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STATE OF VERMONT
CALEDONIA COUNTY, SS

Robert Cassani, Shirley Cassani, and Melanie Ross Plaintiffs v. Bruce Hale, Kathryn Hale, Meadowsend Timberlands, L.P., Ernest LaBrie, and Linda LaBrie Defendants	SUPERIOR COURT Docket No. 256-12-04 Cacv

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The above matter came on for court trial on May 2 and 5, and continued on July 1, 2008. The plaintiffs were represented by Charles Merriman, Esq. and Paul Gillies, Esq. Defendants were represented by Oliver Twombley, Esq. Based upon the evidence adduced at trial, the Court issues the following findings of fact, conclusions of law, and order.

Findings of Fact

This litigation is the third proceeding concerning the same parcels of land in Groton, Vermont. Plaintiffs Cassani own a parcel of land of 178.5 acres (hereinafter the Cassani parcel) in close proximity to lands owned by Defendants. Defendants LaBrie own a parcel of 49.5 acres (hereinafter the LaBrie parcel) which is contiguous with the Cassani parcel. The Hales own a parcel with is contiguous with the LaBrie parcel. Meadowsend owns a parcel which is contiguous with the Cassani, Hale and LaBrie parcels. The Superior Court visited and examined the site on November 16, 2007.

In the early 1980s, these parcels, with the exception of the 178.5 acre parcel, were all under the common ownership of George Rock, et al. Reference is made to the Rock survey (Plaintiff's 2) which identifies the various parcels and their location with respect to one another with greater specificity. Rock created lots 1 (now owned by Meadowsend), 1A (a portion of which is now owned by Hale) and 1B (the 49.5 acre parcel now owned by LaBrie). Rock created a right of way of 60' in width, running from Town Highway 24 (Seyon Pond Road), to access these lots, hereinafter referred to as the Rock right of way. This right of way is centered on the property lines, such that 30 feet of it is on the 49.5 acre parcel and 30 feet is on the Hale property. The 178.5 acre parcel, first acquired by Cassani in 1988, is to the north of these lots.

Cassani purchased the 49.5 acre parcel from Ernest LaBrie and another in 1986. In 1988, Cassani purchased the 178.5 acre parcel. Cassani ceded the 178.5 acre parcel in bankruptcy in 1995 and lost the 49.5 acre parcel to the Northfield Savings Bank (NSB) in foreclosure. Cassani was able to re-acquire the 178.5 parcel, and when he did, NSB conveyed a right of way to Cassani over the 49.5 acre parcel, which conveyance is memorialized in a Vermont Easement Deed, dated February 23, 1996.

NSB subsequently sold the 49.5 acre parcel to LaBrie in October 1997. The LaBries acquired the 49.5 acre parcel for $32,000, subject to and with the benefits of rights of way and easements of record. Before the LaBries purchased the 49.5 acre parcel, Ms. LaBrie knew of the existence of the right of way. She incorrectly assumed the right of way was limited to logging and hunting activities. It is not.

The LaBries and the Cassanis used to be friends. Once the LaBries bought the property, trouble ensued between them. The LaBries were going to offer Cassani the opportunity to purchase the 32.5 acre parcel. No offer was ever made, due to hard feelings between the parties. Ms. LaBrie says that they purchased the 32.5 acre parcel the second time as a favor to Mr. Cassani. She feels this has been lost on Mr. Cassani and has been met by numerous legal proceedings. In recent years, the LaBries have not let the Cassanis across the 49.5 acre parcel.

The Vermont Easement Deed (P. 1) grants a right of way over the 49.5 acre parcel as follows:

> *Being a 50' perpetual easement, for the sole purpose of ingress and egress, over and on the above-described land and premises, by the lane or road now established on this land and premises. The 50' easement created by this instrument commences on the northwesterly edge of the right of way limits of Town Highway 24, and proceeds in a generally northwesterly direction across the lands of the Grantor herein, along the existing lane or road, and terminates at the southern boundary of the lands of the Grantee herein . . ..*

During the time of his common ownership, Cassani had established a road which accessed the 178.5 acre parcel running across the 49.5 acre parcel after departing from the portion running along the Rock right of way. The Vermont Easement Deed does not specifically refer to the Rock right of way.

The LaBrie parcel has only 32.5 feet of frontage on Town Highway 24, 30 feet of which is subject to the Rock right of way (1/2 of the 60' Rock right of way). An existing road and bridge leaves Town Highway 24 primarily in the Hale portion of the Rock right of way. Only a few inches of the bridge are on the LaBrie property. As the road becomes more distant from Town Highway 24, its location becomes more centered along the property line until it splits into individual roads accessing Lots 1, 1B and the Hale lot.

There is presently a 12-foot-wide gravel drive on the Rock right of way, along with a small, one-lane bridge. There is one road at this time. The bridge is almost completely on the Hale land. The small fraction of the bridge falling on the LaBrie parcel is too narrow for a vehicle to pass over it.

In an earlier action, the Plaintiffs sought reformation of the Vermont Easement Deed. This court, Manley, J., granted reformation of the deed, striking references in the deed to property surveys, and appeal was taken to the Supreme Court, which affirmed the reformation. The Supreme Court consolidated the reformation action with the instant case and remanded for determination of whether the easement in the reformed deed was prohibited by, or impermissibly burdensome to, a previously existing right of way owned by defendants.

This case has been the subject of cross motions for summary judgment, which were denied, following the earlier grant of partial summary judgment to plaintiffs. In the denial order filed March 13, 2007, Judge Manley identified the issues for trial here which are:

1) whether Plaintiffs are correct in their belief regarding the location of the 1996 right of way
2) whether the current usable portion of the common right of way could be traversed solely on lot 1 B (LaBrie) and, if not, whether the portion on Lot 1 B could be made useable and
3) whether plaintiffs' use of the common right of way would be an unreasonable interference with defendants' enjoyment of the servitude.

