

In re Highway Project E. Montpelier BRF 037-2(8), No. 198-3-07 Wncv (Teachout, J., Jan. 2, 2008)

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**STATE OF VERMONT
WASHINGTON COUNTY**

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)	Washington Superior Court
)	Docket No. 198-3-07 Wncv
IN RE HIGHWAY PROJECT)	
EAST MONTPELIER BRF 037-2(8))	
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**FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER
Necessity Hearing**

The State of Vermont proposes to replace a bridge on Route 14 in the Town of East Montpelier, and seeks a determination of necessity and order of condemnation in order to acquire temporary and permanent easements and ownership of the land on which the replacement bridge and roadway approaches would be located.

A necessity hearing was held on May 11, 2007 and continued on August 22, 2007. Statutory requirements for notice of the hearing were met. The State of Vermont was represented by Assistant Attorney General Judith L. Dillon. David E. Rogers, who owns property proposed for condemnation, was present and represented on August 22, 2007 by Attorney Michael D. Caccavo. Paul A. Mascitti was the sole owner on May 11, 2007 of property proposed for condemnation, and represented himself that day. By August 22, 2007, his property was owned together with his son Michaeljohn Mascitti, and on that date, both were present and represented themselves.

The two objecting property owners do not dispute that the bridge is in a deteriorated condition and needs replacement. Through their evidence, they challenged whether the State Agency of Transportation has selected the best design for the replacement bridge. Their primary dispute, however, is with the necessity for acquisition by the State of a fee simple interest in each of their properties. Both own properties fronting on Route 14 as it approaches the north end of the bridge.

Findings of Fact

The proposed project is the removal and replacement of Bridge #71 over the Kingsbury Branch on Route 14 in East Montpelier, just south of the intersection of Vermont Routes 14 and 214. At this location, Route 14 is a rural minor arterial highway. The primary function of an arterial highway is to provide mobility for through traffic; access to abutting property is a secondary function. The bridge is in the settlement known as North Montpelier. Some residents in the vicinity walk across the bridge to go to the store and post office at the intersection of Routes 14 and 214.

The existing bridge was built in 1936 and is constructed on stone abutments. The bridge deck is a partially filled steel grid deck. The bridge was rehabilitated in 1946, and has not been regularly maintained in any significant way since 1991. It has a 1,11,11,1 width, meaning that there is a one foot shoulder on each side, and two eleven foot wide travel lanes, one for each direction. There is also a two foot wide raised sidewalk on one side.¹

The State does not own the land underlying Route 14 where it approaches the bridge. Rather, Route 14 and the existing bridge are apparently in a right of way held by the State. No evidence was introduced showing either that the boundaries of that right of way have been established, or that they cannot be established on the basis of record evidence. The State has prepared a survey that shows its opinion of the location of the right of way. It bases its opinion on 19 V.S.A. § 32.²

Both Mr. Rogers and the Mascittis own properties at the north end of the bridge, with the Mascitti property on the west side of Route 14 and the Rogers property on the east side. It is undisputed that an abutment used for the existing bridge is located on the Rogers property, and has been maintained by the State over many years, and that the State claims neither legal ownership nor an easement on the Rogers land on which the abutment sits. Mr. Rogers does not object to State use of this portion of his land for an abutment, but he objects to the State's claim of necessity for ownership of the fee.

The evidence is undisputed that the bridge is structurally deficient. It has been rated structurally deficient in several inspections since 1991. The steel beams that support the steel deck have rusted and corroded due to salt; this compromises the extent of support for the deck. There are voids in the stone abutments that also compromise the structural integrity of the bridge. The stream has worn away some of the abutment and concrete facing at the water line, compromising the structure even more. The rail is badly rusted and has broken off in one place and been replaced with chain link fence and

¹ The State disputes whether it should be called a sidewalk because current recommended specifications for a "sidewalk" on a bridge call for more width. Despite current recommended widths, it looks like a sidewalk and functions as a sidewalk. Provision has been made in the project so that during construction, local residents who normally use the sidewalk to walk across the bridge to go to the post office will be able to do so.

