

STATE OF VERMONT
WASHINGTON COUNTY, SS.

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HOWARD FLETCHER

v.

HENRY W. FERRY

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

SUPERIOR COURT
WASHINGTON COUNTY

Entry Order Regarding Location of Easement

This is a declaratory action concerning the existence and location of an access easement claimed by Henry Ferry across property owned by Howard Fletcher. Attorney Edward M. Kenney represents the plaintiff Howard Fletcher. Defendant Henry W. Ferry, who was previously represented by Attorney Robert Bent, now represents himself *pro se*.

Summary of Background

The background facts are described in the court's earlier decisions and the record. After the first evidentiary hearing and view, the court issued Findings of Fact and Conclusions of Law, filed on December 2, 2002, concluding in pertinent part that (1) Mr. Ferry holds an easement across the Fletcher lot allowing access to his 'Scribner woodlot' property, (2) the easement is appurtenant to the ownership of the Scribner woodlot, and the benefits run with the land, (3) the easement has not been abandoned or otherwise extinguished, (4) the driveway on the Fletcher lot defines the location of a portion of the easement, and (5) the easement does not allow Mr. Ferry to use it for access to his other adjoining parcel, the 'Davis front lot.'

Following the December 2, 2002 decision, the preparation of a proposed order highlighted a new issue, as explained in a three-page opinion filed February 27, 2003. The focus of the litigation shifted to a determination of the location of the easement. The location of a 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 the right of way to become lost through lack of maintenance, and, in the meantime, Fletcher had invested in converting his parcel from a seasonal camp to a full time residence. Under these circumstances, the way fixed by the court "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). In the February 27, 2003 opinion, the court provided the parties an opportunity to use negotiation or mediation to fix a location that would balance their respective interests in the use of their properties.

After the parties were unable to do so, the court then held a second evidentiary hearing on April 25, 2003 to obtain detailed evidence on the issue of location, and took a second view on May 9, 2003. The court then issued a written Decision on Location of Right of Way for Purposes of Final Order, filed May 28, 2003. That decision clarified earlier findings concerning the extent to which the location of the right of way had or had not been proved. The court also issued new findings to explain that each party was proposing a route that would unduly burden the respective rights of the other party. The court then decided the matter by describing a route that would enable both parties to make maximum unobstructed 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 28 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." The cost of the consultation and survey was to be borne by Mr. Ferry, with the cost of preparing the Judgment Order to be borne by Mr. Fletcher.

On August 6, 2003, Ferry filed a Motion to Submit Survey and a Proposed Survey. He stated that Shannon Morrison, District Wetlands Ecologist, had placed flags on the ground showing the boundary of the wetlands. He further represented that the surveyor had depicted the boundary wetlands on the survey map, and also depicted the 50 foot buffer zone on the survey map. The surveyor also depicted the route of the location that Ferry has been seeking throughout this litigation, and depicted a proposal for an alternative route represented to be in compliance with the court's decision of May 28, 2003. Fletcher filed an opposition on August 22, 2003. On October 17, 2003, the court provided Fletcher with the opportunity to consult experts and seek a contested hearing on the survey of the boundaries of the wetlands and buffer.

He did not seek such a hearing, but filed a Motion to Modify on December 31, 2003 seeking modification of the prior location decision on the grounds that the survey map showed that it was impossible for the right of way to be located as the court had described. This is true because the buffer zone invades the Fletcher property to a far greater extent than was suggested by all prior evidence and inspection during the view. The court held a status conference and gave the parties an opportunity to alter their requests. Fletcher was invited to submit an alternative proposal for the location of the right of way, taking into account the new survey information concerning the location of the wetlands and buffer zone. He declined to do so. In

the meantime, Ferry has attempted to submit additional evidence in support of his position that his route represents the “original” route, and Fletcher has objected to attempts to reopen the evidence.

New Findings from Survey and Conclusions

The court declines to reopen the evidence. The court has already conducted two hearings and found, based on the credible evidence described in the Findings of Fact, that the right of way can be located on the ground to a point up Fletcher’s drive 136’ from the centerline of the Moscow Woods Road. The court found that the route advocated by Ferry is logical, and Ferry introduced some evidence in support of it, but there was other evidence that the location could not be determined and the court concluded that the location was only proved to the 136’ point (Point B).

The survey submitted by Ferry, and uncontroverted by Fletcher, shows that the proven right of way (the 136’ from Point A to Point B) lies within the 50’ buffer, and that beyond Point B, most of the land between Fletcher’s house and Fletcher’s southern boundary is also within the 50’ buffer. This is the information that was previously unavailable to the court. This area is depicted in yellow on Exhibit A attached, which is a marked photocopy of the survey plan submitted by Ferry on August 6, 2003. There is no other possible location on Fletcher’s property for a right of way. The distance from Fletcher’s house to his north boundary line is shorter than the 12 foot width of the right of way.