Lisa Ginette is a land surveyor hired by the Plaintiffs. She was asked to look at the land in 2005. In June 2006, she located boundary lines, the bridge, power lines, etc. She located the boundary line between Hale and LaBrie as well, as the boundary line with the town road. She prepared a survey (P. 3). Ms. Ginette identified the Cassani easement in the Vermont Easement Deed between NSB and Cassani and placed the easement on P. 3.

P.4 is a survey prepared by Chase and Chase. It shows basically the same area as P.3. The two surveys may differ in their location of the LaBrie property line, but by less than 3 feet and perhaps as little as a few inches. The difference in the property lines in the two surveys is *de minimis* and does not impact on the decision in this matter.

P.5 is a warranty deed from Meadowsend Timerlands to Hale of 6.4 acres. The Hales have a portion of lot 1A from the Rock survey. This conveys a 60-foot right of way (the Rock right of way), which is shown as the gray shaded area on P4.

P.6 is the Rock to LaBrie deed of Nov. 5, 1984. This contains a right of way under this deed of 30 feet easterly of the common right of way. This is ½ of the shaded area on P4 not on the LaBrie property.

Defendant's I is the Vermont Easement Deed from Northfield Savings Bank to Glinka, Trustee, as it existed prior to reformation by this Court. The easement after reformation

is P. 1. The easement does not contain a metes and bounds description. The only location reference in the easement is the reference to "along the existing lane or road." There are no monuments called out for the location of the easement in D I.

Defendants contend the absence of any metes and bounds description means the right of way should be centered on the road running along the Rock right of way, thereby reducing the easement to 25 feet, as 25 feet would then be on the Hale property and not subject to the grant of an easement by NSB. Defendants contend the words "over and on" and "along" as contained in the easement deed require the easement to be centered on the existing road.

Ginette disagrees that the right of way should be centered on the road. She says if one were to know nothing else about the deed issues, centering the right of way on the road would be proper. However, she believes this ignores the deed issues in this case. In examining the deeds, Defendant's contention becomes unsupportable.

It is of particular importance that NSB did not own the Hale property when it gave Cassani a 50' right of way. At the time the NSB granted the right of way, it owned the 49.5 acre parcel and had ample land to grant an easement of any width it wished. The clear intent of the NSB was to grant a 50' easement, not a 25' easement. There is no support for Defendant's contention that the easement was intended to be centered on the property lines as the Rock right of way was. Such centering was not possible given the state of the deeds at the time the easement was granted. NSB had no legal authority to convey an interest in the Hale parcel, nor to expand the Rock right of way for the benefit of the Cassani parcel.[1] A 50' right of way was intended by the Grantor (NSB) and the Grantee (which became the bankruptcy trustee, then Quensler, then Cassanis). That right of way is on the LaBrie side of the property line. It could be nowhere else.

The right of way in the Vermont Easement Deed was not surveyed. There is an old road which goes through the 49-acre LaBrie parcel and connects to the 178-acre Cassani property. This road was constructed by Mr. Cassani many years ago and had been used by him for logging, hiking and other uses. This road is approximately 8-10 feet in width, although it was wider in places when it was first put in. Consistent with the Court's earlier finding, this "old" road is visible, although more difficult to see in places than in earlier years.

The Cassani right of way branches off the Rock right of way, just as it did when Mr. Cassani built the old road. The Cassani right of way follows the road to the LaBrie house and goes beyond it to the Cassani parcel. Where it passes the LaBrie house, the right of way goes between the house and garage and is within 20 feet of both structures. The LaBries were aware of this right of way and its proximity to the structures when they purchased the land. Linda LaBrie, in her offer to buy the land from the bank, referenced the right of way and acknowledged that the right of way was the only access to the Cassani parcel (see Supreme Court decision ¶19).

[1] Accord Order of December 9, 2005 (Manley, J).

At some point past the LaBrie house, the road becomes much less visible than it is from Town Highway 24 to the LaBrie residence. Ginette is not sure if there is a visible road all the way to the Cassani parcel. This Court has already found that plaintiffs had worked on constructing a road from the area of the LaBrie residence to the 178.5 acre parcel during the time they were in common ownership by Cassani and that Cassani and Ernest LaBrie actually traveled this road at one time together (see decision in the deed reformation action filed Aug. 12, 2004 (Manley, J.). The same decision concluded the route of the right of way is visible all the way to the 178.5 acre parcel, a conclusion Defendants insist on attempting to re-litigate. The Supreme Court likewise found it possible to establish the route of the right of way despite the lack of a survey (Supreme Court decision ¶20).

There is no access to the parcel owned by Cassani off from TH 26 using the so-called Hy Goodwin access. That access is to the 49.5 acre parcel, not the Cassani parcel. There is also no access to the parcel from Rt 232. Defendants argue an easement by implication should exist over that land, formerly owned by Van Vlek. The Vermont Supreme Court has decided that the existence of an easement by implication is of no moment, since the bankruptcy trustee obtained an easement from NSB. Therefore, no other access to the Cassani property has been established. The lack of other access was acknowledged by Linda LaBrie in October 1997 when offering to buy the 49.5 acre parcel. The existence of the right of way through the LaBrie parcel offered leverage in negotiating the purchase price.[2]

At one point, Robert Cassani had considered subdividing the 178 acre parcel into 5 smaller lots. He has no present plans to do so. Defendants suggest the future plans they impute to Cassani are an admitted fact for purposes of trial, because they were mentioned in summary judgment pleadings. The court disagrees.

