The Law of Easements and Rights of Way in Vermont

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Presenter: Liam Murphy graduated from Drew University in 1976 and the Georgetown University Law Center in 1981. He was an associate with the Washington office of the Houston, Texas firm of Butler, Binion, Rice, Cook and Knapp from 1981 to 1983. In 1983, he returned to Vermont and became an associate with the Burlington office of Langrock, Sperry and Wool. He became a partner in that firm in 1987 and remained until 2004 when, together with Brian Sullivan and Catherine Kronk, he became a founding member of Murphy Sullivan Kronk, now MSK Attorneys.

Since 1983, Liam's practice has focused on real estate transactions and litigation, land use and zoning law, environmental law and related business, commercial and financial transactions.

From 1997 to 2000, Liam served as the Chair of the Real Property Committee of the Vermont Bar Association, and in 2001 was awarded the "Service Award" by the Vermont Bar Association. Since 1988, Liam has almost annually taught a course on "Title to Real Estate in Vermont" for lawyers and paralegals, and has published a companion publication. He is a frequent lecturer on land use and development law and related regulatory issues, appearing regularly at events sponsored by the Vermont Bar Association, the Vermont League of Cities and Towns, and the Municipal Clerks and Treasurers Association.

In addition to his practice, Liam is actively involved in community activities, helping to establish the Champlain Valley Greenbelt Alliance, a conservation group dedicated to the preservation of the scenic and working landscape along Vermont's major roadways with an initial focus on Route 7 from Shelburne to Middlebury. In addition, he was a Director of the Lake Champlain Land Trust from 1995 to 2001, and also provides volunteer legal services to a variety of Vermont land trusts and conservation organizations.

LAW OF EASEMENTS IN VERMONT

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Toddler Property Law

1. If I like it, it's mine.
2. If it's in my hand, it's mine.
3. If I can take it from you, it's mine.
4. If I had it a little while ago, it's mine.
5. If it's mine, it must never appear to be yours in any way.
6. If I'm doing or building something, all the pieces are mine.
7. If it looks just like mine, it's mine.
8. If I saw it first, it's mine.
9. If I can see it, it's mine.
10. If I think it's mine, it's mine.
11. If I want it, it's mine.
12. If I "need" it, it's mine (yes, I know the difference between "want" and "need"!).
13. If I say it's mine, it's mine.
14. If you don't stop me from playing with it, it's mine.
15. If you tell me I can play with it, it's mine.
16. If it will upset me too much when you take it away from me, it's mine.
17. If I (think I) can play with it better than you can, it's mine.
18. If I play with it long enough, it's mine.
19. If you are playing with something and you put it down, it's mine.
20. If it's broken, it's yours (no wait, all the pieces are mine).

The Toddler Property Law humorously reflects two attributes of human nature: we are born with an innate sense of property, and we tend to be very self-serving in our view of the world.

RESTATING IMPLIED, PRESCRIPTIVE, AND STATUTORY EASEMENTS
Real Property, Probate and Trust Journal, Spring 2005 by Hernandez, Michael V

1.0 EASEMENTS DEFINED

THE LAW OF EASEMENTS AND LICENSES IN LAND, Bruce and Ely (bold added)

¶1.01 "EASEMENT" DEFINED

An easement is commonly defined as **a nonpossessory interest in land of another**. Several aspects of this definition are noteworthy. First, an easement **is an interest in land**, not merely a contract right. This distinction is important for various purposes, including resolving questions about the applicability of the Statute of Frauds and the availability of compensation for condemnation. Second, the **nonpossessory feature of an easement differentiates it from an estate in land. An easement holder many only use the land burdened by the easement; he may not occupy and possess it as does an estate owner.** Third, an easement **burdens land possessed by someone other than the easement holder**. This characteristic is a corollary of the nonpossessory element of an easement. It emphasizes the distinction between possession and use and highlights the fact that a possessor and an easement holder can simultaneously utilize the same parcel of land.

An easement is **an acquired interest, not a natural incident of landownership as are water rights and the right to support.** Easements **are created expressly, implied in certain circumstances, established by prescriptive use, or obtained by estoppel, custom, public trust, or condemnation. Land burdened** by an easement is appropriately termed a **servient tenement or a servient estate**. If the **easement benefits** a particular parcel of land, that parcel is known as the **dominant** tenement or the dominant estate, and **the easement is said to be appurtenant** to it. If the easement **only benefits an individual personally, not as owner of a particular parcel of land, the easement is termed in gross.** In such cases, no dominant tenement exists.

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000) (bold added)

§ 1.1 Servitude Defined; Scope of Restatement

(1) **A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land.**

(a) Running with land means that the right or obligation **passes automatically to successive owners or occupiers** of the land or the interest in land with which the right or obligation runs.

(b) A right that runs with land is called a **"benefit"** and the interest in land with which it runs may be called **the "benefited" or "dominant" estate.**

(c) An obligation that runs with land is called a **"burden"** and the interest in land with which it runs may be called the **"burdened" or "servient" estate**.

(2) **The servitudes covered by this Restatement are easements, profits, and covenants.** To the extent that special rules and considerations apply to the following servitudes, they are **not within the scope** of this Restatement:

(a) **covenants in leases**;

(b) **covenants in mortgages** and other property security devices;

(c) **profits for the removal of timber, oil, gas, and minerals**.

(3) **Zoning and other public land-use regulations, the public-navigation servitude, the public-trust doctrine, and rights determined by riparian, littoral, prior-appropriation, or ground-water doctrines are not servitudes** within the meaning of the term as used in this Restatement.

§ 1.2 Easement and Profit Defined

(1) **An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement**.

(2) **A profit à prendre is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another**. It is referred to as a "profit" in this Restatement.

(3) **The burden of an easement or profit is always appurtenant. The benefit may be either appurtenant or in gross.**

(4) **As used in this Restatement, the term "easement" includes an irrevocable license to enter and use land in the possession of another and excludes a negative easement. A negative easement is included in the term "restrictive covenant" defined in § 1.3.**

§ 1.4 Terms "Real Covenant" and "Equitable Servitude" Dropped

The terms **"real covenant" and "equitable servitude" describe servitudes encompassed within the term "covenant that run**s with land" and are not used in this Restatement except to describe the evolution of servitudes law.

§ 2.1 Creation of a Servitude

A servitude is created

(1) if the owner of the property to be burdened

(a) enters into **a contract or makes a conveyance intended to create a servitude** that complies with § 2.7 (Statute of Frauds) or § 2.9 (Exception to the Statute of Frauds); or

(b) conveys a lot or unit in a **general-plan development or common-interest community** subject to a recorded declaration of servitudes for the development or community; or

(2) if the requirements for creation of a servitude by estoppel, implication, necessity, or prescription set out in §§ 2.9 through 2.17 are met, or if the requirements for creation of a **servitude for public benefit** under § 2.18 are met.

Children's Home Inc. v. State Highway Bd., 125 Vt. 93 (1965)[1]

At p. 97: "[3] One of the distinguishing features of an easement is the absence of all right to participate in the profits of the soil charged with it; and another, that there must be two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation rests." *Payne* v. *Sheets,* 75 Vt. 335, 345, 55 Atl. 656 (Watson, J.)…"

1.1 Easements Distinguished From Possessory Estates

The difference is the scope of possession. The easement holder may not use the servient easement for more than the uses granted by the easement.

THE LAW OF EASEMENTS AND LICENSES IN LAND, Bruce and Ely (bold added)

¶1.06 EASEMENTS COMPARED TO FEE SIMPLE ESTATES (bold added)

…

[3] Grant of Exclusive Use

When a landowner grants another person **exclusive use** of a portion of the landowner's property, a question arises about the nature of the interest conveyed. In *Latham v. Garner*, the Supreme Court of Idaho concluded that such a transfer may be found to create one of three possible interests.

1. **An easement giving the grantee the right to exclude everyone, including the grantor, from the easement area;**
2. **An easement giving the grantor the right to exclude everyone but the grantor from the easement area; or**
3. **A fee simple absolute.**

In litigation on this matter, the court's task is to determine what interest the parties intended. It is appropriate for a court to find that **a fee was created only when the grantor has clearly and unequivocally relinquished all interest in the subject area. Otherwise, an easement is indicated.**

Of the two easement alternatives just described, the second is preferred. Employing the term "exclusive" in the easement instrument does not alone indicate that the servient estate owner is prohibited from using the easement area. Although the grantor may agree not to enter, occupy, or use the area over which the easement runs, such arrangements are looked upon with disfavor because they severely reduce the grantor's ability to enjoy the fee owner's traditional right of possession. Thus, the term "exclusive" or "exclusively" is frequently not considered to exclude the grantor, and the

[1] CITATIONS: Where the standard citations by Volume and Page numbers are not available Casemaker, the program use citations used which are sequentially numbered within the year of issuance, beginning with the number "1". Within each opinion, each paragraph has been numbered, beginning with the number "1".

transfer is found to create an easement in the grantee, with the grantor retaining the right to use the easement area so long as he does not interfere with the easement holder's rights.

However, when the grantor's intent to relinquish the right to use the easement area is abundantly clear, courts have recognized that the easement holder has a truly exclusive easement – the right to the exclude everyone, including the grantor. (Fairbrother v. Adams…"The hunting and fishing rights are exclusive. The language of the deed used the definite article 'the,' which implies exclusivity. A grantor may give an exclusive right.") The advantage to the grantor of a court's finding an exclusive easement rather than a fee is that the grantor can regain use of the area in question if the easement is abandoned or otherwise terminated. Nonetheless, in isolated exclusive use cases, the grantor may be found to have conveyed a fee to the grantee….

1.2 Easements Distinguished From Licenses

THE LAW OF EASEMENTS AND LICENSES IN LAND, Bruce and Ely

¶1.03 EASEMENTS COMPARED TO LICENSES IN LAND

The task of distinguishing licenses from easements is fraught with potential for confusion and contradiction. As the Supreme Court of Iowa has observed:

> There are several tests given by the textbook writers to determine whether a given right or privilege is an easement or a license; but, since they turn generally upon the result or effect of the grant, which in turn rests upon whether the grant is an easement or a license, the seeker for light finds himself traveling in a circle which brings him at the end to the very spot from which he started.