The court previously found (May 28, 2003 Decision, page 2) that any development within the buffer would require a Conditional Use Determination. Thus, it appears that in order to use the right of way that Ferry advocates, he would need to obtain a Conditional Use Determination. It is unknown whether one can be obtained, but evidence admitted on April 25, 2003 support a finding that a Conditional Use Determination within the yellow area may be possible based on the fact that a prior road existed within that area, even if its exact location cannot be determined.

The court’s decision to divert the right of way away from Fletcher’s house and to route it toward Ferry’s land along Fletcher’s south boundary was based on a balancing of the cost impact to Ferry and the significant invasive impact on the Fletcher house of Ferry’s proposed route, which would bring the right of way within 8-10 feet of the established entry to the Fletcher house,¹ and on the invasive impact of a right of way running through Fletcher’s back lawn and possible septic field site. These continue to be significant considerations. Since a Conditional

¹The court found this as fact on May 28, 2003. This fact is not inconsistent with the survey depiction of the east corner of the Fletcher house as 25.1’ from the centerline of Ferry’s proposed right of way. The court made a comparable measurement on the second view. The 25.1’ measurement shown on the survey plan minimizes the true impact on the use of the Fletcher residence, as the edge of the right of way over which vehicles would pass would be 8-10 feet from the established entry way to the Fletcher dwelling.

Use Determination would be needed for Ferry's preferred route in any event, it may be available for the route described by the court in its May 28, 2003, depending on ANR's analysis of possible damage to the nearby wetlands.

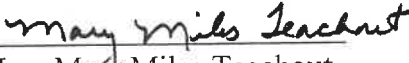
Ferry has no incentive to obtain a CUD, as he continues to seek to persuade the court that his proposed route is the correct "original" route. Fletcher is in a better position to present a case to the ANR for a CUD along the route described by the court (except for the fact that the court now recognizes its incorrect understanding that it would be possible to avoid the buffer zone). An approximate depiction of the route, with Points A, B, and C marked, is shown on Exhibit A attached.²

Thus, the court will provide Fletcher with 60 days to seek a CUD for the route shown on the attached Exhibit A. The court will then have sufficient information for a final judgment.

Order

Plaintiff Fletcher shall have 60 days to seek a Conditional Use Determination for the use by Defendant Ferry of a 12 foot wide easement from Point A to Point C as shown on the attached Exhibit A.

Dated this 23rd day of July, 2004.