It is clear that the lack of monuments or other description in the Vermont Easement Deed has created confusion. This is apparent in the letter Ginette wrote (D. O) to the attorney concerning where the right of way should be located on P. 3. There is also confusion created by the lack of 50' of frontage of the LaBrie parcel on Town Highway 24

The Court finds Ms. Ginnete to be credible, and her explanation concerning why the NSB right of way is not centered on the property lines to be convincing.

The Vermont Easement Deed does not explicitly provide for the construction of a new road. (D. I). The deed gives a 50-foot right of way along the existing road. The terms "over and on" and "along" do not mean the right of way must be centered on the existing road as Defendants contend. P3 depicts the 50-foot right of way commencing at the

[2] In a letter dated October 4, 1997 to Mr. Everett Bell at NSB, Mrs. LaBrie proposed to purchase the property, and in keeping with the natural incentive of a purchaser seeking to diminish the value of land in the eyes of its holder, emphasized to Mr. Bell that the land "contains a bridge that is in need of major repair," and "contains a right of way through it, right past the camp, that is the sole access for the Quensler acreage." The Quensler acreage, of course, became what is now the Cassani parcel. The October 1997 letter has been noted by every court to examine these facts, but it inexplicably has not deterred Defendants LaBrie from intimating that they might be bona fide purchasers without notice. Accord *Cassani v. Northfield Savings Bank.*, No. 158-6-02 Cacv (Manley, J., Aug 12, 2004), p. 7.

LaBrie-Hale property line and moving 50 feet onto the LaBrie property in areas where there is 50' available. This is what was intended by the NSB Easement Deed.

Brian Lyford is an attorney with substantial real estate experience. He was involved on behalf of the NSB when it foreclosed on the two parcels at issue: the parcel now owned by LaBrie and the larger parcel now owned by Cassani. NSB transferred the 49.5-acre parcel, and another 30-acre parcel was transferred to LaBrie in October 1997. They were transferred subject to a right of way. The 30-acre parcel is not before the Court at this time. If it were, the "bottleneck" of 32.5 feet at Town Highway 24 would not exist. Attorney Lyford did not intend the property line between LaBrie-Hale to be the center of the right of way. If he had so-intended, it would have been expressed in the documents, as it clearly could have been. In addition, the NSB had plenty of land to accommodate a 50-foot right of way and did not have the ability to convey a 50' right of way centered over the existing road. Defendants contend that NSB, though it had nearly 50 acres in which to convey a 50' right of way, actually conveyed a right of way only 25' wide, this because of an undocumented attempt to center the right of way over the existing road.

In short, Defendant's contention that the right of way NSB intended to convey was one centered over the existing road ignores the reality that NSB could not make such a conveyance at the time. Further, Defendants LaBrie purchased the 32.5-acre parcel knowing full well of the claimed right of way by Cassani. Defendants LaBrie were aware from the chain of title that NSB could not convey at right of way of 50' falling on a parcel NSB did not own. As a result, they knew the entire 50' right of necessarily was on their property.

The 50' right of way is located on the LaBrie land, following the existing road to the Cassani property. In the area where the LaBrie land is not 50' in width, the right of way extends to the LaBrie property line.

With respect to the use of the right of way, Defendants contend that the construction of another bridge and difficulties with snow removal place an undue burden on the servient estate due to proximity of the roads in the area where they leave Town Highway 24. It is true that snow removal may increase costs during winter months. However, these increased costs are not an undue burden.

Defendants also make allegations that the Cassani property may be subdivided at some future time, which is not before the court. As noted briefly *supra*, Defendants attempt to establish as a fact that Plaintiffs intend to subdivide the 178-acre parcel, not by evidence, but rather based upon a statement of facts used in support of a summary judgment motion which the court denied. The Court finds credible Mr. Cassani's testimony that there are no present plans to subdivide the 178 acre parcel, prior pleadings notwithstanding.

Chad Whitehead is a civil engineer with Dufresne Associates. He has been licensed for just over one year. Plaintiffs hired him to determine if access could be made from Town Highway 24 to the Cassani property, particularly in the area between Town Highway 24 and the place where the LaBrie drive splits off from the Hale road.

Whitehead has never designed or constructed a bridge, although he has general structural knowledge of bridges. He is not offered as an expert on bridge design or the design of bridge abutments. His work was intended merely to show the feasibility of constructing another bridge and not with the specifics of the actual design.

The existing road and bridge are about 12 feet wide. In Whitehead's opinion a bridge and road of similar character could be made to fit within the LaBrie property portion of the Cassani right of way. Whitehead prepared a report, P 7, setting forth his professional opinions and made a plan, P. 8. P. 8 is a notional plan only; it would have to be modified depending on actual conditions. This plan was prepared by Whitehead following a short visit to the site, lasting approximately 20 minutes.

The soil conditions require that care be given to maintain the integrity of the existing bridge, which Whitehead feels can be done. Additional engineering work would need to be done prior to construction. The State has not approved the design as proposed, nor has State approval been sought.

There is room to put another road and bridge next to the existing road, even with the 32.5 foot "bottleneck" near Town Highway 24. This is depicted on P. 8. There is sufficient room for snow storage and/or snow removal, although the area is tight. There would be a need for some fill to be brought in, especially in the area of the bridge.

Whitehead feels the concerns about the proximity to the two bridges can be addressed during construction. In other words, the integrity of the existing bridge and its abutments can be maintained while the new bridge is being erected.

Defendants currently use the area of the proposed bridge and road to stack snow. If a new road is put in, Defendants will have to find a new place to stack their snow. The proposed road is approximately 20- 25 feet from the edge of the existing road.

The state-, town-, or federal requirements for the bridge and roadway may vary if the Cassani lot is subdivided in the future. This is also not an issue before the court at this time. Mr. Cassani is unsure if he will ever attempt to subdivide the property.

Carolyn Diggins is a lister for the Town of Groton. The listers inspect properties for grand list purposes. A bridge on a property would affect the value of that parcel for grand list purposes. This might result in an increased assessment on the LaBrie property, perhaps for as much as one point for land grade.