[1] Fundamental Difference

A license is often defined as permission to do an act or a series of acts on another's land that, absent authorization, would constitute trespass. Because permission is the voluntary grant of a personal privilege, the landowner may usually revoke his consent at any time and thereby terminate the license. For this reason, a license generally is not considered to reach the status of an interest in land. In contrast, easements are irrevocable interests in land of potentially perpetual duration.

Several distinctions flow from this fundamental difference. **An express easement must be in writing to satisfy the Statute of Frauds; a license may be, and usually is, given orally. Easement holders are entitled to protection from interference from third parties; licenses generally are not. Most easements are transferable; licenses are not transferable unless the parties intended otherwise.**

[2] Intent of the Parties

All of the legal distinctions between easements and licenses mentioned in the preceding section only hint at how one can decide which right was created. The critical factor is the parties' intent. The following elements are important in ascertaining intent:

1. **The manner of creation (oral or written);**
2. **The nature of the right created;**
3. **The duration of the right; and**
4. **The amount of consideration, if any, given for the right.**

[3] Cautionary Comments

…Even an awareness of the factors that courts generally weigh in such situations (manner of creation, nature, duration, and consideration paid) is of marginal assistance absent an opportunity to examine the balancing process itself. As has been demonstrated, minor matters often tip the scale in close cases.

A final word of caution about the "metaphysical, subtle, and shadowy" distinction between easements and licenses is in order. Even if the parties intended to create a license in the first instance, a court may conclude that subsequent developments render the license irrevocable, in which case it becomes the functional equivalent of an easement.

Richart v. Jackson, 171 Vt. 94 (2000)

At pp. 4-6: "**The principle of inquiry notice is a venerable one in Vermont.** We have explained the concept as follows:

> [T]he courts of equity are vigilant . . . to see that . . . **a purchaser shall not be allowed to take any benefit resulting from any want of care and watchfulness. If there exist any circumstance of suspicion, whereby he might be said to be fairly put upon his guard, and he neglects to follow out the inquiry, he is affected with notice of all facts, which such inquiry would have brought to his knowledge, and if he purchases with his eyes shut, he acquires only the title of his grantor impeded with its attendant equity.**

Hart v. Farmers & Mechanics Bank, 33 Vt. 252, 264-65 (1860). This principle has been continually reaffirmed in Vermont and elsewhere. See, e.g., Tomasi v. Kelley, 100 Vt. 318, 323, 137 A. 196, 198-99 (1927) ("The circumstances being such as then to put defendant on inquiry, he is chargeable with notice of all such facts as his inquiry, had it been made, would have revealed."); In re Ryan, 851 F.2d 502, 507 (1st Cir. 1988) ("Inquiry notice follows from the duty of a purchaser, when he has actual or constructive notice of facts which would lead a prudent person to suspect that another person might have an interest in the property, to conduct a further investigation into the facts."); Methonen v. Stone, 941 P.2d 1248, 1252 (Alaska 1997) ("It is well established that a purchaser will be charged with notice of a interest adverse to his title when he is aware of facts which would lead a reasonably prudent person to a course of investigation which, properly executed, would lead to knowledge of the servitude."); Hall v. Allen, 771 S.W.2d 50, 53 (Mo.

1989) (en banc) (purchaser of real estate is charged with notice of easement where existence of servitude is apparent upon ordinary inspection of premises).

The uncontroverted facts supported the court's finding that the dock was in use at the time of defendants' purchase, and this finding supported the conclusion that defendants were on inquiry notice of plaintiffs' interest. See Methonen, 941 P.2d at 1252 (purchaser "is considered apprised of those facts obvious from an inspection of the property")."

Guilbault v. Bowley, 146 Vt. 39 (1985)

At pp. 41-42: " [1] The reference to the defendants' water line contained in the plaintiffs' deed did not create any interest not previously existing in the defendants nor does it estop the plaintiffs from challenging the defendants' interest, since the defendants were not parties to that deed. *Tallarico* v. *Brett,* 137 Vt. 52, 59, 400 A.2d 959, 963--64 (1979). Thus, it must be determined whether the defendants acquired an enforceable interest in the water line by some other means.

…

[3] Where an original use or possession is by virtue of permission, it does not become adverse until there is a repudiation or disclaimer, either made known expressly to the owner or clearly indicated by unequivocal actions. Permissive use will not ripen into title no matter how long continued. *Greenberg* v. *Hadwen,* 145 Vt. 112, 115, 484 A.2d 916, 917 (1984); *In re Estate of Smilie,* 135 Vt. 217, 220, 373 A.2d 540, 543 (1977). But see *Lawrie* v. *Silsby,* 76 Vt. 240, 247, 56 A. 1106, 1107 (1904) (a license unlimited in time may ripen into title).

…

[5] The defendants' alternative claim is that they hold an **irrevocable license** to use and maintain the water line. In *Phillips* v. *Cutler,* 89 Vt. 233, 235, 95 A. 487, 488 (1915), this Court stated:

> It is well settled in this State that **when the owner of premises containing a spring orally permits the owner of other premises to take water from the spring to his land by means of an aqueduct laid to such spring, without receiving consideration and without express limitation of time, the taking of the water under this permission is by virtue of a license not revocable during the ordinary life of the aqueduct.** *Clark* v. *Glidden,* 60 Vt. 702, 15 Atl. 358 [1887]; *Allen* v. *Fiske,* 42 Vt. 462 [1869]; *Ainsworth* v. *Stone,* 73 Vt. 101, 50 Atl. 805 [1901]. In these cases the **licensee may repair the** aqueduct as far as necessary to keep it usable, but not to the extent of renewing it. *Clark* v. *Glidden,* 60 Vt. 702, 711, 15 Atl. 358. ... Under the rule established in this State, **the right to the water will pass as appurtenant** to the property benefited, and neither the death of the owner of the spring nor his conveyance of the land will operate as a revocation. See *Ainsworth* v. *Stone,* 73 Vt. 101, 50 Atl. 805; *Clark* v. *Glidden.*

Phillips controls this case. The fact that the source of the water is not located on the plaintiffs' land does not distinguish this case, as the same equitable considerations discussed in *Clark* v. *Glidden, supra,* exist here. **We need not reach the issue of whether the license would have been revocable in the absence of notice of its**

existence to the grantor's successor-in-title, since the plaintiffs were informed of the existence of the water line at the time of their purchase. *Carbonneau* v. *Lague, Inc.,* 134 Vt. 175, 177, 352 A.2d 694, 696 (1976) (irrevocable license may not be withdrawn by purchaser with notice); *Clark* v. *Glidden, supra* (irrevocable license enforced against successors-in-title with notice). The defendants hold an irrevocable license for the use of the water line. "

Tallarico v. Brett, 137 Vt. 52 (1979)

At p. 61: "An easement and a license are distinct concepts. *Western Union Telegraph Co.* v. *Bullard,* 67 Vt. 272, 31 A. 286 (1895)."

Carbonneau v. Lague, 134 Vt. 175 (1976)

At pp.176-177: "… Cano granted **plaintiff permission to install the guy wires with the stipulation that the cables would not interfere with Cano's haycutting operations**. Plaintiff erected the wires at considerable expense and has since maintained them. At no time have the cables interfered with haying operations. In 1969, plaintiff and defendant executed **a one-year lease agreement, renewable at defendant's option, for the continuation of the cables on the property**, for the consideration of one dollar, which plaintiff to date has never paid…

…

[1] … **given the subsequent construction of the guy wires and the absence of any interference with Cano's haycutting operations, the license was rightly classified as irrevocable, terminable only on breach of condition.** *Clark* v. *Glidden,* 60 Vt. 702, 15 A. 358 (1887). Consequently, the injunction would have appropriately issued, for **a license, irrevocable by the licensor, cannot be withdrawn by the purchaser who has notice of the license**. *Sargent* v. *Gagne,* 121 Vt. 1, 13, 147 A.2d 892 (1958).

[2,3] … Given Cano's description of its terms, the license was clearly revocable at his will, if it bothered him. See *Hall* v. *Chaffee,* 13 Vt. 150 (1841). Thus, defendant, as successor in title to Cano, could have revoked the license….

[4, 5] Even given the conclusion that the license was irrevocable, **the voluntary lease agreement entered into between the parties in 1969 terminated the irrevocable license,** itself terminable on breach of condition, as a matter of law, and the lower court erred in issuing an injunction order. If a licensee consents to a substitution in the relation of landlord/tenant for that of licensor/licensee, equity is not concerned in perpetuating the latter relation. *Wheaton* v. *Cutler,* 84 Vt. 476, 79 A. 1091 (1911)…"

Sargent v. Gagne, 121 Vt. 1 (1958)

"[15] It also appears from the findings that the present aqueduct was installed and used in 1948 as the result of a series of licenses. The Town of Royalton drew water from the School Spring in consequence of the acts and permission of the plaintiff. It obtained license from the defendants to lay the line on their land, south of the

school property, to gain access to the School Spring. Reciprocal to the license given by the plaintiffs, is the correlative license, from the town to the plaintiff, to construct a new line across the school land to connect with the aqueduct, then in place, on the school property. The findings report that all parties either participated or were fully cognizant of the entire arrangement. **The several licenses were followed by new construction, with accompanying expenditure of labor and materials. As to all parties, the licenses became executed and irrevocable.** *Clark* v. *Glidden,* 60 Vt 702, 711, 15 A 358; *Phillips* v. *Cutler,* 91 Vt 262, 265, 100 A 40; *Dutton* v. *Davis,* 103 Vt 450, 453, 156 A 531.

[16] The subsequent purchase of the Sewall School property by the defendants could not have the effect of accomplishing a revocation of the earlier executed license from the defendants' grantor to the plaintiffs**. A license, irrevocable by the licensor, cannot be withdrawn by his purchaser who has notice of the license.** *Dutton* v. *Davis,* 103 Vt 450, 453, 156 A 531; *Phillips* v. *Cutler, supra,* 91 Vt 262, 100 A 40; *Wheaton* v. *Cutler,* 84 Vt 476, 483--484, 79 A 1091."]

