

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6579

Petition of Brent Miller vs. Village of)
Morrisville Water and Light Department in re:)
dispute concerning the installation and removal)
of electric utility poles and wire located on)
petitioner's property in Elmore, Vermont)

Order entered: 6/27/2002

I. INTRODUCTION AND PROCEDURAL HISTORY

This docket concerns a request by Mr. Brent Miller ("Petitioner" or "Miller") for a Public Service Board ("Board") order directing the Village of Morrisville Water and Light Department ("Respondent" or "Morrisville") to remove certain electric utility poles and wire now located on a portion of Mr. Miller's Elmore, Vermont, property. The docket was opened in response to a letter from Mr. Miller to the Board, dated October 22, 2001, in which Mr. Miller requested a hearing on the matter. A prehearing conference was held on November 13, 2001, at which the Petitioner was represented by Charles Martin, Esq., and the Respondent was represented by David John Mullett, Esq.

On December 11, 2001, the parties filed a stipulation ("Stipulation"), with accompanying Exhibits number 1 through 7, for admission into evidence. The Stipulation and accompanying Exhibits 1 through 7 are hereby admitted into evidence.

The Stipulation provides, in part:

The parties have entered into this Stipulation to focus the issues and conserve hearing time. The parties expressly reserve all rights to argue their respective positions, including specifically the relevance or lack of relevance of any of the above facts and/or exhibits. The parties have entered into this stipulation acknowledging that they hold differing views as to [sic] the validity of the 1992 right of way,

the relevance of petitioner's dealings with Mr. Salls, and other issues. This Stipulation is intended to facilitate the resolution of those issues, and to limit either sides' ability to argue its position through legal memoranda and/or oral argument.¹

Memoranda of law were filed by the Petitioner and the Respondent on January 11, 2002, and January 14, 2002, respectively. On January 18, 2002, a Scheduling Order was issued that set February 1, 2002, as the deadline for filing responsive legal memoranda and requests for oral argument. Reply memoranda were filed by the Petitioner and the Respondent on January 22, 2002, and February 1, 2002, respectively. Neither party requested oral argument.

II. FINDINGS

1. By Warranty Deed dated July 23, 1982 ("Deed"), Roy D. Salls and Maude H. Salls conveyed certain real estate in Elmore, Vermont, to Brent N. Miller and Jan E. Miller ("the Miller property"). The Deed contained a reservation of a "right of way" to the Salls. Exh. 1.

2. By a Right of Way Easement dated April 23, 1992, the Salls granted Morrisville the right to enter upon certain real property "and to place, construct operate, repair, maintain, relocate and replace thereon . . . an electric transmission or distribution line or system . . ." The real property described in this Right of Way Easement is the same real property described in the Deed. Exh. 2; exh. 1.

3. At sometime in 1992, Morrisville installed electric poles and line ("Equipment") on the Miller property, some of which lie within the right of way as described in the Deed, and some of which lie within the property boundaries as described in the Deed but outside of the reserved right of way as described in the Deed. Stipulation p.3; exh. 7.

4. The Millers did not authorize Morrisville to install the Equipment. Stipulation p. 2; exh. 4.

5. Mr. Miller has asked Morrisville to remove the Equipment from his property, including the electric poles and line that lie within the reserved right of way. Morrisville has declined to do so. Stipulation p. 3; exh. 7.

1. Stipulation dated December 11, 2001, p. 3.

III. DISCUSSION

Mr. Miller contends that he holds the legal right to ask Morrisville to remove the Equipment from the Miller property, including that which falls within the reserved right of way, because Mr. Salls' Right of Way Easement to Morrisville was invalid.² In contrast, Morrisville contends that Mr. Miller does not have the right to request such removal of the Equipment. First, Morrisville maintains that the conveyance from Salls to Morrisville was valid. In addition, Morrisville argues that Mr. Miller is precluded from asserting his claim at this point in time because of the doctrine of laches.³

For the reasons set forth below, I have concluded that Mr. Miller does hold the legal right to ask Morrisville to remove the Equipment from the Miller property, including that which is located within the reserved right of way. I also have concluded that the doctrine of laches does not apply to the circumstances of this case.⁴

Mr. Miller's right to ask Morrisville to remove the Equipment

At issue in this docket are the respective property rights of the parties. Morrisville takes the position that it may rely upon the Right of Way Easement it received from the Salls. However, it is a well settled principle of Vermont law that a grantor's power to convey property is confined to what he owns at the time that the conveyance is made.⁵ Therefore, the threshold question is what the Salls owned at the time that they gave Morrisville the subject Right of Way Easement.