At .60 land grade, the assessment is $35,900. At .70 it is $41,900, an increase of $6000. Ms. Diggins did not testify that the construction of a bridge would increase the assessment on the LaBrie property, merely that it might impact on the assessment. The court finds the impact of construction of a second bridge on the value of the LaBrie parcel to be insignificant and further of no consequence here. The LaBrie parcel was purchased with knowledge of the easement which might require the construction of a

bridge. They cannot now be heard to complain that its construction may result in increased property valuation.

Meadowsend Timberlands owns a large parcel of land which it uses for timber harvesting, accessing it across the Hale bridge. As a user of the existing right of way, road, and bridge, Meadowsend is concerned with the integrity of the existing bridge. It is important from their viewpoint that the existing bridge be able to handle the loads to the bridge.

Jeffery Smith is one of the Defendants in this case. He is the managing forester for Meadowsend Timberlands. Meadowsend has been using the existing right of way for more than 10 years.

Meadowsend traverses the existing right of way with timber harvesting equipment and tractor-trailers loaded with logs or chips. These loads can weigh up to 35 tons. They last did a forestry operation on their property about 8 years ago and do not expect to do another for 7-12 years. When they do, they will have to again inspect the Hale bridge to determine if it is safe.

Typically, Meadowsend's trucks turn left once they cross the bridge and enter town highway 24. This means they swing wide to the right in order to make the left turn. The presence of an additional road might have some impact on the left-turning trucks, but this has not been established. The court finds the testimony of Mr. Whitehead that the road construction would not impact the ability to use the existing road to be credible. Potential adverse impacts on logging trucks use of the existing road can be accommodated in the design of the "new" road without interfering in Meadowsend's existing use of its easement right.

William Chase is a self-employed land surveyor, with about 40 years of experience. He was hired by the LaBries to conduct a survey of existing conditions concerning the Rock right of way.

Chase's survey differs slightly from Ginette's survey in a minor respect around the location of the power pole. According to Chase, the Ginette survey shows the right of way 4 feet too far to the west. Chase's reference points for his survey were taken from pins found on the property. Ginette used other pins, which she felt were more accurate. This may serve to explain the discrepancy. The court finds the Ginette survey is the more accurate of the two. However, even if the right of way were moved 4 feet, there would be adequate room for parallel roads to co-exist.

Chase feels the right of way called out at over and along the existing road should be centered on the road. He has this opinion based upon his surveying experience with roadways. He feels this because the road is the only monument called out in the easement description. That, along with the stated width of the easement of 50 feet would mean 25 feet of the easement was located on the LaBrie property. He further opines that the right of way follows the existing bridge, so that where it is not centered over the LaBrie-Hale

property line but rather is more on the Hale land, there is even less easement remaining on the LaBrie land. This would reduce the available right of way at the bridge to 17 feet (25', less 8') in Chase's opinion.

Chase's opinion ignores the deed history here. At the time the right of way was given by NSB, they did not own 50 feet from the center of the road. NSB gave a right of way of 50 feet, over and on the existing road, but this could only fall upon lands they owned, i.e. the LaBrie property. To adopt Chase's opinion ignores the intention to convey a 50-foot right of way, because centering the right of way on the existing road would: 1) reduce the right of way conveyed to 25 feet because 2) a right of way can not be conveyed over property not owned by NSB. Chase feels the NSB was in error when they conveyed the 50 foot right of way because they did not own 50 feet if it was centered on the existing road. Nonetheless, Chase believes that NSB intended that the right of way be centered over the existing easement, notwithstanding this discrepancy. "[A]long the existing lane or road" to him means that the right of way was intended to be centered on the existing road (see description in Vt Easement deed). The court disagrees.

The Court finds the Ginnete survey to be accurate, recognizing however that the location of the pole is ambiguous. However, precise location of the pole is not necessary. Under either survey, there exists sufficient property for a 50-foot right of way across the LaBrie parcel, which NSB owned at the time of the disputed conveyance. The only location where there exist fewer than 50 feet of space is found at the bottleneck by TH 24, at which point the court finds the right of way narrows to the real width of the parcel.

Bruce Hale is a neighboring property owner and a co-defendant in this action. He placed a gate on the road between town highway 24 and the bridge. As the gate was being constructed, Mr. Cassani asked for a key to the gate. Hale asked him if he had a right of way and Cassani said no, but he'd like a key anyway.

Kathryn Hale is the wife of Bruce Hale and a real estate agent. The Hales have constructed a log cabin on their land and enjoy country living. They like to come to Groton to get away from city life in Burlington. They bought their property from Meadowsend, and they access it across the existing bridge. Ms. Hale's understanding was that only the LaBries, Meadowsend and the Hales could use the right of way. She says the opportunity for others to use the right of way would be disappointing to her. She feels the Cassanis have been discourteous by trying to use the existing road when they have another means into their property. The other means into the property has not been built and does not appear to exist.

The Hales and the LaBries are concerned that the construction of a new bridge adjacent to the existing bridge might destabilize it. Ms. Hale feels her dream of living in the country could be impaired if another bridge were constructed. She is also concerned that having to haul snow out would cause additional costs to the Hales if they could not stack it where they do now.

Harry Shepard is a structural engineer. He has been licensed engineer since 1988. He also has done geo-technical work, including foundations for bridges. He has designed approximately six small bridges such as the one which crosses the creek here.

Shepard has reviewed the plans prepared by Dufresne and Associates and has found them to be deficient in several respects. Shepard examined the Hale bridge on April 10, 2008 in order to study the conditions.

Based upon his investigation, Shepard feels the proposed Cassani bridge would negatively impact the Hale bridge. He feels the bridge as set forth in the Dufresne plans poses a risk to the Hale bridge, which is constructed upon a sand foundation, with concrete block and boulders on top.