1.3 Easement Distinguished From Covenants

THE LAW OF EASEMENTS AND LICENSES IN LAND, Bruce and Ely

¶1.07 EASEMENTS DIFFERENTIATED FROM REAL COVENANTS

Real covenants, contractual agreements regarding the use of land, and easements overlap at certain points. Indeed, some commentators have advocated that because of their similarities, these two categories of rights be merged under the label "servitudes." But this is not likely to occur in the near future, so it remains necessary to differentiate between easements and real covenants.

How can one tell easements and real covenants apart? Usually, this is not difficult. Most easements are affirmative in character, authorizing use of another's land. Many real covenants are negative or restrictive in nature, prohibiting certain use of land. Moreover, affirmative easements are readily distinguished from affirmative real covenants. Unlike an affirmative easement, which allows its holder to utilize someone else's property, an affirmative real covenant requires the owner of land to take some action, such as to pay assessments or to keep a structure in repair.

Negative easements and restrictive covenants are less easily differentiated. Negative easements are relatively uncommon and usually concern light and view. Restrictive covenants involve all manner of private land use, including light and view. Hence, the line between negative easements and restrictive covenants often blurs.

The following rule of thumb may be helpful in distinguishing between these two interests. If the owner of the burdened land is prohibited from using his entire parcel for a certain purpose, such as commercial use, then the interest is probably a restrictive

covenant. If, however, the owner of the burdened land is prohibited only from making a particular use of a certain portion of his land, such as building any structure in a specified area or modifying an existing structure, then the interest is probably a negative easement. Admittedly, this guide is not foolproof, but it is consistent with one authority's observation that "[p]erhaps the difference [between easements and restrictive covenants] consists in the directness of physical advantage. . ."

Some **courts have obfuscated the negative easement/restrictive covenant question by using the phrase "implied reciprocal negative easement" to refer to a restrictive covenant implied in equity in certain subdivision development situations.** Courts may have used easement terminology in early cases to bolster their opinions cosmetically. Implied easements have a long history; implied restrictive covenants were not generally recognized until the twentieth century and still are not accepted in some jurisdictions.

Several important legal ramifications flow from the easement/real covenant distinction:

1. Easements as interests in land must meet the requirements of the Statute of Frauds; opinion is divided as to whether real covenants are property interests covered by the Statute.
2. Easements may be created by implication in all jurisdictions; implied real covenants are not recognized in some states.
3. Easements in gross are permitted in this country; real covenants in gross generally are not.
4. The holder of an easement terminated by condemnation is entitled to just compensation; the beneficiary of a real covenant taken by eminent domain does not receive compensation in some states on the theory that a real covenant does not constitute property.

Finally, it should be noted that a single instrument may create both an easement and a real covenant. In fact, many easement deeds also contain various agreements relating to the basic grant. These agreements are governed by real covenant law and run with the land to bind subsequent purchases only if such covenants meet a complicated set of requirements.

Sweezey v. Neel, 2006 VT 38

> ¶ 12. The second general principle relied upon by defendants is that one who seeks the **enforcement** of an established legal property right is entitled to **injunctive relief irrespective of the relative hardships of the parties**. See *Welch v. Barrows,* 125 Vt. 500, 508, 218 A.2d 698, 705 (1966). In the cases cited by defendants, however, we have strictly applied this general principle in the context of the enforcement of restrictive covenants. See *Mann,* 2004 VT 100, ¶ 29 ("Because this case involves the **enforcement of a restrictive covenant, no balancing of hardships was required.**"); *McDonough v. W.W. Snow Constr. Co.,* 131 Vt. 436, 441, 306 A.2d 119, 122 (1973) ("Basic to the enforcement of restrictive covenants is that they are enforceable through the equitable relief afforded by an injunction."). Indeed, in Welch, we acknowledged that many courts balance the relative hardships in determining whether to require the removal of a permanent encroachment onto

another's property, but we declined to do so in that case, which involved a request to enforce a restrictive covenant. 125 Vt. at 508, 218 A.2d at 705.

¶ 12. **Contrary to enforcing restrictive covenants, locating easements often allows some flexibility in terms of creating a remedy that is satisfactory to all parties**. Although the owner of an easement is generally entitled to injunctive relief when the servient estate encroaches upon the easement, see *Knudson v. Leach*, 142 Vt. 648, 651, 458 A.2d 1140, 1142 (1983) ("If the right-of-way is illegally obstructed, the owner of the right-of-way is entitled to injunctive relief."), **the trial court is not necessarily confined to requiring the removal of the encroaching structure irrespective of the extent or impact of the encroachment**. *Cf. Renaissance Dev. Corp. v. Universal Props. Group, Inc.*, 821 A.2d 233, 238 (R.I. 2003) (stating general rule that continuing trespass entitles owner of easement to mandatory injunction, but noting that coercive relief may be withheld in exceptional cases where encroachment causes little or no damage). Further, as indicated above, acquiescence may equitably estop the owner of an easement from demanding removal of an encroaching structure. "

1.4 Easement Distinguished From Natural Rights

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¶1.02 EASEMENTS DISTINGUISHED FROM NATURAL RIGHTS

There is a **substantial difference between easements and natural rights, such as water rights and the right to support. Easements must be created, whereas natural rights are inherent aspects of landownership.** For example, title to real property carries with it the right to use water flowing through the property and the right to lateral and subjacent support from neighboring land. These entitlements are incidental to landownership; no separate act of creation is necessary.

Close examination of this distinction in origin leads to the critical legal difference between easements and natural rights. As one authority has stated:

> **[N]atural [rights] give one landowner neither rights nor privileges in the land of another; they are merely a statement of rights against the world at large that every landowner has . . . with respect to his land**: the fundamental characteristics of a true easement [are] that it is a lessening of the normal rights of the owner in a given piece of land and a transferring of those rights to some third person, ordinarily the owner of another piece of land.
>
> A landowner's natural rights may be expanded or reduced by an easement. For example, a riparian owner may acquire by grant or by prescription an easement to use the water in a larger quantity than he had the right to use by virtue of his ownership of riparian land. Likewise, a landowner may acquire an express or an implied easement for more support from neighboring parcels than is available

under the natural right to support. However, an individual may not obtain a prescriptive easement for support.

Kelbro, Inc. v. Myrick, 113 Vt. 64 (1943)

At pp. 68-70: "[3,4] The rights of an abutting owner in an adjacent street or highway are of two kinds, public rights which he enjoys in common with all other citizens, and certain **private rights which arise from the ownership of property contiguous** to the highway which are not common to the public in general, and this irrespective of whether the fee to the highway is in him or in the public. **Certain of the latter rights constitute property, or property rights of which an abutter cannot be unlawfully deprived. While the cases involving such rights relate, mainly, to questions of ingress and egress, light and air, and lateral support, neither logic nor sound legal principle exclude the recognition of other rights equally valuable to an abutting owner.** *Skinner* v. *Buchanan,* 101 Vt. 159, 165, 142 A 72; *Barnett* v. *Johnson,* 15 NJ Eq. 481, 487.

[5] **These private property rights are usually termed easements. Even if it can be questioned whether they are true easements in the strictest sense they are at least rights in the nature of appurtenant easements,** the abutting property being the dominant and the highway the servient tenement, and they are governed by the law of easements. An important **right of this nature is the abutter's right of view to and from the property, from and to the highway; that is, his right to see and to be seen.** This right of reasonable view has been generally recognized by the weight of authority and has been protected in numerous cases where encroachments on streets or sidewalks obscured the visibility of signs, window displays or show cases. Among such cases may be cited *First Nat'l Bank* v. *Tyson,* 133 Ala. 459, 32 So 144, 59 LRA 399, 91 Am St Rep 46; *Klaber* v. *Lakenan,* 64 F2d 86, 90 ALR 783; *Perry* v. *Castner,* 124 Iowa 386, 100 NW 84, 66 LRA 160, 2 Ann Cas 363; *Bischof* v. *Mchts. Nat'l Bank,* 75 Neb 838, 106 NW 996, 5 LRANS 486; *Williams* v. *Los Angeles R. Co.,* 150 Cal 592, 89 P 330; *Yale Univ.* v. *New Haven,* 104 Conn 610, 134 A 268, 47 ALR 667; *Davis* v. *Spragg,* 72 W Va 672, 79 SE 652, 48 LRANS 173. See 25 Am Jur Highways, Secs. 155 and 319. While authority contra may be found we are in accord with the rule above stated which we believe to be the sounder and more logical one. It is to be noted that in each of the authorities above cited this right is designated an easement.

[6] It is said in Goddard on Easements p. 383, 8th ed. that "a right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement. It cannot be used for any purpose unconnected with the enjoyment of the dominant tenement, neither can it be assigned by the dominant owner to another person and so be made a right in gross, nor can he license anyone to use the way when he is not coming to or from the dominant tenement." *McCullough* v. *Broad Exch. Co.,* 101 App Div 566, aff'd 184 NY 592, 77 NE 1191; *Bang* v. *Forman,* 244 Midi 571, 222 NW 96; *Miller* v. *Weingart,* 317 111 179, 183, 147 NE 804, 805--6. While this principle has been applied most frequently to rights of way it is applicable to other appurtenant easements and should, in our opinion, be applied in the present case where **the servient tenement is the public highway, built with public funds, designed for public use, and under the exclusive**

regulation and control of the Legislature. Especially is this so since it is a principle which underlies the use of all easements that the owner of the easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden. 17 Am Jur Easements Sec. 98; *Hopkins the Florist, Inc.* v. *Fleming,* 112 Vt. 389, 391, 26 A2d 96; *Dernier* v. *Rut. Ry. L. & P. Co.,* 94 Vt. 187, 194, 110 A 4.

[7] The result, as to the claim here made, is that **the right of view of the owner or occupant of the abutting property is limited to such right as is appurtenant to that property and includes the right to display only goods or advertising matter pertaining to business conducted thereon**. His appurtenant easement does not include the right to display advertising matter foreign to a business conducted on the property, and he could not convey to this plaintiff a right that he did not himself possess."