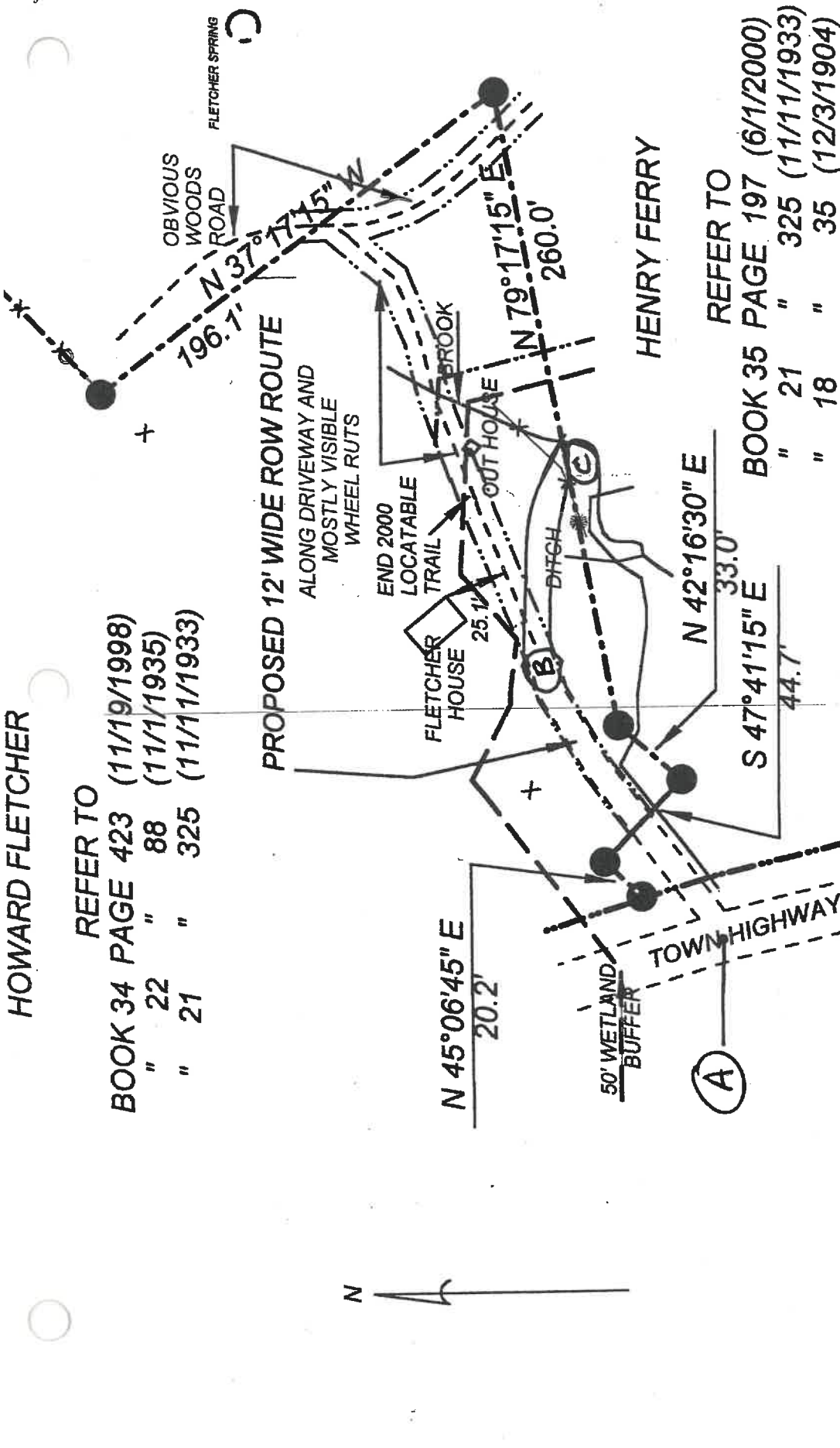


Hon. Mary Miles Teachout
Superior Judge

²The survey plan submitted by Ferry on August 6, 2003 does not depict Point B. The court has done its best to show roughly where it is, but this is clearly not the work of a professional surveyor.

HOWARD FLETCHER

REFER TO
 BOOK 34 PAGE 423 (11/19/1998)
 " 22 " 88 (11/1/1935)
 " 21 " 325 (11/11/1933)



- PROPERTY LINE
- _____ LINE OF WETLAND FLAGS
- LINE OF 50' WETLAND BUFFER
- EDGE OF GRAVEL DRIVE
- CENTERLINE OF APPARENT WHEEL TRACK
- EDGE OF PROPOSED 12' R.O.W.
- EDGE OF COURT PROPOSED RELOCATED R.O.W.

HOWARD FLETCHER

REFER TO
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 " 22 " 88 (11/1/1935)
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PROPOSED 12' WIDE ROW ROUTE

ALONG DRIVEWAY AND
 MOSTLY VISIBLE
 WHEEL RUTS

END 2000
 LOCATABLE
 TRAIL

FLETCHER
 HOUSE

N 45°06'45" E
 20.2'

50' WETLAND
 BUFFER

TOWN HIGHWAY No. S.A. 5

(A)

25.1'

FLETCHER
 HOUSE

OUT HOUSE

DITCH

BROOK

N 42°16'30" E
 33.0'

S 47°41'15" E
 44.7'

HENRY FERRY

REFER TO
 BOOK 35 PAGE 197 (6/1/2000)
 " 21 " 325 (11/1/1933)
 " 18 " 35 (12/3/1904)

N 79°17'15" E
 260.0'

OBVIOUS
 WOODS
 ROAD

N 37°11'15" W
 196.7'

FLETCHER SPRING



- PROPERTY LINE
- _____ LINE OF WETLAND FLAGS
- - - - - LINE OF 50' WETLAND BUFFER
- - - - - EDGE OF GRAVEL DRIVE
- - - - - CENTERLINE OF APPARENT WHEEL TRACK
- · - · - · EDGE OF PROPOSED 12' R.O.W.
- · - · - · EDGE OF COURT PROPOSED RELOCATED R.O.W.

**PROPOSED RIGHT-OF-WAY ROUTE
 FOR HENRY FERRY THROUGH THE
 PROPERTY OF HOWARD FLETCHER
 MOSCOW WOODS ROAD, T.H. No.S.A. 5
 CALAIS, VERMONT**

SCALE 1" = 60'
 AUGUST 2003 BY SUNWISE SURVEYING

Exhibit A