The proposed foundation on the west side is close to the abutment and wing walls of the Hale bridge. The current wing walls and abutments consist of dry-laid concrete blocks and boulders. The concrete blocks are not re-enforced in any way.

Mr. Shepard feels the Dufresne drawing is a concept drawing only and not a feasible design. He feels the design as set forth in the existing drawing poses a substantial risk to the Hale bridge. This due, in large part, to the type of construction used in the Hale bridge and the proximity of the proposed Cassani bridge.

Shepard estimates the edge of the proposed footing to be about nine feet away from the existing wing wall on the Hale bridge. He thinks this creates an issue concerning de-watering—that is, getting rid of water for purposes of construction, such as through the use of coffer dams. He thinks this is not a sufficient distance to allow for proper construction.

Mr. Shepard feels that dewatering and seepage forces would serve to weaken and undermine the existing abutments. In addition, the vibrations connected with constructing a coffer dam could cause problems with the load-carrying capacity of the existing abutments.

The actual soils have not been tested, but the soils appear to be sandy outwash deposits. No geotechnical investigation has been done. There are boulders in the area. These may need to be cleared in order to drive sheeting for a coffer dam. This could also put the Hale bridge at risk. The Hale bridge is not well-constructed and will need repairs at some future point.

No scouring analysis has been done of the site. A scouring analysis considers how soils are transported by flowing water. This needs to be considered when constructing foundations in the presence of flowing water. This has not been done in the Dufresne work. A scour study determines the depth that the soil beneath water is subject to erosion by the flowing water.

Shepard feels that, in order to properly construct the Cassani bridge, a geotechnical study including borings, lab testing of soils and hydrologic analysis of the river, and a scour analysis in order to determine the depth of proper foundations, all should be done. He feels the foundations should be six feet below the stream bed, much deeper that depicted on the Dufresne drawings. The deeper the foundations need to be, the greater the risk to the Hale bridge.

Shepard feels the bridge as proposed will need to be wider than 12 feet. For a 12-foot lane, the structure needs to be wider and the abutments wider than the structure, perhaps as much as 18 feet, which would reduced the distance between the two abutments to as little as 6 feet. The proposed bridge would also need guardrails of approximately 2 feet in height. These are required under standards applicable to bridge construction known as ASHTOE.

Shepard has never applied for bridge construction permit in Vermont. He does not know what the permitting process would encompass or consider. Shepard feels that additional information might affect his consideration of the feasibility of construction of the bridge.

Bernard Chenette is a civil engineer with subdivision experience, including subdivisions involving construction of roads. He has done two site inspections.

The soils here consist of sandy loam and boulders. Chenette is concerned with the construction of abutments for the construction of the Cassani bridge, given the nature of the soil. He feels it would be difficult to construct a bridge as proposed by Cassani due to concerns over excavation for abutments. He is also concerned with the ability of logging trucks to make the necessary turns if another bridge is constructed. It may be that logging trucks will have to use additional care if a second road is present. The court finds, however, that the logging trucks will still be able to access the Meadowsend Timberlands property using the existing right of way.

Chenette concedes a final design could be made with removable guardrails. He cannot say how serious the potential impact is on the existing bridge, since it has not been fully studied. He doesn't feel the existing proposal goes far enough to determine feasibility. What he can say is that it cannot be done the way it is planned.

Robert Alexander is a traffic engineer. He has been employed in that capacity for 20 years. He was hired by the defendants to consider the traffic impacts by the proposed new road to the Cassani property.

Alexander feels the new road would impact the intersection of the Town Highway adversely by increasing the intersection from 4 legs to 5. This will necessarily impact those who use the intersection, including those who currently use the Rock right of way.

Alexander feels there are three "conflict points" with respect to each leg of the intersection at present, for a total of 12 considering the four roads which currently

intersect. If another road were added, the total conflict points would be 15. These conflict points are all within the existing public right of way for TH 24.

The additional conflict points and their proximity to the existing Hale driveway is a concern to Alexander. Alexander has not done a traffic count on any of these roads. There are very few traffic delays in this area, and construction of the Cassani road would not impact traffic flow to any appreciable degree.

If a new road were constructed, most vehicles would turn left coming out of the Cassani road. This might increase the risk of accidents for people coming out of the Rock road in the event two vehicles were using these roads simultaneously. If all vehicles were using the same road, the risk of accident would be less, to say nothing of the aesthetic benefits of having one road instead of two.

As proposed, the distance between the Hale road and the Cassani road at their entrances from Town highway 24 is about 17 feet from centerline to centerline. In Alexander's opinion, there is not adequate separation of the two roads to meet safety concerns. Relying upon State Highway Standard B71, which has been adopted as guidance in the Groton town highway ordinance, Article 4, Alexander feels that a safe separation distance for driveways is 125 feet. This court would not hazard to guess how many driveways in the state are within 125 feet of one another.

Alexander is also concerned with the grade at the approach to Town Highway 24. There would be an ascending grade of about 10% as one approaches TH 24 from the proposed Cassani road. He feels this may encourage "rolling stops."

Based upon ITE trip-generation data, 48 one-way trips per day may be expected if a 5-lot subdivision is constructed on the Cassani land. As the court has observed, however, there is no plan before the court to construct such a subdivision.

Much of Chennette, Alexander and Shepard's testimony does not bear directly on the issues before the court. Though informative, the testimony is geared on the whole toward Defendants' purely-speculative, factually unfounded anxiety that the Cassani parcel could, in theory, at some unknown future point, be divisible. This could be said of most land in the state. To the extent the concern is real, it is also tautological. It may be that construction of a second bridge may be more difficult, or more expensive, than presently contemplated. It may be that additional safeguards will be required to protect the integrity of existing structures, to deal with drainage issues and/or grades approaching the bridge. It may be that the construction of a second bridge next to the first will be visually unappealing. However, those are issues which Mr. Cassani must confront, when, and if, he constructs a second bridge. There is room for a second bridge, and its construction, costs aside, is feasible.

