, which could include improved water and septic systems as well as improvements and additions to the dwelling on the property. The expense to Ferry of this location is out of proportion to the benefit to Fletcher, particularly given the fact that Fletcher bought his lot subject to an easement serving the Ferry lot, as detailed in the December 2, 2002 Findings and Conclusions. The cost of constructing an access road at this location is approximately \$4,300 if no wetlands permit is needed, approximately twice the cost of constructing a road at Ferry's proposed location. In addition, it would result in disturbance of protected wetlands. It would also mean a departure from the proven right of way much closer to the Moscow Woods Road than where Ferry has proven it to end.

Ferry's proposal would route the right of way across Fletcher's lawn, through an area that is a reasonably practical location for a future septic area for the Fletcher dwelling, given the very small size of the Fletcher lot. (The dwelling currently has no septic facilities, although it is used as a year-round residence.) It would also run the driveway within 8-10 feet of the established entry way to the Fletcher dwelling (though approximately 20 feet away from the outside wall of the house) in a manner that would be extremely disruptive to the privacy of the dwelling and its curtilage. It would also cross a drainage ditch that routes runoff water around Fletcher's house and away from the house. It would also run across a wet area and brook on Fletcher's lot, resulting in either a wet muddy "chewed up" area if the driveway is not improved, or a disruptive driveway through the center of Fletcher's small lot if the right of way is improved. On the second view on May 9, 2003, which is a wet time of year, the court noted that any crossing of the brook at any point on either Fletcher's or Ferry's land would entail going through the running water of the brook.

Conclusion

The court has concluded that the following route will enable both parties to make maximum unobstructed use of their respective property interests:


Beginning at the centerline of the Moscow Woods Road (Point A) and proceeding to the end of the proven right of way, which is a point on the "Proposed Right of Way Route" on Defendant's CC located 136 feet northeast of the centerline of the Moscow Woods Road (Point B), then making a right turn and proceeding south toward the Ferry land at a 90 degree angle, which angle may be enlarged to the degree necessary to permit the right edge of the 12 foot wide right of way to clear the Class II wetlands designation and buffer zone on both the Fletcher and Ferry parcels. (Point C is the intersection with the Ferry boundary.)

Once on the Ferry land, Ferry is free to select the route he chooses to make the access road connect with the woods roads on his land. It is anticipated that any such route will be

located south of the brook. This route will require Ferry to cross the brook on his land, but the conditions of the brook at the location where he would do so are similar to the conditions of the brook where he proposed to cross it on Fletcher's land, so he is not unduly prejudiced by this change.

A consultation with a professional engineer, surveyor, or wetlands specialist may be necessary in order to determine the exact angle and location of the course from Point B to Point C, and to locate a route on the Ferry property that avoids the wetlands and buffer zone. The cost of such consultation, and the cost of surveying the exact location of the right of way, shall be borne by Ferry. The cost of preparing the Judgment Order in this case, including a legal description of the right of way based on the Ferry survey, in a form suitable for recording in the Calais Land Records, shall be borne by Fletcher.

Date at Montpelier, Vermont this 26th day of May, 2003.


Hon. Mary Miles Teachout
Presiding Judge