² "A roadway width of one and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined." 19 V.S.A. § 32.

guardrails.

The State contends that the bridge is also functionally deficient, and contends that the bridge does not meet current governmentally recommended specifications for bridge design. The landowners dispute the specific functional deficiencies claimed. It is unnecessary for the court to examine this issue as the structural deficiencies are sufficiently compelling to show the need for replacement. The two owners who dispute necessity do not disagree with the fact that the bridge is in poor structural condition and needs to be replaced rather than repaired. The need for replacing the bridge for structural reasons is thus established by undisputed evidence. There is also no dispute about the anticipated traffic volume for the design year of 2032.

The landowners dispute whether some features of the proposed design make sense for the location, and whether the engineer has chosen the best type of bridge construction for this location. For example, the design maintains two eleven foot wide travel lanes, but eliminates the raised sidewalk and adds five foot shoulders on either side, and uses a concrete slab for the bridge deck rather than a steel grid deck. The landowners contend that the wide shoulders with no raised sidewalk will encourage higher speeds through the small village settlement of North Montpelier. The design engineer testified to his opinion that the design will not cause traffic speeds to increase. He relied for his opinion on a study done on an interstate highway in Pennsylvania. There are no studies showing that a two-lane minor artery in a rural area that passes through a village center is safer if a raised sidewalk is eliminated and shoulders on both sides are enlarged to five feet.

This is not a factual issue that the court needs to address, as it is not the function of the court to decide whether the design is the best one that could be chosen for the site. It is the role of the State Agency of Transportation engineers to make that decision. The issue for the court is whether or not there is a necessity for taking private property interests in order to replace the bridge. Whether the shoulders are five feet wide or less, and whether or not there is a raised sidewalk, and whether the bridge is built with a concrete slab or steel deck are not issues that would impact the extent of property interests necessary to replace the bridge, as the State's evidence is that even if the court does not find necessity for condemnation of ownership of the land, the proposed work can be accomplished within the right of way claimed and used by the State. The bridge will be 1.64 feet wider on the west side of the road and 4.03 feet wider on the east side of the road, for a total increase in width of the bridge, from outside edge to outside edge, of five feet eight inches. Nonetheless, the State's evidence is that the enlarged width does not require a wider area than is already claimed and used by the State. Thus, the issues that Mr. Rogers and the Mascittis raise about the impact on their properties are the same whether the State uses the design it proposes, or a different design that the landowners would prefer.

Replacement of the bridge requires installation of new abutments. Three of the abutments are designed with a vertical wall at approximately ninety degree angles, to run parallel to the roadway. These are near the Mascitti house on the northwest, and the Potter Stuwe property on the southeast and southwest. The design calls for the fourth

abutment, at the northeast corner, to be located on the Rogers property, with a flared wingwall design, meaning it would run at a 45 degree angle from the road, and jut into the Rogers property. This is at approximately the same location as the abutment that currently exists on the Rogers property without a State right of way or ownership interest.³ The wingwall is needed to provide support for the new bridge and roadway surface and to retain fill from spilling into the river. The State seeks ownership of a 911 square foot area, as outlined in green on Plaintiff's Exhibit 1, in order to install and maintain the wingwall.

Project plans call for rerouting traffic to Route 2 during the construction period. The AOT has carried out traffic studies to determine the impact of the detour, and has coordinated planning with the Town of East Montpelier and its rescue and fire services to their satisfaction. Plans also call for a temporary pedestrian bridge to accommodate pedestrian traffic within the village during the construction period. Construction activities will require the use of some easements on a temporary basis only, during construction. No objections have been raised to temporary and permanent easements for construction and maintenance and utility purposes, and the evidence establishes the necessity for such easements.

As part of the bridge project, the AOT must tie in, or transition, the new bridge to the existing road. The Agency has included the roadway approaches to the bridge in the project in order to provide for a natural progression from the bridge to the portions of Route 14 that approach the bridge. Both the Rogers and Mascitti properties are adjacent to the strip of land on which Route 14 is located off the north end of the bridge, and are thus in the transition zone.