There are concerns about snow storage if two roads are essentially side by side, both at the end near the town highway and where the proposed Cassani road ties into the existing road. The area where the proposed Cassani road would be located is, in some respects,

used for snow storage at present. Obviously, if a road is constructed in that location, other means must be employed to store snow from the existing Hale road, to the extent land currently used for that purpose is no longer available due to the Cassani road. However, such storage area exists, both between the two roads, and if necessary, to the opposite side of the Hale road. It may be that centerline snow storage space will prove insufficient for one or both roadways; however, this does not create an undue burden on the Hale land.

Ms. LaBrie is concerned about the location of the right of way and its proximity to the "camp." She is concerned about the septic field and potential impact by use of the right of way. This right of way was in existence when she and her husband purchased the property. This right of way affected the purchase price of the property and enabled the LaBries to purchase the land for far less than it had been valued at an earlier time.

Ms. LaBrie is concerned about the impact of a second road on the value the LaBrie land, in terms of the effect on the existing bridge and her privacy. She is also concerned about possible liability from a bridge located on her property. As is often the case, construction here will decrease the privacy enjoyed by the land owners. The loss of privacy here, to the extent it may occur, is not an undue legal burden on the servient estate.

While the Defendants would prefer no "second bridge" and no use of the right of way by Cassani, the use of the right of way will not unduly burden the servient estate. Cassani has a 50-foot right of way running on the LaBrie side of the LaBrie-Hale property line, along the Rock right of way, until it leaves the Rock right of way and follows the course previously litigated along the LaBrie driveway, past the camp and onto the 178-acre parcel.

The use of this right of way will impact on snow removal, result in a second bridge alongside the existing Hale bridge, result in traffic past the LaBrie camp, and cause reduction in the privacy enjoyed by LaBrie, Meadowsend and Hale. Potential liability as a result of the construction of a bridge on the LaBrie land is purely speculative. Construction of the second bridge and road will be met with expense and engineering challenges, but this construction can be accomplished without undue burden on the servient estate.

That two roads and bridges will exist side-by-side in a remote area of Groton, Vt. is unfortunate. However, aesthetic concerns and legal rights are two different matters. A far more satisfactory result to all concerned likely could have been negotiated between the parties.

Conclusions of Law

It is incumbent upon the court to say not only what it has found and will order, but also why and how. As is often the case with fact-specific property disputes, disposition of the underlying legal issues may appear sparse relative to the found facts. In this case, a majority of the legal issues have been resolved by previous litigation and previous orders

of this court on the instant docket; those dispositions will not be recited gratuitously, but some must be summarized for context.

Part I of this discussion summarizes the history of the related actions. With that history and its significance explained, Part II clarifies the court's mandate in view of the applicable legal standards and finally disposes the two core issues remaining, which are: (1) what happens when a fatally-ambiguous deed places an easement grant certain as to space in conflict with an imperfect location description (or more simply, "where this easement is"); and (2) whether the particular right of way in this case impermissibly overburdens the existing, substantially adjacent right of way (or more simply, "whether it can be there").

I.

This land has generated a tremendous amount of litigation. In a previous action in this court, *Quensler v. LaBrie*, No. 214-8-01 Cacv, Plaintiffs' daughter and predecessor in interest sought declaratory relief as to the subject right of way. For reasons which are by now obvious, this court, in *Quensler*, by Pearson J. (May 9, 2002), found the deed creating the right of way hopelessly inaccurate and therefore incapable of relief by declaration alone. Judge Pearson suggested that reformation might do what the documents could not. See *Id.* p. 6 ("It may well be that Quensler would be entitled, given the requisite proof, to reformation of the 1996 Easement Deed to state the true intent of the Bank and the Bankruptcy Trustee. *See, e.g., Bourne v. Lajoie*, 149 Vt. 45 (1987).")

A separate reformation action ensued in *Cassani v. Northfield Savings Bank.*, No. 158-6-02 Cacv (hereinafter, *NSB*), so captioned because Ms. Quensler had by then conveyed the parcel, together with the subject right of way, back to her parents, the Cassanis. On appeal, the Supreme Court affirmed the reformation, setting aside for remand, consolidation, and exploration here a single issue: the particular effect reformation would have upon non-party beneficiaries of the shared, nearby, possibly-coterminous, Rock right of way. *See Cassani v. Northfield Sav. Bank*, 179 Vt. 204 (2005).

This court, Manley, J., in *Cassani v. Northfield Savings Bank.* (*NSB*), No. 158-6-02 Cacv, now by order of the Supreme Court a consolidated part of this case, set out its goal for reformation in detail which bears repeating:

> *Reformation is a separate and distinct action [from declaratory judgment], sounding in equity, whose purpose is to correct mutual mistakes of the parties, which mistake[s] create a result neither party intended. Such is the situation that presents itself here. There is no doubt that both the Trustee in Bankruptcy and the Bank intended to convey a right-of-way across the 49.5 acre [now-LaBrie parcel] once previously owned by Plaintiffs, for the use and benefit of the owners of the 178.5 acre parcel, also previously owned by plaintiffs and that the right-of-way would follow a road or lane already in existence. The fact that the road was not*

graveled or contoured in its entirety does not defeat the intent or ability to reform the deed to reflect the intent.

Id. at p. 8 (emphasis added).

Judge Manley further expressed a belief that reformation could establish the particular route of the right of way following Mr. Cassani's sketch of the old road he worked on when he had common ownership of the properties.