1.5 Easements Distinguished From Profits

THE LAW OF EASEMENTS AND LICENSES IN LAND, Bruce and Ely

¶1.04 EASEMENTS CONTRASTED WITH PROFITS

[1] "Profit" Defined

The right to remove oil, minerals, sand, gravel, or the like from another's land is called a profit à prendre or, more commonly, a profit. Because profits necessarily include the right to enter the servient tenement, they are governed by the same general legal principles that apply to easements. What distinguishes a profit from an easement is that a profit holder has the right to remove a portion of the burdened property. In essence, a profit includes two property interests: the right to remove part of the servient tenement and access necessary to accomplish the removal.

The commercial significance of the item to be removed is so great in certain situations that entire branches of law have developed to define the legal relationship between the landowner and the profit holder. Oil and gas law and the law of solid mineral rights are notable examples….

The typical profit case involves the right to remove sand or gravel, to cut timber, to hunt and fish, to graze cattle, or to pick fruit or nuts. As indicated, these cases are generally resolved by reference to easement law. Thus, analysis of profits is integrated with the discussion of easement law in the chapters that follow. However, a few particularly troublesome issues regarding profits are noted here. These areas of special concern are:

1. Identifying profits;
2. Determining the duration and scope of profits;
3. Ascertaining whether a particular profit is exclusive or nonexclusive;

4. Comparing the transferability of profits with the transferability of easements in gross; and
5. Deciding whether profits may be extinguished by abandonment.

[3] Duration and Utilization of Profits

Profits, like easements, may last indefinitely. Also like easements, profits may be limited in duration.

[5] Transferability of Profits

A profit may be appurtenant or in gross. Profits appurtenant are transferred automatically with the land they benefit. Profits in gross are also alienable and inheritable. It is the transferable aspect of profits in gross that makes it important to distinguish them from easements in gross, which in many jurisdictions are freely transferable only if they are commercial in nature.

[6] Abandonment of Profits

As a general rule, a profit may be extinguished in the same ways that an easement may be extinguished. However, there is some diversity of opinion as to whether a profit may be terminated by abandonment. The generally accepted view is that a profit holder, like an easement holder, may relinquish his right by abandoning it.

2.0 TYPES OF EASEMENTS

2.1 Appurtenant v. Gross

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 1.5 Appurtenant, In Gross, and Personal Defined

(1) **"Appurtenant" means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land.** The right to enjoyment of an easement or profit, or to receive the performance of a covenant that can be held only by the owner or occupier of a particular unit or parcel, is an appurtenant benefit. A burden that obligates the owner or occupier of a particular unit or parcel in that person's capacity as owner or occupier is an appurtenant burden.

(2) **"In gross" means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.**

(3) **"Personal" means that a servitude benefit or burden is not transferable and does not run with land. Whether appurtenant or in gross, a servitude benefit or burden may be personal.**

§ 2.6 Creation of Benefits in Gross and Third-Party Beneficiaries

(1) The benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property, as defined in § 1.5.

(2) The benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.

Steven C. Clayton v. Clayton Investments, Inc., 2007 VT 38A, 182 Vt. 541

"¶ 17. The superior court agreed with plaintiff on an additional rationale. Both the deed tendered by defendant, and that tendered by plaintiff, contained standard language that the deed conveyed the **property "with all the privileges and appurtenances thereof." The court held that under this language "the use of the parking areas in common with other lot owners is included in the grant of the deed."**

¶ 18. In *Swazey v. Brooks,* this Court described the scope of an appurtenance as follows:

> We think that the word appurtenances in the habendum of the defendant's deed has its full force and application when it is confined to existing rights which naturally and necessarily belonged to the thing granted in the hands of the grantor, and that it ought not to be extended so as to carry an easement in other land, which by reason of not having ripened into a legal right, had not become legally attached to the premises conveyed, unless

accompanied by proper words describing it, and showing the intention of the grantor to pass it.

34 Vt. 451, 454 (1861); see *Cole v. Haynes*, 22 Vt. 588, 590 (1849) ("**Land does not pass as a mere appurtenance to other land; and, consequently, no portion of the highway, or stream, will be conveyed, unless the instrument of conveyance can, by reasonable construction, be made to include it.");** see also *Humphreys v. McKissock*, 140 U.S. 304, 314 (1891) (land cannot be appurtenant to other land, and "[**a]ll that can be reasonably claimed is that the word 'appurtenance' will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created")**. On the other hand, we recognize, consistent with other courts that have addressed the issue, that "[s]hopping centers exist because of an abundance of parking area and ease of access from and to the same. Deny either parking or access thereto and they cease to exist as a viable entity." *Joseph v. Hustad Corp.,* 454 P.2d 916, 918 (Mont. 1969). A good example of the reconciliation of these principles is *Grand Central Plaza, Inc. v. Bussel,* 528 N.Y.S.2d 726, 728 (App. Div. 1988). That case is otherwise identical to this one except that the lease there included an easement to use common area parking. On that basis, the court held that the option impliedly included an easement for parking. Id. In comparison, the evidence here is that the preexisting lease did not include an easement over the common area parking lot.

¶ 19. **We cannot accept, based on the record before us, that the appurtenance clause necessarily gave plaintiff an easement over the parking area with no further contribution. "**

Rowe & Banschbach v. Lavanway, 2006 VT 47

"¶ 3. …We also hereby mean to convey to the said Brown **the lane about thirty-feet wide on the southeasterly side of the land now occupied by** Levi Nutting as a pasture and leading to land now and heretofore owned by said Brown, and bounded on the southeasterly side by land now belonging to Harmon Sherman's Estate. Said Brown agrees to put up all bars in the lane in passing to and from the land hereby conveyed.

TO HOLD SAID GRANTED PREMISES WITH THE APPURTENANCES THEREOF FOREVER.

¶ 4. The court found that the passage cited above in bold constituted the description and grant of the right-of-way at issue, and the passage in small capitals was the deed's habendum. See *Kipp v. Chips Estate*, 169 Vt. 102, 104 n.1, 732 A.2d 127, 129 n.1 (1999) ("The habendum clause in a deed typically sets forth the estate to be held by the grantee. While the granting clause actively transfers the land from the grantor to the grantee/s, the habendum clause seeks to describe the type of title that has been granted"). The court **rejected plaintiffs' contention that the absence of words of inheritance rendered the grant a mere personal license to Brown. The court explained that, although the words of inheritance had not been included in the granting clause or the habendum, the word "appurtenances" was included in the habendum.** The court found that there were only two possible

appurtenant easements in the deed-those created by the language italicized and bolded above. It concluded that both provisions created easements and each satisfied the criteria for an easement appurtenant because they served a parcel of land. The court thus found that to give meaning to the word "appurtenances" in the habendum, the parties must have intended both easements to be appurtenant to their respective parcels.

…

¶ 10. Plaintiffs first argue that the court erred in interpreting the terms of the 1881 deed. They assert that the deed did not create an appurtenant right-of-way because the grant did not include words of inheritance. Plaintiffs maintain that the court erred in looking at the habendum clause when the granting language was clear. Plaintiffs further assert that the word "appurtenances" does not mean what the court found it to mean, and that the court erred in giving the word independent legal significance and effect. Even assuming that the term could be so interpreted, plaintiffs argue, the habendum would be inconsistent with the terms of the grant and therefore invalid. According to plaintiffs, the context of the full deed evinces the parties' intent to convey an easement for the exclusive benefit of grantee Brown. Plaintiffs find support for their position in the deed's imposition of a personal obligation on Brown to "put up all bars in the lane passing to and from the land hereby conveyed."

¶ 11. We reject these arguments**. Our goal in interpreting a deed is to implement the intent of the parties.** *Kipp*, 169 Vt. at 105, 732 A.2d at 129; see also *Barrett v. Kunz,* 158 Vt. 15, 18, 604 A.2d 1278, 1280 (1992) ("The 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."). We **look first to the language of the written instrument because we presume that it declares the parties' intent.** *Kipp,* 169 Vt. at 105, 732 A.2d at 129. The parties' intent, "when ascertainable from the entire instrument, prevails over technical terms or their formal arrangement." Id. (quotations omitted). In interpreting a deed, we **"read the entire written instrument as a whole, giving effect to every part so as to understand the words in the context of the full deed. In so doing, we construe the various clauses of the document, wherever possible, so that the deed has a consistent, or harmonious meaning**." *Id.* (citations and quotations omitted).

¶ 12. In this case, the trial court concluded that **the deed as a whole reflected the grantor's intent to convey an appurtenant easement.** We agree**. An appurtenant easement is one that serves a parcel of land rather than a particular person, and a construction that an easement is appurtenant is favored.** *Barrett,* 158 Vt. at 18, 604 A.2d at 1280 (explaining that, in contrast, personal easements, or easements in gross, are intended only to benefit the holder, and they are usually created for a limited purpose and a limited duration); *Scott v. Leonard*, 119 Vt. 86, 98, 119 A.2d 681, 698 (1956) ("A construction that an easement is one appurtenant rather than in gross is favored."). We reject plaintiffs' assertions that the absence of the words of inheritance in the granting clause controls the interpretation of the deed. See *Kipp,* 169 Vt. at 105, 732 A.2d at 130 ("Although we agree that in some cases according priority to the granting clause over other deed language is appropriate, we stress that such priority is only an aid to determining the intent of the grantor, to

be used along with other such aids."). We similarly reject plaintiffs' assertion that the deed's imposition of an obligation on Brown to "put up all bars in the lane" necessarily rendered the conveyance a personal license. This phrase does not conclusively demonstrate that Brown had any personal interest in securing a right-of-way distinct from his interest as owner of the lot. See *Leonard,* 119 Vt. at 98, 119 A.2d at 698 **("[T]here is nothing in the relation of the grantors to the grantee, to each other, nor in the nature of the right in question, that shows it to be a mere personal right or that it was so intended.").**

¶ 13. As the trial court found, its interpretation of the deed gave meaning to the word **"appurtenances." We reject plaintiffs' suggestion that we should give the term a different meaning from that identified by the trial court. With no evidence that the easement was personal to Brown or created for a limited purpose or duration, the intent of the parties to convey a way of ingress and egress to Brown's land is accomplished in the deed. Mindful that appurtenant easements are favored over easements in gross, we note that the trial court's interpretation is also consistent with the common understanding of the term "appurtenance." See Webster's Ninth New Collegiate Dictionary 98 (9th ed. 1985) (defining "appurtenance" as "an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it).** When a term is unambiguous, we give it its plain meaning. See, e.g., *N. Sec. Ins. Co. v. Perron*, 172 Vt. 204, 209, 777 A.2d 151, 154 (2001) (Court gives disputed terms their "plain, ordinary and popular meaning"). The trial court did not err in finding that the deed established an appurtenant right-of-way."