Agency plans call for installing a pavement apron on the shoulder of Route 14 in front of the Rogers and Mascitti properties as part of the transition from Route 14 to the bridge, but the Agency is willing to drop paving in that area if the owners do not wish it. Nonetheless, the Agency seeks full ownership of a three-rod wide strip in the transition zone in order to perform maintenance work on Route 14 as it approaches the bridge.

The part of East Montpelier where the project is located is an historic district, and both the Rogers and Mascitti residences are historic homes. Both homes are located very close to the road. The Mascitti house has apparently been at its current location for 250 years. Mr. Mascitti's testimony, unrefuted, is that "King George owned the land when the house was built." If the State acquired what it seeks in fee simple ownership, persons coming out of the house would step directly on to State owned land, as there would be no apron of land at the front of the house. There would also be no parking for residents of the building. Moreover, the property line would run right through the building.

The State does not own a fee interest in the land on which Route 14 runs at the location of the project, but holds a right of way, which it claims is three rods wide. It is undisputed that the boundary of the three-rod right of way claimed by the State cuts

³ It is unclear whether the State might have an easement for the existing wingwall due to acquiescence, or otherwise, but the State appears to be waiving any such claim.

through the porch and front of the Mascitti home. Mr. Williams testified that the area in front of the home is part of the roadway approach and needed to tie the roadway to the bridge project. The State asks the court to determine that a strip of land three rods wide, as surveyed by the State, is necessary for the project, even though it cuts through the Mascitti residence.

The State's proposed solution to the problem of a property line cutting through the Mascitti building is what it calls "accept and reserve." Mr. Malnati testified that the State would permit the Mascitti home to remain on State-owned land, as long as there were no changes to it. No witness for the State was able to describe how the Mascittis' interest in their home, including maintaining it, would be protected if the State owned the land lying under a portion of their residence, nor was any witness or attorney able to explain what legal instrument or interest would be used to implement "accept and reserve." The State apparently would not require the Mascitti dwelling to be torn down, but if it were to be damaged, the State would not permit it to be rebuilt, or perhaps repaired. The Mascittis are concerned that if a truck accidentally ran into their building, they would lose their building under the State's proposal: they would not be permitted to rebuild or repair, and would have an unusable building needing demolition.

The State's request for a finding of necessity that the State needs the land under the front portion and porch of the Mascitti home is in conflict with the Mascittis' property interest in preserving their home. The home does not stand on land where any portion of the bridge or road would be located, but on the edge of the strip it seeks, and the State does not propose to demolish the house, at least for the meantime. Nonetheless the State seeks full fee simple ownership of the land under a portion of the Mascitti home.

The State's position is that it already owns the right of way that runs through the Mascitti home, but this is far from clear. The State relies on 19 V.S.A. § 32: "A roadway width of one and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined." The State proposes a finding of fact that its right of way agent, Mr. Malnati, found no surveys, but his testimony was not clear on that point, and did not constitute sufficient proof of the factual circumstances necessary for § 32 to apply.

The State's rationale for seeking full ownership of the land under the Mascitti home and the 911 square foot piece of land on the Rogers property where the wingwall would be located is its position that it is required to obtain the fee in order to maximize its ability to maintain the public infrastructure and reduce inconvenience every time the State wishes to do maintenance. The statute relied on states that "all property rights shall be taken in fee simple whenever practicable." 19 V.S.A. § 502(a). In its post-hearing memorandum, the State contends that it is encouraged under the federal funding program for the project to obtain the fee.

Mr. Rogers' tenants now park in the area the State claims as its right of way, close to the traveled way. Mr. Rogers objects to State ownership in fee of the area the State

claims as its present right of way as he wishes to have that land area available for his own uses such as tenant parking and storage of plowed snow, and he objects to State ownership in fee of the 911 square foot area as he wishes to be able to use his side yard in ways compatible with the abutment being there. He wishes to have a lawn and perhaps construct a set of steps. He has no objection to an easement in favor of the State in the 911 square foot area for purposes of construction and maintenance of the wingwall.