Though Defendants intimate that the "road or lane already in existence," to which this court referred in the *NSB* block quotation *supra.*, necessarily is one and the same as the Rock right of way and must therefore share its centerline, this is not so and does not stand to reason. First, the reference plainly includes the incomplete roadway worked on by Mr. Cassani in the period of his common ownership and deviating from the Rock right of way for the purpose of reaching the Cassani parcel. Second, the reference comes only after the deed language had been adjudged useful only as to equitable reformation. Third, fixation on the preferred centerline distracts from the most important of Judge Manley's holdings in *NSB*: The overriding intent of the disputed easement deed was to grant the Cassani parcel workable, real, fifty-foot-wide highway access over the LaBrie parcel.

The moment *Cassani v. Northfield Sav. Bank*, 179 Vt. 204 (2005) took hold of the case, affirming *NSB* and its intent to give force to the intent described in the section underlined *supra*, it became a certainty that Plaintiffs had a legal entitlement to a real, serviceable, actual, workable right of way meeting the intent of NSB and the Trustee in Bankruptcy and existing across the LaBrie parcel, if such right of way could be established at all. Barring physical impossibility, the only question became where it lay.

While the *NSB* appeal was pending concerning reformation, the instant dispute was substantially narrowed by this court's Decision and Order on Defendant's Motion for Summary Judgment (Manley, J., Dec. 9, 2005), which granted the motion in part. The court therein noted that Plaintiffs had conceded that the Rock right of way laid out by George Rock did not serve the Cassani parcel, and that it was, as a matter of law, impossible for NSB to have burdened, by the 1996 Vermont Easement Deed, any land other than the 49.5-acre parcel (now-LaBrie parcel, also denominated 1B) that NSB then owned. The Decision and Order went on to enumerate and reserve the live issues discussed at p. 3, *supra*. The court granted partial summary judgment to Defendants, to the effect that Plaintiffs had no easement rights in the 60-foot-wide Rock right of way, where that right of way lay on property NSB never could convey. For Defendants Hale, this meant their land was out of the suit, and their remaining interest in the case was reduced to the question, handed back days later by the Supreme Court, of whether reformation of the Cassani easement, wherever it lay on the LaBrie parcel, would overburden the common easement.

It is important to understand what happened in December of 2005, because that month saw a confluence of two parallel holdings tending toward the same conclusion. On December 9, with the *NSB* appeal pending on the issue of reformation, this court,

Manley, J., in relation Plaintiff's original claim to a right in the Rock right of way, held that it was a legal impossibility for NSB to have conveyed to Plaintiffs any rights in property other than the LaBrie property NSB then owned. On December 16, almost simultaneous to that holding, the Supreme Court, in *Cassani v. Northfield Savings Bank*, 179 Vt. 204 (2005) affirmed *NSB's* grant of reformation and consolidated and remanded the two cases for determination of whether the reformed Cassani easement could cooexist with the Rock right of way. The December 9 trial court order made much less likely the problem of interference with the Rock right of way that the Supreme Court remanded for consideration days later, because the December 9 order necessarily uncoupled the proper location of the Cassani right of way from the centerline of the Rock right of way, which centerline would have woven into the Hale property and been an impossibility. There was still some "existing road" useful to giving force to the deed parties' intent, but it was the existing road that branched off the Rock right of way and headed for the Cassani parcel.

Finally, though perhaps gratuitously, it is difficult to review the record without remarking at the persistence of this dispute. Consider, for example, that this court, Manley, J., in *NSB,* held that it would not reach the question of a way of necessity—despite findings strongly suggesting the same would be available in the alternative—"because the claim for reformation has been established beyond a reasonable doubt." *Id.* Accord *Cassani*, 179 Vt. at 210-11. Even giving due regard to the perogative of litigants to pursue and defend their property interests in court, it is increasingly hard to see, these many years later, why Defendants LaBrie would so persistently seek to attack the theory undergirding the Cassanis' deeded easement when an apparently-viable alternative theory, suggesting a substantially similar result, has lurked all the while in the background. Although Defendants sought to suggest it at trial, the so-called Hy Goodwin access has not been established, meaning that necessity likely would guarantee what a deed would not. As the courts and judges involved in this litigation have said unanimously, though, the deeded easement obviates the question.

These people who had enough land between them to reach a palatable accord if they wished, have been kicking a dirt driveway across no more than seventy-five theoretical feet of survey map, knowing all the while that of course the dominant estate eventually would have to find a way from the highway, and of course the basic contours of that way would move less than half the length of a football field. By no means does the court mean to trivialize property rights and legal precision—our bread and butter—but surely the first decade of a driveway dispute is not too soon to wonder if there was a more efficient means of ending the controversy. In the end, it is not the court's business to guess whether the dispute could have been settled. Perhaps they tried. The best that can be done now is to settle the location of the Cassani right of way so that the dispute is resolved completely and not repeated by the parties' successors .

II.

This case revolves around construction and reformation of the Vermont Easement Deed creating the disputed Cassani right of way. When interpreting a deed, the court's goal is to implement the intent of the parties. *Rowe v. Lavanway*, 180 Vt. 505, 508 (2006). Further, "[t]he character of an easement depends on the intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement." *Barrett v. Kuntz*, 158 Vt. 15, 18 (1992). Inferences may, and often must, be drawn from the chain of title. *Id.* at 19.