2. Petitioner's Memorandum of Law, p.1.

3. Memorandum of Village of Morrisville Water and Light Department, pp. 3 and 5.

4. In this proposal for decision, I do not reach the question of whether Morrisville may seek to acquire a utility easement by eminent domain, or the question of whether, and from whom, Morrisville might be entitled to compensation for costs incurred as a result of the removal or relocation of the Equipment.

5. "A conveyance of right, title, and interest in land is sufficient to pass the land itself if the party conveying has an estate therein at the time of conveyance; but it passes no estate that was not then possessed by him." *Cummings v. Dearborn*, 56 Vt. 441 (1884), citing *Brown v. Jackson*, 3 Wheat. 449.[16 u.s. 449 (1818)]; *Vermont Shopping Center, Inc. v. Pettengill*, 125 Vt. 145, 148 (1965); *Sheldon Slate Products Co. v. Kurjiaka*, 124 Vt. 261, 267 (1964).

The Salls "right of way" was acquired by them through the Deed, which states, in pertinent part:

"Also reserving a right of way fifty feet in width, the center line of which shall be along the following course [distance markings are then set forth]"⁶

No additional language in the Deed further addresses the scope of the "right of way" reserved by the Salls. Morrisville asserts that language of the Deed creates a reservation of an open-ended "right of way" that gives the Salls complete discretion to limit its use or define its scope.⁷ In contrast, Mr. Miller contends that an unrestricted "right of way" (as conveyed by the Deed) is no more than a specific type of easement that consists of the "privilege which one person . . . may have of passing over the land of another in some particular line."⁸

In construing a deed, courts initially look at the instrument itself, which is deemed to declare the understanding and intent of the parties.⁹ A deed creating an easement by express reservation is a contract, which is subject to construction and enforcement according to the principles of contract law.¹⁰ Therefore, consistent with fundamental principles of contract law, where the language of a deed is clear and unambiguous, the intent of the parties can be shown only by the terms of the instrument itself.¹¹ Furthermore, the law presumes that parties to a contract meant and intended to be bound by the plain and express language used in the document and, accordingly, parties to a contract are bound by the common meaning of the words chosen to reflect their agreement.¹²

6. Exh. 1.

7. Memorandum of Village of Morrisville Water and Light Department, 1/14/02, p. 5.

8. Petitioner's Memorandum of Law, 1/10/02, p. 2.

9. *Merritt v. Merritt*, 146 Vt. 246, 250 (1985) citing *Fairbrother v. Adams*, 135 Vt. 428, 429, 378 A.2d 102, 104 (1977).

10. *Christmas v. Virgin Islands Water and Power Authority*, 527 F.Supp. 843, 847 (1981) citing *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 127 S.E.2d 539 (1962) and *Merrill v. Manufacturers Light and Heat Co.*, 409 Pa. 68, 185 A.2d 573 (1962).

11. *U.S. v. Sea Gate, Inc.*, 397 F.Supp. 1351, 1360 (1975), citing *Weyerhaeuser Company v. Carolina Power and Light Company*, 257 N.C. 717, 127 S.E.2d 539 (1962); *Whittington v. Derrick*, 153 Vt. 598, 603 (1990) citing *Downer v. Gourlay*, 133 Vt. 544, 546, 349 A.2d 707, 708 (1975).

12. *Goodrich v. United States Fidelity and Guaranty Company*, 152 Vt. 590, 594 (1989); *Roy's Orthopedic, Inc. v. Lavigne*, 145 Vt. 324, 326 (1985).

The term "right of way" has a generally accepted meaning: "Right of way" is used to describe a right belonging to a party to pass over the land of another.¹³ This generally accepted meaning does not further include the principle that the grantor of the "right of way" has ongoing discretion to limit its use or otherwise define its scope.¹⁴ In the present case, the language of the Deed reserving the right of way is clear and unambiguous, and the fact that a dispute has arisen over the proper interpretation of the term "right of way" does not automatically render it ambiguous.¹⁵ Therefore, I conclude, as a matter of law, that the term "right of way" as used in the Deed means the right belonging to a party to pass over the land of another.¹⁶

Consequently, I also conclude that the Salls did not have the power to convey the subject utility Right of Way Easement to Morrisville. At the time that the Salls purported to convey a utility easement to Morrisville, it was the Millers who owned the real estate in question, subject only to the Salls right of way for passage. The evidence in the record of this docket also shows that the Millers still own the land on which Morrisville has installed the Equipment.¹⁷ Accordingly, I conclude that Mr. Miller has the legal right to request that Morrisville remove the Equipment from his property.