The State introduced evidence that it says proves that the annual property tax loss resulting to the Town of East Montpelier as a result of its proposed taking of the 911 square feet (0.02 acre) from Mr. Rogers is \$13.52. The court finds this allegation unproven, as it is based on a proportional percentage reduction of land area and a corresponding percentage reduction of land value, rather than taking into consideration the overall effect on the Rogers and Mascitti parcels from the taking proposed.

Conclusions of Law

The State seeks to acquire, on grounds of necessity, (1) ownership in fee of the land area where it believes its right of way is located, including land directly under the front portion and porch of the Mascitti house, (2) ownership in fee of a 911 square foot piece of land of the parcel owned by Mr. Rogers to use for construction and maintenance of a wingwall for the southwest corner of the new bridge, and (3) temporary and permanent easements on the Mascitti and Rogers parcels.⁴

The requirement of “necessity” derives in the first instance from the Vermont Constitution: “That private property ought to be subservient to public uses when necessity requires it, nevertheless, whenever any person’s property is taken for the use of the public, the owner ought to receive an equivalent in money.” Vt. Const., ch. I, art. 2.

“Necessity” is defined by statute as follows:

Necessity shall mean a reasonable need which considers the greatest public good and the least inconvenience and expense to the condemning party and to the property owner. Necessity shall not be measured merely by expense or convenience to the condemning party. Due consideration shall be given to the adequacy of other property and locations and to the quantity, kind and extent of cultivated and agricultural land which may be taken or rendered unfit for use by the proposed taking. In this matter the court shall view the problem from both a long range agricultural land use viewpoint as well as from the immediate taking of agricultural lands which may be involved. Consideration also shall be given to the effect upon home and homestead rights and the convenience of the owner of the land; to the effect of the highway upon the scenic and recreational values of the highway; to the need to accommodate present and future utility installations within the highway corridor; to the need to mitigate the

⁴ These interests are in addition to temporary and permanent easements on properties owned by others. No objections have been raised by the other owners as to the necessity of the easements for the bridge project.

environmental impacts of highway construction; and to the effect upon town grand lists and revenues.

19 V.S.A. § 501(1).

Case law interpreting the statute has established that a proposed taking is justified if it is “reasonably necessary,” as opposed to being absolutely imperative. *Agency of Transportation v. Wall Management*, 144 Vt. 640, 643 (1984) (quoting *Cersosimo v. Town of Townshend*, 139 Vt. 594, 597 (1981)). The State has met its burden to show that the taking of some property interests of some owners is necessary in order to replace the bridge due to its physical deterioration.

Other than the Mascittis and Rogers, no other owner with affected property interests challenges the necessity of the interests the State proposes to take from them. The first question presented is whether necessity has been shown for the taking of the proposed property interests from the Mascittis and Rogers. If, as to each owner, necessity is shown as to some level of taking, the next question is the extent of the taking that is needed; specifically, a fee interest or easement.⁵

The State argues in its proposed conclusions of law that acquisition of the fee interest is reasonably necessary to facilitate the State’s cooperation with the federal aid highway program. Regulations of the Federal Highway Administration require state highway agencies to acquire “rights-of-way of such nature and extent as are adequate for the construction, operation and maintenance of a project.” 23 C.F.R. § 1.23(a). The regulations require that such rights-of-way be “devoted exclusively to public highway purposes.” 23 C.F.R. § 1.23(b), and regulate leasing and disposal of real property acquired with the participation of federal aid highway funds. 23 C.F.R. §§ 710.407 and 409.