Barrett v. Kunz, 158 Vt. 15 (1992)

At pp. 16-19: "…Plaintiffs' property is virtually inaccessible without the use of an old road that crosses defendants' parcel. The existence of the road predated plaintiffs' purchase. Predecessors in title had also used this road to reach the property, and, in fact, townspeople and others had used the road for various recreational purposes for many years. **The deed conveyed to plaintiffs the 104-acre parcel and "all privileges and appurtenances thereof," but it did not specifically mention the right-of-way. Nor was the right-of-way specified by the previous grantors**, Barent and Constance Stryker, in the deed to Armstrong and Ewing, **although the road was in existence** on the date Armstrong and Ewing acquired the parcel, with all privileges and appurtenances, in 1973.

…

Defendants' chain of title shows the existence of a right-of-way reserved … in a deed … on April 8, 1952 [which] **specified "a right-of-way across the northwest of said buildings which served as a farm road for [the] past several years."**

…

The thrust of defendants' first argument is that no specific language in plaintiffs' deed gives them a right-of-way across defendants' land, and that the language mentioning a right-of-way in defendants' chain of title created a personal easement that was not conveyed as an appurtenance to plaintiffs' parcel.

[1, 2] **Appurtenant easements serve a parcel of land, rather than a particular person.** R. Cunningham, W. Stoebuck & D. Whitman, The Law of Property § 8.2, at

440 (1984). **The land benefited by the easement is known as the dominant tenement, and the land burdened by it is the servient tenement. *Id.* Although the owner of an appurtenant easement may be said to benefit personally by its use, the benefit lasts only as long as the owner owns the land, and when conveyed, it passes to a new owner.** *Scott v. Leonard,* 119 Vt. 86, 98, 119 A.2d 691, 698 (1956); *Nelson v. Bacon,* 113 Vt. 161, 169, 32 A.2d 140, 145 (1943). **Thus, an appurtenant easement passes with subsequent conveyances, even if the specific language of the right-of-way is not repeated**. *Russell v. Pare,* 132 Vt. 397, 407, 321 A.2d 77, 84 (1974), *overruled, in part, on other grounds, LaGue, Inc. v. Royea,* 152 Vt. 499, 502--03, 568 A.2d 357, 359 (1989); *Sabins v. McAllister,* 116 Vt. 302, 306, 76 A.2d 106, 108 (1950), *overruled, in part, on other grounds, Lague, Inc. v. Royea,* 152 Vt. at 502--03, 568 A.2d at 359.

[3, 4] **By contrast, personal easements, or easements in gross, are intended to benefit only the holder. Usually, they are created for a limited purpose and a limited duration. Because a personal easement exists apart from a holder's ownership of land, there is no dominant tenement, and the easement expires when the property is conveyed unless specifically reserved**. R. Cunningham, W. Stoebuck & D. Whitman, *supra,* at 440. **Personal easements are typically those held by utility companies, which give them access to land to erect poles and lines, but they hold no dominant estate**. *Id.*

[5] **The 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**. *Griffith v. Nielsen,* 141 Vt. 423, 428, 449 A.2d 965, 968 (1982) (right-of-way reserved by grantor, her heirs and assigns, was passed on to subsequent grantees); *Hunsdon v. Farrar,* 128 Vt. 410, 415--16, 264 A.2d 809, 813 (1970) (circumstances surrounding right-of-way reserved by deed established appurtenant easement); *Sabins,* 116 Vt. at 305, 76 A.2d at 108 (right to use driveway established by deed of common grantor was a benefit to the land, not a specific grantor)."

Scott v. Leonard, 119 Vt. 86 (1956)

At pp. 97-98: "[1,2] Our recent decision in *Sabins* v. *McAllister,* 116 Vt 302, 305, 306, 76 A.2d 106, is directly on point and determines the question. That case states, at page 305, "the intent of the parties, to be gathered from the nature of the subject matter and the language used in the deed, must control. *Hill* v. *Shorey,* 42 Vt 614, 619; *Cooney* v. *Hayes,* 40 Vt 478, 482; Easements, 17 Am Jur., §810; Easements, 28 CJS, page 636 et seq." **In the Sabins case, as here, there is nothing in the relation of the grantors to the grantee, to each other, nor in the nature of the right in question, that shows it to be a mere personal right or that it was so intended. There is nothing to indicate that Sarah E. Grant had any personal interest in securing a right of way distinct from her interest as owner of the lot conveyed. A construction that an easement is one appurtenant rather than in gross is favored. The Sabins case holds and so do we in the present case that the right of way granted by the deed was legally appurtenant to the land conveyed and went with it to the grantee and her successors in title.** *Sabins* v. *McAllister,* 116 Vt 302, 305, 306, 76 A.2d 106."

2.1.1 Transferability of Appurtenant Easements

Barrett v. Kunz, 158 Vt. 15 (1992)

At pp. 16-19: **The deed conveyed to plaintiffs the 104-acre parcel and "all privileges and appurtenances thereof," but it did not specifically mention the right-of-way. Nor was the right-of-way specified by the previous grantors**, Barent and Constance Stryker, in the deed to Armstrong and Ewing, **although the road was in existence** on the date Armstrong and Ewing acquired the parcel, with all privileges and appurtenances, in 1973.
…

Thus, **an appurtenant easement passes with subsequent conveyances, even if the specific language of the right-of-way is not repeated**. *Russell v. Pare,* 132 Vt. 397, 407, 321 A.2d 77, 84 (1974), *overruled, in part, on other grounds, LaGue, Inc. v. Royea,* 152 Vt. 499, 502--03, 568 A.2d 357, 359 (1989); *Sabins v. McAllister,* 116 Vt. 302, 306, 76 A.2d 106, 108 (1950), *overruled, in part, on other grounds, Lague, Inc. v. Royea,* 152 Vt. at 502--03, 568 A.2d at 359.

[3, 4] **By contrast, personal easements, or easements in gross, are intended to benefit only the holder. Usually, they are created for a limited purpose and a limited duration. Because a personal easement exists apart from a holder's ownership of land, there is no dominant tenement, and the easement expires when the property is conveyed unless specifically reserved**. R. Cunningham, W. Stoebuck & D. Whitman, *supra,* at 440. **Personal easements are typically those held by utility companies, which give them access to land to erect poles and lines, but they hold no dominant estate**. *Id.*

Tallarico v. Brett, 137 Vt. 52 (1979)

At pp. 60-61: "[9] Furthermore, the Tallaricos' **deed makes specific reference to the deed from Pearsons to Elizabeth Brett. This practice is as effective as if the deed referred to had been copied into the deed making the reference.** *Basso* v. *Veysey,* 118 Vt. 399, 110 A.2d 706 (1954). This being so, no more is excepted from the Tallaricos' deed than the right of way specifically described in the deed referred to, because the specific controls the general. *Pareira* v. *Wehner,* 133 Vt. 74, 330 A.2d 84 (1974).

Russell & Russell v. Pare & Rodin, 132 Vt. 397 (1974)

At p. 407: "[11, 12] Another claim of the defendants, akin to their "tacking" claim, relates to the lack of mention of this easement in conveyances of the Seymour Lodge property subsequent to 1939. When an easement has been perfected, it is as if it were acquired by grant, *Montgomery* v. *Branon, supra,* 127 Vt. at 89--90, it will be conveyed by a deed of the dominant estate just as an easement by grant would be. A conveyance impliedly includes all incidents necessary to its enjoyment. *Perrin* v. *Garfield,* 37 Vt. 304, 312--13 (1854); see also Note 32 Cal. L. Rev., *supra,* at 438--39. **Appurtenant easements are included in conveyances by deeds referring to**

"appurtenances" even if not otherwise mentioned in the deed. *Scott* v. *Leonard,* 119 Vt. 86, 99, 119 A.2d 691 (1956). Not only is lake access necessary to the enjoyment of a fishing lodge, but **the deeds in the plaintiffs' chain included "appurtenances" and this easement, once perfected, was undoubtedly appurtenant.** See *Sabins* v. *McAllister,* 116 Vt. 302, 305, 76 A.2d 106 (1950); Restatement of Property § 453."

Sabins v. McAllister, 116 Vt. 302 (1950)

At pp. 304-306: "…In the deed (Defts.' Ex. C) the following language appears: **"The driveway on the lot herein conveyed is to be used in common with the lot adjoining on the south (not herein conveyed**)."

…

[3] **It is true, as found by the chancellor, that no mention of the right in question was made in the deed from Mrs. Stonegrave to the defendants. But such mention was not necessary to the passing of the right for, as we have seen, it was a right appurtenant to the land so conveyed and went with it.** *Deavitt* v. *Washington County, supra; Dee* v. *King,* 77 Vt 230, 240, 59 A 839, 68 LRA 860; *Phillips* v. *Cutler,* 89 Vt 233, 235, 95 A 487; Restatement of the Law, Property, Ch. 40 § 487, Comment a.

[4] **Moreover, by the *habendum* in their deed the defendants took the premises "with all the privileges and appurtenances thereof." As the easement in the driveway was legally appurtenant to the granted premises it was an appurtenance conveyed by the habendum.** *Swasey* v. *Brooks,* 34 Vt 451, 454; *Haldiman* v. *Overton,* 95 Vt 478, 482, 115 A 699."

2.2 Affirmative v. Negative

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 1.3 Covenant Running with Land, Affirmative, Negative, and Restrictive Covenants Defined

(1) A covenant is a **servitude if either the benefit or the burden runs with land**. A covenant that is a servitude "runs with land".

