

In re Highway Project East Montpelier BRF 037-2(8), No. 198-3-07 Wncv (Teachout, J., Mar. 25, 2008)

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**STATE OF VERMONT  
WASHINGTON COUNTY**

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	)	<b>Washington Superior Court</b>
	)	<b>Docket No. 198-3-07 Wncv</b>
<b>IN RE HIGHWAY PROJECT</b>	)	
<b>EAST MONTPELIER BRF 037-2(8)</b>	)	
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**State’s Motion to Alter or Amend, filed January 16, 2008**  
**Response, filed March 14, 2008 by David Rogers**

The State asks the court to alter or amend its Findings of Fact, Conclusions of Law, and Order filed on January 2, 2008. For the reasons set forth in the Response filed by Attorney Caccavo on behalf of Landowner David Rogers and as stated below, the court declines to do so.

The State argues, correctly, that under the standard for determining necessity, the State does not need to prove that an easement is not sufficient. The State also argues correctly that it does not have an “added burden to demonstrate that a lesser interest [lesser than the fee] would not be sufficient to accomplish its intended transportation purpose.” Nonetheless, the State has the burden to prove necessity for the fee interest that it seeks. The court concluded that the State did not meet the burden to prove necessity for a fee interest, but that its evidence is sufficient to prove necessity for the lesser interest of an easement. The court did not change or increase the burden of proof, but granted the State’s petition to the maximum degree that it had met its burden of proof.

The State argues that because there is no house or permanent fixture on the 911 square foot area within Mr. Rogers’ land parcel that the State seeks to own, it is “practicable to take the interest in fee.” While it is true that there is no structure or fixture within the 911 square feet, the area is close to the structure, which is on a small lot

on a river bank with significant grade changes. The court took that into account in determining what is “practicable,” and declines to alter or amend its findings or conclusions.

The State argues that an order based on the court’s decision would compromise the ability of the State to comply with federal regulations and thereby jeopardize the State’s ability to acquire federal funding. An easement that is properly drafted to burden the Rogers property for highway purposes trumps conflicting uses by the landowner, in the same way that any State highway easement currently does. The State has not shown that the federal standard would not be met under such circumstances.

The court’s decision does not authorize Mr. Rogers to dump snow in the easement area in a manner to obstruct the State’s access to construct and maintain the wingwall. It is not what Mr. Rogers believes he wants to do in the easement area that controls, but the defined burden on the servient estate as a matter of law, and the defined burden approved by the court is one that would allow unfettered access for the construction and maintenance of the wingwall, while also permitting the owner to engage in non-conflicting compatible uses of the area, such as a lawn and steps in the 911 square foot area. The attorneys for the State and Mr. Rogers are encouraged to work together to draft the easement.

The court’s decision does not require the State to conduct a survey as a predicate to filing a necessity petition. The extent of the evidence needed by the State in meeting its burden of proof in a necessity case will vary, depending on the specific facts in the case. In this particular case, the historical development at the north end of the bridge called for research and investigation into historical facts regarding property and right of way boundaries, which was not done sufficiently to meet the burden of proof. The State did not meet its burden to show that “the terminations and boundaries cannot be determined.” 19 V.S.A. § 32. Thus, it has not shown that 19 V.S.A. § 32 applies as the mechanism for establishing the boundaries of Route 14 as it approaches Bridge #71.

Finally, the court is fully aware that the determination of compensation to the owner for the value of property interests taken by necessity occurs in a second phase of hearing on compensation, and not within the first phase of determination of necessity. The court simply did not find that the State’s evidence on annual property tax loss to the Town of East Montpelier met the standard of proof for the factual finding requested. This was evidence presented by the State at the necessity hearing. A conclusion that the evidence of projected tax loss is not persuasive is not in conflict with the statutory process that requires compensation to be determined at a hearing subsequent to the necessity hearing.

### **Order**

For the reasons described above, the Motion to Alter or Amend is *denied*.

Dated this \_\_\_\_ day of March, 2008.

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Mary Miles Teachout  
Superior Court Judge