The Doctrine of Laches

13. Black's Law Dictionary (7th ed. 1999). Black's Law Dictionary (revised 4th ed. 1968)("The right of passage or of way is a servitude . . . by virtue of which one has a right to pass on foot, or horseback, or in a vehicle, to drive beasts of burden or carts, through the estate of another.")

14. This is to be distinguished from those situations where the description of a reserved "right of way" as set out in the deed is such that a future exercise of discretion clearly is allowed. *Thomas v. Farrell*, 153 Vt. 12 (1989)(Language used in the deed conveyed an easement subject to certain restrictions, by virtue of which the grantor of the easement was allowed to diminish the rights of the party entitled to the right of way.)

15. *Towns v. Vermont Mutual Insurance Company*, 169 Vt. 545 (1999).

16. Whether a contract is ambiguous is a question of law. *Kim v. Kim*, __ Vt. __, 790 A.2d 38, 382 (2001), citing *Isbrandtsen v. North Branch Corp.*, 150 Vt. 575, 577 556 A.2d 81,83 (1988).

Even if I were to conclude that the term "right of way" is subject to more than one reasonable interpretation, the interpretation asserted by Mr. Miller would control here. Under Vermont law, if the wording of the deed is subject to equally reasonable constructions, it must be construed against the grantor (i.e., Mr. Salls) and in favor of the grantee. *Merritt v. Merritt*, 146 Vt. 246, 250 (1985) citing *Fairbrother v. Adams*, 135 Vt. 428, 429, 378 A.2d 102, 104 (1977).

17. Exh. 1.

Laches is "the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right."¹⁸ Morrisville claims that it has been prejudiced by Mr. Miller's delay in requesting removal of the utility poles and line because of the legal and economic burdens it bore in connection with having the line as part of its electric service distribution system, and because "the construction or relocation of a power line entails significant work, the use of various types of equipment, disruption to the land, and prospective interruption in electrical service to persons served by the line."¹⁹

However, as a matter of law, a utility company cannot suffer prejudice as a consequence of a valid request that it remove its poles and wire from property at any time. 30 V.S.A. § 2519 provides:

Enjoyment of any length of time of the privilege of maintaining a line of telegraph, telephone or electric wires, poles, conduits or other apparatus, upon or over the buildings or lands of other persons, shall not give a right to the continued enjoyment of such easement or raise a presumption of a grant thereof.

Thus, a utility company does not have an unfettered continuing right to maintain components of its electric distribution system at a particular location, regardless of how long the utility has maintained its facilities at that location.²⁰ Accordingly, the doctrine of laches cannot give rise to a utility's claim, such as Morrisville's, that it is entitled to maintain its facilities on another's property due to the property owner's delay in requesting the removal of the utility's facilities.

IV. RECOMMENDATION

18. *Ransom v. Bernitz*, 782 A.3d 1155, 1162 (2001), citing *Chittenden v. Waterbury Center Community Church*, 168 Vt. 478, 494 (1998).

19. Memorandum of Village of Morrisville Water and Light Department, pp. 4-5.

20. Nor can continued use of a right of way for utility poles and wires ripen into adverse possession. *Dodge v. Washington Electric Cooperative, Inc.*, 134 Vt. 320, 321 (1976).

Based on the above discussion, and the conclusions reached therein, I recommend that the Board grant Mr. Miller's petition, and order Morrisville to remove the utility poles and line now running across the Millers' land located in Elmore, Vermont.

The foregoing is hereby reported to the Public Service Board in accordance with the provisions of 30 V.S.A. § 8.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 29th day of May, 2002.

s/Judith M. Kasper

Judith M. Kasper
Hearing Officer

V. BOARD DISCUSSION

We heard oral argument in this docket on June 5, 2002, after Morrisville and Mr. Miller filed comments on the Hearing Officer's proposal for decision. Morrisville has contended that there was no deficiency in the right-of-way easement they received from Salls, that 30 V.S.A. Section 2519 does not preclude application of the doctrine of laches, and that Morrisville's eminent domain rights would allow the existing equipment to stay in place.²¹ Mr. Miller has requested that he be awarded attorney's fees.²² For the reasons set forth below, we accept the findings, conclusions and recommendation of the Hearing Officer, with modification addressing the timing of removal of the Equipment.²³