(2) The nature of the burden determines whether a covenant is affirmative or negative. **An "affirmative covenant" requires the covenantor to do something; a "negative covenant" requires the covenantor to refrain from doing something.**

(3) A **"restrictive covenant" is a negative covenant that limits permissible uses of land. A "negative easement" is a restrictive covenant.**

3.0 CREATION OF EASEMENTS

3.1 Express Easements

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 2.7 Formal Requirements (Statute of Frauds)

The formal requirements for creation of a servitude are the same as those required for creation of an estate in land of like duration.

§ 2.8 Failure to Comply with the Statute of Frauds

If a contract or conveyance intended to create a servitude does not comply with the Statute of Frauds, the burden of the servitude is not enforceable and the benefit is terminable at will, unless there is an applicable exemption, or unless the transaction falls within the exception set forth in § 2.9, or § 129 of the Restatement Second of Contracts.

§ 2.9 Exception to the Statute of Frauds

The consequences of failure to comply with the Statute of Frauds, set out in § 2.8, do not apply if the beneficiary of the servitude, **in justifiable reliance on the existence of the servitude, has so changed position that injustice can be avoided only by giving effect to the parties' intent to create a servitude.**

Scanlan v. Hopkins, 128 Vt. 626 (1970)

At pp. 629-630: "[1, 2] **The law requires no technical formula of words to create a servitude against one property in favor of another. The only essential is that the parties make clear their intention to establish an easement. If the language of the instrument is not clear, the intentions of the parties must be gathered from the total language and from the circumstances which prevailed at the time of the conveyance. And all doubts in this regard are to be resolved in favor of the use of land free from such encumbrances.** *Wing* v. *Forest Lawn Cemetery Association,* 15 Cal.2d 472, 130 A.L.R. 120, 126; Thompson, Real Property § 332 (1961 Replacement). "

3.1.1 Reserved Easements Versus Easement By Exception

In re Estate of Harding,178 Vt. 139 (2005)

"¶ 8. *Nelson v. Bacon*, we noted that the terms **"reservation" and "exception" are often used synonymously in deeds**. 113 Vt. 161, 169, 32 A.2d 140, 145 (1943). In this case, both terms are used conjunctively in the original deed. Therefore, the exception/reservation inquiry focuses not on the language used, but on the

intention of the parties, the circumstances existing at the time the deed was executed, and the subject matter of the deed language at issue. *Id.*

¶ 9. **A deed exception takes something out of the conveyance that would otherwise pass, while a reservation creates some new right out of the thing granted.** *Roberts v. Robertson*, 53 Vt. 690, 692 (1881). The property interest being excepted, however, will not always be a fee simple estate. Plaintiff cites numerous cases that construe disputed deed language as signifying exceptions to the deed conveyances. In many of these cases, however, the interest the grantor excepted was an easement. *Sargent v. Gagne*, 121 Vt. 1, 9-10, 147 A.2d 892, 898 (1958) (holding that deed language was intended as an exception for an easement appurtenant); *Nelson*, 113 Vt. at 169, 32 A.2d at 145 (same); *Haldiman v. Overton*, 95 Vt. 478, 481-82, 115 A. 699, 700-01 (1922) (recognizing that original grantor intended deed language concerning the use of a well and aqueduct as an exception of "an appurtenance to" the property he retained for his use and the use of his successors). One of these cases, *Haldiman*, presents an instructive point of comparison. In *Haldiman*, the original grantor subdivided a parcel he owned. A spring located on part of the land being conveyed supplied water to his dwelling that was located on part of the parcel he was retaining. We held that the deed language created an exception by which the grantor retained an easement in the spring because the spring, and the grantor's right to use it, were in existence at the time of the grant. *Haldiman*, 95 Vt. at 481, 115 A. at 700; accord *Nelson*, 113 Vt. at 170, 32 A.2d at 145 (distinguishing reservations that are used to create new rights and exceptions that are used withhold existing rights from a grant). In supporting her claim that the Harding-to-Barton deed contained an exception for the burial yard, plaintiff points out that the burial yard, like the well in *Haldiman*, was in existence at the time of the Harding-to-Barton grant. But as *Haldiman* illustrates, an exception for an existing interest may signify that an easement, not a fee, is being withheld from the grant.

¶ 10. **An exception may give rise to an "easement in fee," which survives after the life of its holder expires, while a reservation without words of inheritance creates an easement that terminates upon the death of the reserving grantor.** *Nelson*, 113 Vt. at 170, 32 A.2d at 145; *Smith's Ex'r v. Jones*, 86 Vt. 258, 260, 84 A. 866, 867 (1912). Accordingly, Caleb Harding's use of an exception to protect a burial easement would make sense here because it would ensure his heirs the future right to maintain his son's grave after he was no longer alive to do so himself. Thus, while we agree that the deed language at issue created an exception from the original grant, this conclusion does not help us determine whether the interest that plaintiff and her fellow heirs hold in the burial yard is an easement or a fee simple estate.

¶ 11. At common law, **the establishment of a family burial plot created an easement against the fee**. fn2) See, e.g., Aldridge v. Puckett, 278 So. 2d 364, 366 (Ala. 1973); *Haas v.Gahlinger*, 248 S.W.2d 349, 351 (Ky. 1952); *Heiligman v. Chambers*, 338 P.2d 144, 148 (Okla. 1959). When the person who established the family cemetery conveys the land upon which it is located, the bare legal title to that portion will pass subject to the easement. Aldridge, 278 So. 2d at 366; *Heiligman*, 338 P.2d at 148. The easement benefits the person who established the

burial plot, and it descends to the heirs. Aldridge, 278 So. 2d at 366. **The rights created by the easement survive until either its originator or the heirs abandon it.** Id. Moreover, at common law, the interred's next-of-kin have the right to protect the grave by taking legal action against anyone, including the owner of the fee, who would knowingly and wantonly disturb the grave without right to do so. J*ohnson v. Ky.-Va. Stone Co.*, 149 S.W.2d 496, 498 (Ky. 1941)."

Barrett v. Kunz, 158 Vt. 15 (1992)

At p. 20: "Finally, **defendants claim that the right-of-way was a "reservation" without words of inheritance, which could not pass to subsequent grantees. Because the easement had been in existence for many years at the time it was specifically mentioned in the deed to defendants' immediate predecessor in title, Louise Forrest, it was an "exception," rather than a reservation, and did not require any formal words of inheritance for conveyance.** *Sheldon Slate Products Co. v. Kurjiaka,* 124 Vt. 261, 266--67, 204 A.2d 99, 103 (1964)."

II.

[7, 8] In view of our holding on the nature of the right-of-way, and our discussion of its general use, defendants' argument that the trial court impermissibly burdened the servient estate by expanding the use of the easement from farm purposes to general purposes requires little discussion. The trial court's findings on the history of use of the right-of-way by the public are well supported by the record, and are not clearly erroneous. V.R.C.P. 52(a); *Harte v. Town of Bennington,* 153 Vt. 256, 259, 571 A.2d 53, 54 (1989). The trial court did not recognize any use that went beyond the evidence, and the servient estate was not impermissibly burdened."

Tallarico v. Brett, 137 Vt. 52 (1979)

At p. 59: "The appellants rely in part on language in the Tallaricos' deed. The deed recites: **"Included in this sale is a driveway... subject to the right of Elizabeth B. Brett to travel same."** The parties agree that the driveway referred to is the private road involved here.

The language concerning the driveway is in recognition or confirmation of rights existing in a person not a party to the deed. As such, it is to be construed as an exception and not a reservation. *Toussaint* v. *Stone,* 116 Vt. 425, 77 A.2d 824 (1951). **The prevailing rule is that the grantee of a deed that contains an exception in favor of a stranger is not estopped to deny the efficacy of the exception.** Annot., 88 A.L.R.2d 1199, 1224 (1963**). Such an exception is effective only to confirm a pre-existing right and will not itself vest any title or interest in the third person.** See *First National Bank* v. *Laperle,* 117 Vt. 144, 86 A.2d 635 (1952); *Toussaint* v. *Stone, supra.*"

Sabins v. McAllister, 116 Vt. 302 (1950)

At p. 306: "[5, 6] **Since the driveway was in existence at the time of the conveyance from Mrs. Stonegrave to the Warners the easement was created by an exception and**

not as a reservation. *Smith's Exr.* v. *Jones,* 86 Vt 258, 259, 84 A 866; *Dee* v. *King, supra.* **Thus no technical words of limitation were necessary to its creation**. *Nelson* v. *Bacon,* 113 Vt 161, 170, 32 A.2d 140."

Nelson v. Bacon, 113 Vt. 161 (1943)

At pp. 169-173: "[4] The defendant argues that the plaintiff can have no right to the use of the passageway because in the deed from the Clarks to Foster and Cole of August 12, 1857, the phrase "We also reserve to the said George White the right to pass from the common stairway on the second floor, cross the premises hereby conveyed, said passage to be at least three feet wide" is not an exception to the grant to them but a reservation, and there being no words of inheritance attached thereto, White received nothing that his successors in title could acquire. The fallacy of this claim is apparent. White's right was what he received under his deed from the Clarks, and this was an easement appurtenant to the portion of the building conveyed to him, and as such, by the terms of the deed, it passed to his assigns. *Dee* v. *King,* 77 Vt. 230, 240, 59 A 839, 68 LRA 860; *Deavitt* v. *Washington County,* 75 Vt. 156, 161, 53 A 563; *Mason* v. *Horton,* 67 Vt. 266, 269, 31 A 291, 48 Am St Rep 817.