The previous litigation has made very clear, since 2002, that parsing the 1996 Easement Deed for some insight that will define the rights of the parties is an exercise in futility. Were the language of the deed sufficient, *Quensler* could have fixed things, and *NSB*, granting reformation, would have been unnecessary. The deed, by its own terms, did not accomplish its purpose of memorializing accurately the intent of the parties to it, because they mutually misunderstood the particular locations involved and the particular options available to them. We have tortured that document for meaning, and it has died on the rack. What is known from it that serves the prospective ends of equitable reformation is that a fifty-foot right of way, running from the town highway frontage, is meant to exist on the LaBrie parcel for the benefit of the Cassani parcel, and that grantee and grantor, both institutional interests working at arms length with no animosity between them, genuinely wanted the thing to work, to make highway access possible to the Cassani parcel so it would be marketable, and to do it substantially in the space fifty feet to the LaBrie side of what is now the LaBrie-Hale property line. Neither banks nor bankruptcy trustees like to hold property out of service, and neither had any reason want a hypertechnical construction. Their purpose was to guarantee access, to prevent it from being called into question in the future, and thereby to avoid litigation or dispute about whether the Cassani parcel had highway access through the LaBrie parcel. They meant for it to have that. It has that.

III.

The first "core" question before this court is, where physically exists the right of way which NSB, through Brian Lyford and bankruptcy trustee Gleb Glinka, attempted to create by the Vermont Easement Deed dated February 23, 1996, recorded in Book 47, pages 39-40 of the Groton Land Records, which deed this court in *Cassani v. Northfield Savings Bank.*, No. 158-6-02 Cacv (Manley J., Aug. 12, 2004)(aff'd 179 Vt. 204 (2005), set out to reform.

The goals of reformation have been articulated in *Cassani*, 179 Vt. at 210:

> *[R]eformation is a separate and distinct action sounding in equity, whose purpose is to correct mutual mistakes of the parties that have created a result neither party intended. See Burlington Sav. Bank v. Rafoul, 124 Vt. 427, 431, 209 A.2d 738, 741 (1965) ("[T]he court exercises the power of*

reformation where the mistake is common to both parties and by reason of it each has done what neither intended." (quotations omitted)); accord Ward v. Lyman, 108 Vt. 464, 472, 188 A. 892, 896 (1937). The Restatement (Second) of Contracts § 155 (1981) provides:

> *Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement, except to the extent that rights of third parties such as good faith purchasers for value will be unfairly affected.*

"Once it has been established that there was an intended agreement that the formal writing mistakenly failed to express, equity will deal generously in the correction of mistakes." deNeergaard v. Dillingham, 123 Vt. 327, 331, 187 A.2d 494, 497 (1963).

The parties' mutual mistake here was to set out a right of way too far south and east of where it possibly could be, because the southeastern-most bound of possibility was determined by the Hale-LaBrie property line.

Fundamentally, the principle to be applied here is the very basic one that specific language controls over more general language. *Tallarico v. Brett*, 137 Vt. 52, 60 (1979). The only germane, specific detail from the reformed deed is that the right of way is fifty-feet-wide where the LaBrie parcel is that wide. The right of way therefore runs fifty feet parallel-to, and northerly and westerly of, the common LaBrie-Hale property line—that is, on the LaBrie side of the line only. This path as closely and unobtrusively as possible approaches the "existing" way the grantor and grantee claimed to be relying upon. The fifty-foot right of way departs from the property line only where the centerline of the existing road from the Rock right of way to the Cassani property carries the centerline of a fifty-foot right of way north and west of parallel, and toward the Cassani property until it terminates.

One of the appellate claims in *Cassani v. Northfield Sav. Bank*, 179 Vt. 204 (2005) was that "the court erred in additionally burdening the right-of-way benefitting the lots in the Rock subdivision without providing notice and an opportunity to be heard to the two other owners thereof." *Id* at 208. Though it affirmed the underlying reformation and rejected three of four appellate arguments, the Supreme Court declined to decide that single issue, the fourth, both for lack of a record and because co-beneficiaries of the Rock right of way were not parties to the appeal. Those owners and co-beneficiaries, Meadowsend and Hale, are joined in the instant suit, then pendent. The Supreme Court consolidated and remanded the matter so as to "allow the superior court to determine how, if at all, its decision to reform the Easement Deed affects the other owners of the Rock right-of-way." *Cassani*, 179 Vt. at 209.

Those parties' evidence now has been weighed and their interests considered. Thus, the second and final "core" question before this court is, whether the Cassani easement herein specified overburdens the existing Rock right of way or otherwise impermissibly impinges upon the settled property rights of Defendants Meadowsend, Hale, or LaBrie. The facts show that it does not. Behind much of Defendants' trial evidence was a concern that future increased use of the Cassani parcel might be possible. Speculation is insufficient to justify limiting an easement. Future overburdening is ripe for intervention where there is a proposal to imminently overburden an easement. *Jost v. Resta*, 536 A.2d 1113, 1115 n. 3 (Me.1988) (cited by *Forant v. Chatot*, docket no. 2002-191; 2002 WL 34422305 (unreported mem.). Here, there is none.

Under the present proposed use, Meadowsend's trucks will be able to continue along their ordinary route, and they will be able to turn onto the town highway unimpeded. The Hales actually will come out somewhat better than would have been the case if Plaintiff's errant initial theory of entitlement to the Rock right of way, which is partly on the Hale parcel, were a viable one. The LaBries will lose some privacy in their camp, and their concern there is genuine, but they took the property with notice of and subject to that risk—indeed, specific knowledge of that risk allowed them to drive a hard bargain with NSB. Equity is not offended by this occurrence, and an easement is not overburdened by an anticipated use the servient landowner merely hoped against. The parallel driveways can coexist.

Order

For the foregoing reasons,

The Cassani parcel is served by a right of way consistent with the reformed deed previously ordered by this court, and located as described more particularly herein. The Cassani right of way does not overburden the existing Rock right of way.

Plaintiff's attorney shall prepare forms of judgment, to be submitted with a brief summary proposal for entering definitive corrections into the land records.

Dated at St. Johnsbury this 1st day of August, 2008.

Harold E. Eaton, Jr.
Superior Court Judge

Roy C. Vance
Assistant Judge

William P. Kennedy
Assistant Judge