STATE OF VERMONT
WASHINGTON COUNTY, SS.

HOWARD FLETCHER	)	
	)	**Washington Superior Court**
v.	)	**Docket No. S 376-7-01 Wncv**
	)	
HENRY W. FERRY	)	

Final Decision
regarding
Decree declaring Location of Defendant's Easement

The sole remaining issue in this case is the establishment of a description for the easement of Defendant Henry Ferry ("Ferry") for access to his so-called Scribner woodlot. The easement crosses land owned by Howard Fletcher ("Fletcher"). The facts are described in a series of earlier decisions. The case is now before the Court for a final decision on several post-hearing requests related to the content of the decree declaring the location of the easement. Attorney Edward M. Kenney represents the plaintiff Howard Fletcher. Defendant Henry Ferry, who was previously represented by Attorney Robert Bent, now represents himself.

There were originally several claims and counterclaims as set forth in amended pleadings. An evidentiary hearing was held on all issues and a view was taken, and the Court filed Findings of Fact and Conclusions of Law on December 2, 2002 on all claims, concluding, *inter alia*, that Ferry holds an easement, created by reservation in a 1935 deed, across Fletcher's land for access to Ferry's Scribner woodlot.

After the decision, a followup dispute emerged between the parties concerning the location of the easement. See the Opinion filed February 26, 2003. The location of one portion of the easement was defined, but the route of the remainder, near and beyond Fletcher's dwelling, had become undefined over time. Ferry's predecessors had allowed the location of that portion of the right of way to be lost through lack of use or maintenance, and meanwhile Fletcher had converted the dwelling on his small parcel from a camp to a full-time residence. The Court concluded that under these circumstances, the Court has the responsibility to fix a specific location, and the route "must be a reasonable one as to both parties in view of all the circumstances, and such as will not unreasonably interfere with the enjoyment of the servient estate." *Stevens v. MacRae*, 97 Vt. 76, 81-82 (1923).

The Court held a second evidentiary hearing in order to fix the route and took a second view. It clarified its earlier findings, made additional factual findings, and determined a location for the easement in a written Decision filed May 28, 2003. The Court found that Ferry had proved the location of a portion of the route, but not the location of the route beyond a point 136 feet from the centerline of the town road. It also explained that each party was proposing a route that would unduly burden the rights of the other party. Based on the law set forth in *Stevens*, the Court

established a route that would enable both parties to make maximum use of their respective property interests, as follows:

> 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.)

The May 2003 decision also explained that "[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."

Following that Decision, detailed survey information was submitted by Ferry, and unrefuted by Fletcher, that showed that the wetlands buffer zone extended closer to Fletcher's house than had been shown by the evidence presented at both evidentiary hearings. The survey showed that no route could entirely clear the wetlands buffer zone, and that most of the land between Fletcher's house and his southern boundary is within that zone. This meant that there might be regulatory compliance issues involved in use of the route fixed by the Court, and a conditional use permit (CUD) may need to be obtained to enable Ferry to use the easement to which he held title. While information before the Court indicated that ANR regulations would permit use of a preexisting road to continue, it was not clear whether a preexisting road whose location was surely within a wetland or buffer zone but had been lost through non-use, and whose location was recently established by declaratory action in court, could be used consistently with current regulations. Ferry continued to argue for selection of his original preferred route as the "correct" route and one that would be grandfathered, and Fletcher opposed Ferry's attempts to reopen issues that had been decided.

In an Entry Order filed August 2, 2004, the Court updated its rulings in view of the new information, described a more specific location using the survey map, and attached a map establishing a specific route, taking into account the fact that the entire possible area for easement use lies in a regulated wetlands buffer zone and that it was not possible to avoid the wetlands buffer. The Court determined that Fletcher had more incentive to seek a CUD for that location than Ferry did, and gave 60 days for Fletcher to do so. After making an attempt, Fletcher determined that he was unable to do so because he lacked sufficient detailed information that could only be provided by Ferry. The Court then gave Ferry 60 days to seek a CUD to use the route set forth by the Court so that it could be determined, for the benefit of Ferry, whether use can be made of the easement consistently with current wetlands regulations. This would give the Court a final opportunity, using the best available information, in exercising its equitable powers under *Stevens* to take all factors into consideration in balancing the equities before a judgment decree was entered.

Despite having had sufficient time, and despite having filed many documents and requests, Ferry has not obtained a CUD for use of the route, nor has he filed any rulings obtained from ANR pertaining to the use of the route fixed by the Court showing impossibility of use. District Wetlands Ecologist Shannon Morrison has stated, in letters to Ferry, that an existing road would be grandfathered, and that a new route would require a CUD. However, her advice appears to be based on a misunderstanding that the route closest to Fletcher's house has been established as the original route. There is no evidence that Ferry ever applied for a CUD to cover the route fixed by the Court, nor that he has properly represented to ANR that a prior road existed in the area and most certainly within the wetlands or buffer zone but that a portion of its location was not proved and was fixed by the Court recently by declaratory action. The most recent letter from Ms. Morrison, dated October 29, 2004, explains that the test for receiving a CUD "is whether the proposed impact will have an undue, adverse impact on the functions and values of the wetland." She also states, "This cannot be evaluated and decided upon outside the CUD process." Her letter to Ferry included a CUD application form. There is no evidence that Ferry ever filed an application. Despite ample opportunity, Ferry has not taken the necessary steps to either (a) obtain or confirm permission to use the route established by the Court, or (b) demonstrate that the route established by the Court cannot be used as a matter of law.

The Court has declared the location of the easement, as requested by the parties, in its Entry Order of August 2, 2004. While the Court had expected that it would be beneficial to the parties to enter a Declaratory Judgment that incorporated a survey description of the exact location of the entire route (see Decision of May 28, 2003), the Court has not been provided with the details that would make such a decree possible, nor has it been provided with any reliable information showing that Ferry cannot use the easement at the location established by the Court. It does not appear that providing any additional opportunities will yield any more information. Therefore, the matter is ripe for entry of judgment.

The Court this day issues a Declaratory Judgment that Ferry holds an easement for access to the Scribner woodlot along the route described in the Entry Order of August 2, 2004, as well as other declarations and injunctive relief based on the Findings of Fact and Conclusions of Law. The Court makes no declaration concerning whether Ferry is or is not able to use the easement without violating ANR regulations or related law.

Dated at this15th day of July, 2005.

Mary Miles Teachout

Hon. Mary Miles Teachout
Superior Judge