[5--10] Furthermore, the language in the deed to Foster and Cole is not to be construed as a reservation but as an exception. **The use of the word "reserve" is not controlling. The terms "reservation" and "exception" are often used as synonymous, and the intention of the parties, not the language used, is the dominating factor, and the circumstances existing at the time of the execution of the deed, the situation of the parties and the subject-matter are to be considered**. *Haldiman* v. *Overton,* 95 Vt. 478, 481, 115 A 699; *Smith's Ex'r* v. *Jones,* 86 Vt. 258, 259, 84 A 866; *Dee* v. *King,* 77 Vt. 230, 237, 59 A 839, 68 LRA 860; *Keeler* v. *Wood,* 30 Vt. 242, 246; *Stockwell* v. *Couillard,* 129 Mass 231, 233. **Technically, a reservation is some newly created right, which the grantee impliedly conveys to the grantor, while an exception is something withheld from a grant which would otherwise pass as a part of it.** *Smith's Ex'r.* v. *Jones, supra,* p. 260, 84 A 866; *Keeler* v. *Wood, supra.* **While under the common law an easement in fee cannot be created by way of reservation without words of inheritance** (*Smith's Ex'r* v. *Jones, supra; Bailey* v. *Agawam Nat. Bk.,* 190 Mass 20, 23, 76 NE 449, 3 LRANS 98, 112 Am St Rep 296), **if an easement is made the subject of an exception, technical words of limitation are not necessary.** *Dee* v. *King, supra,* p. 239, 59 A 839, 68 LRA 860. **A reservation, moreover, cannot create an estate or interest in a stranger to the deed, but can operate only to the benefit of the grantor therein**. *Bessom* v. *Freto,* 13 Mete., Mass, 523, 525; *Murphy* v. *Lee,* 144 Mass 371, 374, 11 NE 550; *Herbert* v. *Pue,* 72 Md 307, 20 A 182, 183; *Bartlett* v. *Barrows,* 22 RI 642, 49 A 31, 32; *Deaver* v. *Aaron,* 159 Ga 597, 126 SE 382, 39 ALR 126, 128; 3 Washburn Real Property, (3rd ed.), 377 para. 67; and see cas. cit. annotation, 39 ALR 129. **An effective exception may be made in favor of a third person not a party to the deed, in recognition and confirmation of a right already existing in him.** *Fusaro* v. *Varrecchione,* 51 RI 35, 150 A 462, 463; *Beckley Nat. Exchange Bank* v. *Lilly,* 116 W Va 608, 182 SE 767, 102 ALR 462, 470; *Haverhill Svgs. Bank* v. *Griffin,* 184 Mass 419, 421, 68 NE 839; *Deaver* v. *Aaron,* 159 Ga 597, 126 SE 382, 39 ALR 126, 127; and cases cited, annotation 39 ALR 32. The deed of the Clarks to White and their deed to Foster and Cole were dated on the same day and

there is no finding as to which one was first executed and delivered. But the deed to Foster and Cole refers to premises already granted to White, and so it appears that the phrase "we also reserve to George White etc." must be taken as referring to an easement already granted to White, and therefore constitutes a valid exception in his favor**. The title acquired by him under his deed cannot be affected by the fact that the exception is not mentioned in the subsequent deeds in the defendant's chain of title. The clause in the deed to Foster and Cole constituted notice of the existence of an easement, and was sufficient to put upon subsequent grantees the duty of inquiry as to its nature.** *Dahm Realty Corp'n* v. *Cardel,* 128 NJ Eq. 222, 16 A2d 69, 71; *Stockwell* v. *Couillard,* 129 Mass 231, 232--3.

3.1.1.a Exceptions not granted

Guilbault v. Bowley, 146 Vt. 39 (1985)

At pp. 41-42: " [1] **The reference to the defendants' water line contained in the plaintiffs' deed did not create any interest not previously existing in the defendants nor does it estop the plaintiffs from challenging the defendants' interest, since the defendants were not parties to that deed.** *Tallarico* v. *Brett,* 137 Vt. 52, 59, 400 A.2d 959, 963--64 (1979). Thus, it must be determined whether the defendants acquired an enforceable interest in the water line by some other means.

Tallarico v. Brett, 137 Vt. 52 (1979)

At p. 59: "The appellants rely in part on language in the Tallaricos' deed. The deed recites: **"Included in this sale is a driveway... subject to the right of Elizabeth B. Brett to travel same."** The parties agree that the driveway referred to is the private road involved here.

The language concerning the driveway is in recognition or confirmation of rights existing in a person not a party to the deed. As such, it is to be construed as an exception and not a reservation. *Toussaint* v. *Stone,* 116 Vt. 425, 77 A.2d 824 (1951). **The prevailing rule is that the grantee of a deed that contains an exception in favor of a stranger is not estopped to deny the efficacy of the exception.** Annot., 88 A.L.R.2d 1199, 1224 (1963**). Such an exception is effective only to confirm a pre-existing right and will not itself vest any title or interest in the third person.** See *First National Bank* v. *Laperle,* 117 Vt. 144, 86 A.2d 635 (1952); *Toussaint* v. *Stone, supra.*"

3.2 Implied Easements

3.2.1 Easements by Necessity

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 2.15 Servitudes Created by Necessity

A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

Berg v. State of Vermont, 2006 VT 116

"¶ 4….**the 1959 deed reserved no express easement for access to the Norton Pond Exclusion across the land conveyed to the State**….

¶ 6. Our common law has long recognized that '**when, as a result of the division and sale of commonly owned land, one parcel is left entirely without access to a public road, the grantee of the landlocked parcel is entitled to a way of necessity over the remaining lands of the common grantor or his successors in title**.' Traders, Inc. v. Bartholomew, 142 Vt. 486, 491, 459 A.2d 974, 978 (1983); see Smith v. Higbee, 12 Vt. 113, 123 (1840) (recognizing easements of 'necessity' where essential to the "enjoyment of the principal thing conveyed"); Willey v. Thwing, 68 Vt. 128, 131, 34 A. 428, 428-29 (1896) (acknowledging existence of easement where "necessary to the enjoyment of the land"). **In Okemo Mountain, Inc. v. Town of Ludlow, we outlined the basic requirements for an easement by necessity as: "(1) there was a division of commonly owned land, and (2) the division resulted in creating a landlocked parcel."** 171 Vt. 201, 206, 762 A.2d 1219, 1224 (2000). **The easement is said to remain in effect so long as the necessity exists.** Traders, 142 Vt. at 493, 459 A.2d at 979.

¶7… the **court concluded that plaintiff's claim was defeated solely by virtue of the fact that he could reach the property by water.** In so holding, the court stated that "'necessity' is the operative term in the doctrine," and explained that it could not recognize an easement "merely because water access is not as desirable as the road access that is sought." The court relied on a few early Vermont decisions characterizing the requisite standard as one of "strict necessity," as well as several out-of-state decisions adhering to the view that water access, unless completely useless, bars a finding of necessity.

¶ 8. While the court's conclusion is understandable given the relatively little attention accorded the easement-by-necessity doctrine in recent years, it is nevertheless erroneous in several respects. The term "strict necessity" first appeared in our law in Howley v. Chaffee, 88 Vt. 468, 474, 93 A. 120, 122 (1915). The issue there, however, was not whether the Court should apply a rule of "strict" or "loose"

necessity in easement-by-necessity cases. Indeed, there was no dispute that the plaintiff could not show necessity because his parcel "front[ed] on one of the principal streets of the city." Id. at 473, 93 A. at 122. The issue instead was whether a reservation of an easement by implication, a separate doctrine, required the element of necessity as defined for an easement by necessity, or some other standard easier to meet. See id. The answer was that the implied reservation required necessity as defined in the easement by necessity cases, particularly in Dee v. King, 73 Vt. 375, 50 A. 1109 (1901). **To the extent the Court used the word "strict," it was to compare the elements in the different theories; that is, the plaintiff strictly had to show necessity and nothing less.** See Poronto v. Sinnott, 89 Vt. 479, 481-82, 95 A. 647, 648 (1915) (summarizing holding in Howley that "strict necessity" is required in a case of easement by implied reservation).

¶ 9. In Dee, the plaintiff also was able to access his property, but only over a hill that could not "be crossed without making several turns, and then only with very light loads." 73 Vt. at 377, 50 A. at 1110. The Court drew a **fundamental distinction-to which we have repeatedly returned-between "extreme inconvenience," which would not justify an easement by necessity, and "necessity, and not convenience, that gives the right."** 73 Vt. at 378, 50 A. at 1110; accord Tallarico v. Brett, 137 Vt. 52, 58, 400 A.2d 959, 963 (1979); Howley, 88 Vt. at 478, 93 A. at 122. As Dee explained, the plaintiff's access to his property was "inconvenient and expensive" but not "impracticable," and therefore was not so deficient as to invoke the doctrine. 73 Vt. at 378, 50 A. at 1110. Although definitions in other jurisdictions vary, it is noteworthy that states requiring strict necessity often employ similar language. See, e.g., Johnson v. Shoults, 160 S.W.3d 440, 442 (Mo. Ct. App. 2005) ("Strict necessity has been interpreted to mean the absence of a reasonably practical way to and from plaintiff's land . . . ."); Watson v. Dundas, 136 P.3d 973, 979-80 (Mont. 2006) ("Strict necessity means a lack of practical access to a public road for ingress and egress.").

¶ 10. Therefore, **if there is a distinction to be drawn from our prior decisions, it is between mere inconvenience and necessity, with a lack of reasonably practical access required to find an easement by necessity. Thus understood, the record here leaves no doubt that without use of the road across State land, plaintiff would have no reasonably consistent, practical means of reaching his property; rather, he would be subject to the constant vicissitudes of motor boats, weather, and water conditions. In addition, he would have virtually no access for those periods of the year when the pond could not be safely traversed because of ice or snow. (**fn2)

¶ 11. The real lesson of these cases, however, lies in the nature of the property interest protected. On this point, the holding of Traders is significant. As we there explained, **"since the easement is based on social considerations encouraging land use, its scope ought to be sufficient for the dominant owner to have the reasonable enjoyment of his land for all lawful purposes."** 142 Vt. at 494, 459 A.2d at 979-80. Earlier cases foreshadow this emphasis on land use protection. See Thwing, 68 Vt. at 131, 34 A. at 428-29 (recognizing that an easement must be "necessary to the enjoyment of the land"); Wiswell v. Minogue, 57 Vt. 616, 621 (1885) (holding that easement arises from the "necessity of a right of way to the

reasonable use and enjoyment of land"); Higbee, 12 Vt. at 123 (finding that easement requires showing of necessity "to the enjoyment" of the property).