Mascitti Property

The State argues that its depiction of the boundaries of its right of way for Route 14 has not been contradicted by any other evidence, and that the court should adopt the State’s survey of the right of way as correct and use it as the basis for granting the State a fee simple interest based on necessity, as the taking is for highway purposes.⁶ There is a fundamental problem with the State’s argument, which is that the State has not sufficiently proved what it does and does not own at the site of the Mascitti and Rogers properties. There was no evidence showing that the boundaries of the State right of way are where the State claims they are.

The State appears to believe that it owns a three rod right of way in the affected area by virtue of 19 V.S.A. § 32, which provides as follows: “A roadway width of one

⁵ The General Assembly has expressly authorized the taking of property rights in fee whenever practicable for state highway purposes: “[A]ll property rights shall be taken in fee simple whenever practicable.” 19 V.S.A. § 502(a).

⁶ See footnote 5 above.

and one half rods on each side of the center of the existing traveled way can be assumed and controlled for highway purposes whenever the original survey was not properly recorded, or the records preserved, or if the terminations and boundaries cannot be determined.” Such a right of way would not only extend onto the Mascitti property, but would extend onto the land on which the Mascitti house actually sits. It would also block out any front yard or parking area for both the Mascitti and Rogers buildings.

The State’s view seems to be based directly on the interpretation of 19 V.S.A. § 32 that has been rejected by the Supreme Court. See generally *Town of South Hero v. Wood*, 2006 VT 28 (discussing acquiescence and the “rolling easement theory” in the context of 19 V.S.A. § 32). Section 32 creates a presumption in certain circumstances as to the location of an easement on the ground, but it does not otherwise define what the State owns. For an analysis of the distinction between the creation of an easement and establishment of its location through the use of 19 V.S.A. § 32, see *Bren v. Eardensohn*, No. 320-5-05 Wncv (Teachout, J., Jan. 22, 2007), available at <http://www.vermontjudiciary.org/tcdecisionscvl/2007-4-13-3.pdf>.

There is no evidence before the court to establish whether or not the terminations and boundaries of Route 14 as it approaches the Kingsbury Branch in East Montpelier is based on properly recorded original surveys, or whether boundaries of the right of way can be determined. The hearing has revealed a probable boundary dispute between the State and the Mascittis and Rogers concerning the location of the right of way in relation to their lands. The Mascitti house was built before the State of Vermont existed. The fact that the Mascitti house lies closer than one and one half rods from the centerline of Route 14 as currently used raises the question of whether, when either the road or the Mascitti property was laid out, a boundary was established, and if not, where the boundary should be established.

The case before the court is not a declaratory action to determine the boundaries of the present right of way, and the parties did not present evidence as though it is. The court cannot simply assume that the boundaries of the right of way cannot be determined. Even if the court were to address the issue of the location of the boundaries within the context of this hearing, there is no evidentiary basis to conclude that the elements for invoking 19 V.S.A. § 32 have been proved or that the right of way of Route 14 is where the State shows it on its project plan.

Because the location of the boundaries of Route 14 are uncertain, the court cannot conclude, as a general matter, that the State has shown a necessity for taking any property rights of the Mascittis at all in order to complete the bridge project. That is, the evidence is insufficient to establish that the the Mascittis hold any property interests that the State needs. Private property interests are subject to special protection and cannot be taken without the proof of necessity under the standards required for these proceedings, and the State has not met that burden of proof with respect to the Mascitti property.

Moreover, even if it were to be established that the State owns the right of way it claims, the next question would be whether there is a necessity for a taking of the fee,

above and beyond the easement it ostensibly already holds. This involves both the question of whether it is reasonably necessary to take the fee, and whether it is “practicable” to do so. As to the first issue, the State’s evidence has not answered Mr. Mascitti’s question raised at the outset of the hearing, ‘Why does the State need to take what it already claims it has?’ If the reason is to obtain federal funding, there are two considerations: first, the federal regulations show that fee ownership is not a strict requirement and an easement may be sufficient, and second, the taking of a fee for highway purposes need only occur under state law when it is “practicable.”