First, for the reasons outlined by the Hearing Officer, we agree that the right-of-way easement reserved by the Salls in their 1982 deed to the Millers was not so broad as to include the right to install utility poles and wire. We further note that "[t]he principle which underlies the use of all easements is that the owner thereof cannot materially increase the burden of it upon the servient estate nor impose a new or additional burden thereon."²⁴ Thus, a right-of-way of passage to a lake shore has been held not to include the right to maintain a boat and a boat landing;²⁵ and, installation of a utility pole on a right-of-way for passage has been held to obstruct the way and thereby create a new and additional burden on the land.²⁶ Similarly, in this case, the 1992 Right-of-Way Easement given by the Salls to Morrisville contains a prohibition against placing buildings closer than 25 feet to the pole line,²⁷ and it thereby purports to impose a new or additional burden on Mr. Miller's servient estate.²⁸

21. Comments of Village of Morrisville Water and Light Department on Hearing Officer's Proposal for Decision, 5/13/02.

22. Letter of Charles S. Martin, 5/13/02.

23. We note that this case calls for us to render judgment about the placement of utility company equipment, a matter that falls within our jurisdiction pursuant to 30 V.S.A. Sections 9, 203 and 209.

24. *Edwards v. Fugere*, 130 Vt. 157, 163 (1972), citing *Dernier V. Rutland Ry. Light and Power Co.*, 94 Vt. 187, 194, 110 A. 4, 7 (1920).

25. *Id.*

26. *Crullen, et. al., v. Edison Electric Illuminating Co. of Boston*, 254 Mass. 93, 95, 149 N.E. 665, 666 (1925).

27. Exh. 2.

28. Tr. 6/5/02, pp. 36-38.

Because Mr. Salls' reserved right-of-way did not include a right to install utility poles and wire, he could not convey such a right to Morrisville.²⁹ There is no evidence in the record of this docket concerning the reason for Morrisville's lack of knowledge about the respective property rights of Mr. Miller and Mr. Salls in the property described in the 1992 Right-of-Way Easement,³⁰ and Morrisville's lack of knowledge in and of itself does not, as a matter of law, operate to diminish Mr. Miller's rights as the owner of the servient estate. Moreover, the provisions of 30 V.S.A. Section 2519³¹ suggest that the legislature intended to place the burden on utility companies to obtain legitimate permission to install and keep utility company equipment at any particular location. The evidence in the record of this docket shows that Morrisville has relied solely upon the 1992 Right-of-Way Easement from the Salls,³² and there is no evidence in the record of this docket that Morrisville obtained permission from the rightful landowner, Mr. Miller.

In addition, for the reasons set forth in the Hearing Officer's Proposal for Decision, we agree that 30 V.S.A. Section 2519 renders the doctrine of laches inapplicable in this case. We also note that the doctrine of laches requires proof that *delay* in asserting a right has been prejudicial to the adverse party.³³ There is no evidence in the record of this docket that Mr. Miller's alleged delay caused prejudice to Morrisville.³⁴ Nor is there any evidence in the record of this docket to identify the prejudice allegedly suffered by Morrisville or to support a finding

29. "A conveyance of right, title, and interest in land is sufficient to pass the land itself if the party conveying has an estate therein at the time of conveyance; but it passes no estate that was not then possessed by him." *Cummings v. Dearborn*, 56 Vt. 441 (1884), citing *Brown v. Jackson*, 3 Wheat. 449.[16 u.s. 449 (1818)]; *Vermont Shopping Center, Inc. v. Pettengill*, 125 Vt. 145, 148 (1965); *Sheldon Slate Products Co. v. Kurjiaka*, 124 Vt. 261, 267 (1964).

30. Tr. 6/5/02, p. 46.

31. That statute provides: "Enjoyment of any length of time of the privilege of maintaining a line of telegraph, telephone or electric wires, poles, conduits or other apparatus, upon or over the buildings or lands of other persons, shall not give a right to the continued enjoyment of such easement or raise a presumption of a grant thereof."

32. Tr. 6/5/02, pp. 12, 26-27.

33. *Ransom v. Bernitz*, 782 A.3d 1155, 1162 (2001), citing *Chittenden v. Waterbury Center Community Church*, 168 Vt. 478, 494 (1998).

34. For example, there is no evidence in the record of this docket concerning the cost(s) to Morrisville that might be entailed in removal of the Equipment now, or that might have been entailed in removal of the Equipment at some prior time. *See also*, tr. 6/5/02, pp. 32-33.

that Morrisville actually has suffered or would suffer prejudice.³⁵ Accordingly, even if the doctrine of laches were to apply in this case, the evidence prerequisite to implementation of that doctrine has not been presented here.