It is not “practicable” to grant the State a fee simple interest in a parcel of land with a boundary that runs through a private citizen’s house unless the house has to be demolished for either construction or maintenance of the project.⁷ The State does not need to tear down the house in order to replace the bridge, and there is no evidence that the State needs the land under the Mascitti house in order to maintain the bridge and approaching roadway. Therefore, on this evidence, it would be neither reasonably necessary nor practicable to grant a fee simple interest to the State in the land area under the Mascitti house.

Because it is not practicable for the State to acquire fee simple ownership of the Mascitti land under the Mascitti building, it is consequently not practicable to acquire such an ownership interest in the properties of other owners whose properties front Route 14 in the project area.

Rogers Property

The conclusion above, that the State has not shown the boundaries of its right of way for Route 14, and therefore cannot show necessity for taking either an easement or full ownership, applies to the front portion of the Rogers property as well.

The State would also like to acquire fee simple ownership of the 911 square foot plot on the Rogers land. Its stated rationale for necessity is to fulfill its maintenance obligations with respect to the replacement wingwall to be newly constructed. At present, the State does not have any recorded easement or right of way for maintenance of the existing wingwall. Mr. Rogers does not object to the State acquiring an easement, but objects to acquisition of the fee. The evidence does not show that an easement, as opposed to fee ownership, is insufficient for the State to meet its construction, operation, and maintenance obligations for the bridge or Route 14, either under the necessity statute or in order to meet the prerequisites for federal funding.

⁷ The State’s position is that it does not need to demolish the Mascitti house in order to do the bridge project, but by setting up a situation in which it may prohibit the repair or rebuilding of the Mascitti house in the future, the effect of its proposal is a condemnation of the Mascitti building. The “accept and reserve” terms proposed by the State would not, in the end, protect the Mascittis’ property interest in their building. The State’s evidence is that it has allocated \$10,000 toward compensation for property interests for this project. It is not clear that the State has budgeted for compensation for risk of loss of the Mascitti building.

A finding of necessity for an easement in the 911 square foot plot, which Mr. Rogers does not oppose, would give the State a sufficient property interest for its purposes. The State seeks fee ownership so that Mr. Rogers will not feel free to use the area for other purposes. Mr. Rogers testified that he would like to build a set of steps to connect the upper front land with the back of the building, and to plant a lawn around the wingwall. The State's evidence does not establish that these uses are incompatible with its need to maintain the wingwall, and does not establish that full fee ownership in the 911 square foot plot, as opposed to an easement, is reasonably necessary. The State has shown that an easement is necessary in the 911 square foot area, but it has not shown that an easement will not be sufficient to satisfy the needs of the project.

Other interests: temporary and permanent easements

Based on its view of the boundaries of the Route 14 easement, the State has claimed that the project could go forward even if the court did not find necessity for acquisition of full fee ownership of the Mascitti and Rogers pieces. This may or may not be the case, depending on the actual boundaries of the Route 14 right of way at the site of the Mascitti and Rogers properties, and how any related disputes are resolved, but it is quite possible that the State holds sufficient interests to proceed with the project without acquiring more from the Mascitti and Rogers properties than an easement in the 911 square foot plot.

The State also seeks a finding of necessity for a variety of other temporary and permanent easements, primarily for detour purposes during construction and for utility purposes. No challenges have been raised to a finding of necessity of these easements. The project as a whole is reasonably necessary in order to replace the structurally deficient bridge, and the easements requested are reasonably necessary for the project to be done.

Summary

For the foregoing reasons, the court concludes that:

1. The State has not proved the necessity of taking a fee simple ownership interest in the properties of Mascitti and Rogers or other owners fronting Route 14 in the project area;
2. The State has proved the necessity of an easement in the 911 square foot plot on the Rogers property for purposes of constructing and maintaining a wingwall for the bridge; and
3. The State has proved the necessity of all other requested temporary and permanent easements.

Order

The attorney for the Agency of Transportation shall prepare an Order consistent with the foregoing Findings and Conclusions.

Dated this ____ day of December 2007.

Mary Miles Teachout
Superior Court Judge