With respect to Morrisville's assertion that its eminent domain rights would allow the existing Equipment to stay in place, we observe that Morrisville has not initiated eminent domain proceedings in connection with the land that is the subject of this dispute.³⁶ Therefore, the issue of Morrisville's eminent domain rights is not before us, and, we cannot make any determination here concerning Morrisville's purported rights arising in connection with eminent domain. However, we do observe that, even if Morrisville were to initiate and successfully obtain eminent domain right over this property, it would still have to pay appropriate compensation to the landowner for the ensuing reduction in the landowner's use and enjoyment of the property.

We recognize the possibility that, in the future, Morrisville, might be able to take the subject right-of-way by eminent domain or through a voluntary settlement with the landowner. Also, we understand that there currently is a year-round resident who receives electric service via the Equipment.³⁷ We do not believe that the best interest of the public will be served if the Equipment is removed only to be reinstalled, or if a customer's electric service is unnecessarily interrupted. Therefore, we shall allow Morrisville to keep the Equipment in place for a period of time not to extend beyond June 30, 2003, pending resolution of this dispute by agreement of the parties, or otherwise, or initiation of eminent domain proceedings.

Finally, we deny the Petitioner's request for attorney's fees. Vermont applies the "American Rule" regarding attorneys' fees, which means that parties must bear their own attorneys' fees absent a statutory or contractual exception.³⁸ In addition, although the Vermont Supreme Court has recognized the ability of a court to use its equity power to award attorneys' fees as the needs of justice dictate, such power may be invoked only in exceptional cases and for

35. This is to be distinguished from prejudice that might be suffered by Morrisville's customer(s). Morrisville has asserted that a customer would be without electric service if the Equipment were removed, however, that customer has not intervened in this proceeding. Tr. 6/5/02, p. 22.

36. Tr. 6/5/02, pp. 23, 33-36.

37. There has been no representation by any party that there is any special need for electric service by this resident/customer for health reasons or otherwise.

38. *DJ Painting, Inc., v. Baraw Enterprises, Inc.*, Vt. (2001), 776 A.2d 413, 419 (2001).

dominating reasons of justice.³⁹ Thus, the Vermont Supreme Court has upheld the award of attorneys' fees in cases where a litigant was compelled to appear more than once in a state supreme court in order to obtain relief, while the Court has declined to uphold the award of attorneys' fees in a case where multiple trips through the state court system were not required and there was no indication that the party against whom attorneys' fees were sought acted obdurately or obstinately in conducting the litigation."⁴⁰

The Petitioner has not cited (nor are we aware of) any statutory or contractual provision that demands the award of attorneys' fees in this case. Moreover, Morrisville's conduct in connection with this proceeding hardly can be characterized as outrageous. Rather, Morrisville has cooperated with the Petitioner in order to try to minimize the litigation costs pertaining to this proceeding. Morrisville joined the Petitioner by filing a stipulation, including exhibits, which replaced the need for holding evidentiary hearings. In addition, Morrisville agreed that this material would serve as the record upon which the Board could base its rulings pertaining to the issues in this docket.⁴¹ Under these circumstances we conclude that this case is not an exceptional case that calls for the imposition of attorneys' fees for "dominating reasons of justice."

VI. ORDER

_____ IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings and recommendation of the Hearing Officer are hereby adopted.
2. The Village of Morrisville Water and Light Department ("Morrisville") is directed to comply with the request from Mr. Brent N. Miller to remove certain electric utility poles and wire now located on a portion of certain real property, as described in a warranty deed from Roy and Maude Salls to Brent N. Miller and Jan B. Miller dated July 23, 1982, and recorded in the land records for the the Town of Elmore, Vermont, at Book 27, Pages 468-9.

39. *Id.*, at 419-420, citing *In re Gadhue*, 149 Vt. 322,327, 544 A.2d 1151, 1154 (1987) and *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

40. *Id.*, at 420.

41. Stipulation dated December 11, 2001.

3. Morrisville's obligation to remove the said electric utility poles and wire pursuant to this Order shall be stayed for a period of time not to extend beyond June 30, 2003, pending resolution of the subject dispute by agreement of the parties, or otherwise, or initiation of eminent domain proceedings.

4. Morrisville shall file with the Public Service Board, not later than June 30, 2003, notice of the manner in which the subject dispute has been resolved.

5. Each party shall bear its own costs associated with this docket.

Dated at Montpelier, Vermont, this 27th day of June, 2002.

s/Michael H. Dworkin)	
)	
)	PUBLIC SERVICE
)	
s/David C. Coen)	BOARD
)	
)	OF VERMONT
)	
s/John D. Burke)	

OFFICE OF THE CLERK

FILED: June 27, 2002

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.