¶ 12. Plainly, **without use of the road, plaintiff would lack any practical means of access for the "reasonable enjoyment of his land."** While the property may be accessible by water for part of the year, the State made no real claim - and the trial court here made no finding-that this represents access adequate for reasonable enjoyment of the property. **We depend on roads and automobiles for transporting not only our family and friends, but all our basic necessities to and from our homes,(fn3) and it is a quaint but ultimately pointless fiction to pretend that water - much less ice-represents a sufficient substitute.**

¶ 13. Although the trial court here relied on the principle, accepted in a few other jurisdictions, that **water access defeats an easement by necessity, this view has not been adopted in Vermont, and it is contrary to the trend in most other jurisdictions**. The nearest Vermont decision on point is Clark v. Aqua Terra Corp., 133 Vt. 54, 329 A.2d 666 (1974). The dispute there arose from an 1857 conveyance of a point of land on Lake Champlain to the United States for the construction and operation of a lighthouse. Id. at 56, 329 A.2d at 667. The property was bounded to the south, east, and west by water, and on the north by property retained by the original owner, Danforth Mott. Id. Many years later, defendant Aqua Terra Corporation-a successor-in-interest to the Mott parcel-blocked access by the subsequent purchasers of the lighthouse property, the Clarks, to a roadway leading from the point to the town road, resulting in the lawsuit. Id. at 57, 329 A.2d at 667-68.

¶ 14. The trial court ruled in favor of the Clarks on the basis of adverse possession. Although defendant challenged the factual basis of the ruling, Chief Justice Barney gave scant attention to its claims, observing that the weight of the evidence was for the trial court to decide. "But assuming the facts to be as the defendant urges them," the Chief Justice continued, "the result in this case would not be affected." Id. at 57, 329 A.2d at 668. For the simple fact was, as Chief Justice Barney had earlier observed, the original grant from Mott to the United States gave rise to an easement by necessity at the very outset. "Under the law of Vermont the circumstances of this grant from the Motts to the United States would generate in the United States a right-of-way by necessity." Id. at 56, 329 A.2d at 667.

¶ 15. The trial court here dismissed Aqua Terra as "of little assistance," noting that it contained little analysis of the easement-by-necessity issue and no direct discussion of the effect, if any, of access to the property by means of Lake Champlain. We do not believe, however, that the case is so easily dismissed. The Court was eminently aware of the availability of this alternative means of access. Indeed, Chief Justice Barney observed in the opinion's second sentence that "[t]he position of the defendant would cut off all access except by water or over winter ice." Id. at 54, 329 A.2d at 667. Moreover, in Traders, we cited Aqua Terra not once, but three times, for **the principle that an easement by necessity arises at the instant the original property is divided, and remains in existence so long as the necessity exists**. Traders, 142 Vt. at 492, 459 A.2d at 979 ("At that instant, a way of necessity arose over the lands severed for the benefit of the original grantor.")

(citing Aqua Terra, 133 Vt. at 57, 329 A.2d at 668); id. at 493, 459 A.2d at 979 ("In this case, plaintiff's predecessors acquired a way of necessity in 1943, through their grantor, the common owner.") (citing Aqua Terra, 133 Vt. at 57, 329 A.2d at 668); id. at 493-94, 459 A.2d at 979 ("Therefore such a way exists only so long as the necessity which creates it: if, at some point in the future access to plaintiff's land over a public way becomes available, the way of necessity will thereupon cease.") (citing Aqua Terra, 133 Vt. at 56-57, 329 A.2d at 668).

¶ 16. Even if we accept the trial court's dismissal of Aqua Terra as binding authority, however, the question remains whether our other precedents or sound policy support the navigable-water exception. The trial court concluded that we must apply the exception because it was the law in 1959, at the time of the original conveyance in this case. We disagree for two reasons. First, as noted, **our case law has long made practical access to a public road the linchpin of the easement-by-necessity doctrine.** This was the law at the time of the original conveyance in 1959, and it remains so today. Indeed, the navigable-water exception has been widely regarded by courts and commentators as archaic and unrealistic for many decades. See generally Cale v. Wanamaker, 296 A.2d 329, 333 (N. J. Super. Ct. Ch. Div. 1972) ("Although some courts have held that access to a piece of property by navigable waters negates the 'necessity' required for a way of necessity, the trend since the 1920's has been toward a more liberal attitude in allowing easements despite access by water . . . . "); Note, Property Law-Minnesota's Lakeshore Property Owners Without Road Access Find Themselves Up a Creek Without a Paddle-In re Daniel for the Establishment of a Cartway, 30 Wm. Mitchell L. Rev. 725, 751 ("Since 1966, the vast majority of cases addressing water access have similarly found water access to be unreasonable in light of current modes of transportation."); E. Kellett, Annotation, Easements: Way by Necessity Where Property is Accessible by Navigable Water, 9 A.L.R.3d 600, 603 (1966) ("The 'trend,' if it may be so called, toward a more liberal attitude in allowing easements despite access by water, might therefore be explained as a tacit recognition of the fact that most people today think in terms of 'driving,' rather than 'rowing,' to work, home, or market.").

¶ 17. The trial court relied on decisions from other states that had decided the question many years ago and, because of stare decisis, have consistently adhered to their early precedents.(fn4) Vermont, however, had not addressed the effect of navigable waters on easements by necessity at the time of the conveyance in this case, and there is no way to definitively determine what we might have decided in 1959. Nevertheless, the same reasons that militate against accepting water access as a legally adequate substitute today would, in our view, have applied with equal force then.

¶ 18. Second, we are not, in fact, persuaded that we must apply different versions of the common law based on when interests in land arise, and act as if we were judges at that time. **The issue here is about use**. As the Restatement (Third) of Property (Servitudes) § 2.15, Cmt. d (2000) states:

> **What is necessary depends on the nature and location of the property, and may change over time. Access by water, while adequate at one time, is**

generally not sufficient to make reasonably effective use of property today. Land access will almost always be necessary, even though water access is available. . . . Until recently, access for foot and vehicular traffic tended to be the only rights regarded as necessary for the enjoyment of surface possessory estates. However, the increasing dependence in recent years on electricity and telephone service, delivered through overland cables, justify the conclusion that implied servitudes by necessity will be recognized for those purposes.

We should not freeze the common law in time, holding that for some landowners water access is sufficient, and for others it is not, or that some landowners can have electricity but others cannot. Today's standards compel the conclusion that access to navigable water is generally not legally sufficient, standing alone, to defeat a finding of necessity."

Myers v. LaCasse, 2003 VT 86A

"¶ 16**. A way of necessity is "a fiction of law,"** Howley v. Chaffee, 88 Vt. 468, 473, 93 A. 120, 122 (1915), **that arises when the division and transfer of commonly owned land results in a parcel left entirely without access to a public road.** See Traders, Inc. v. Bartholomew, 142 Vt. 486, 492, 459 A.2d 974, 978 (1983). **In such a case, "the grantee of the landlocked parcel is entitled to a way of necessity over the remaining lands of the common grantor or his successors in title."** Id. at 491. **Thus, "[t]o obtain a way of necessity, one must show that (1) there was a division of commonly owned land, and (2) the division resulted in creating a landlocked parcel.**" Okemo Mountain, Inc. v. Town of Ludlow, 171 Vt. 201, 206, 762 A.2d 1219, 1224 (2000). Our earlier cases described the rationale for the way of necessity as the implementation of the presumed intent of the grantor of the landlocked parcel. See Tracy v. Atherton, 35 Vt. 52, 55-56 (1862). Subsequent cases have, however, emphasized the public policy rationale that "no land be left inaccessible for the purposes of cultivation." Howley, 88 Vt. at 473, 93 A. at 122; Traders, Inc., 142 Vt. at 491, 459 A.2d at 979 (" 'Its philosophy is that the demands of our society prevent any man-made efforts to hold land in perpetual idleness as would result if it were cut off from all access by being completely surrounded by lands privately owned.' ") (quoting 2 Thompson on Real Property § 362, at 382 (1980)). This shift in emphasis is consistent with the development of the law in other jurisdictions. See J. Simonton, Ways By Necessity, 25 Colum. L. Rev. 571, 576-77 (1925). Thus, the new Restatement provision asserts that an easement by necessity avoids the costs involved if the property is deprived of rights necessary to make it useable, whether the result is that it remains unused, or that the owner incurs the costs of acquiring rights from landowners who are in a position to demand an extortionate price because of their monopolistic position.
1 Restatement (Third) of Property (Servitudes) § 2.15 cmt. a (2000).

¶ 17**. In this case, it is undisputed that a way of necessity arose over Parcel I for the benefit of Parcel II as a result of First Vermont's strict foreclosure of the third mortgage on Parcel I and defendants' failure to redeem, which eliminated defendants' equitable title in Parcel I and landlocked Parcel II**. This is precisely the holding of Traders, Inc. See Traders, Inc., 142 Vt. at 492, 459 A.2d at 979.

¶ 18. Plaintiff argues, however, that Traders, Inc. does not apply when additional superior mortgages exist and are thereafter foreclosed. In such circumstances, she asserts that the priority of the interests in the land should be determined by the common law rule of "first in time, first in right." See First Twin State Bank v. Hart, 160 Vt. 613, 613, 648 A.2d 820, 821 (1993) (mem.). She notes that this rule is routinely applied to easements that come into existence after a mortgage is given so that foreclosure of the mortgage eliminates the easement. See generally L.S. Tellier, Annotation, Foreclosure of Mortgage or Trust Deed as Affecting Easement Claimed In, Over, or Under Property, 46 A.L.R.2d 1197 (1956) (collecting cases). **Here, the 1990 mortgage preexists the foreclosure of the third mortgage that created the way of necessity, and, as a result, plaintiff argues, foreclosure of those mortgages should extinguish the way of necessity if defendants do not redeem.**

¶ 19. The trial court disagreed, ruling that the claimed way of necessity was not junior to the mortgages held by plaintiff and thus not subject to foreclosure, for three reasons. First, a reservation of easement must be implied in the granting of the 1990 mortgage because "the law must charge the parties with foresight of a potential way of necessity, in the event a foreclosure eventually resulted in a severance of the two parcels." Second, there is a strong public policy against landlocking land. Third, plaintiff was attempting to foreclose on collateral that was not part of the original security agreement.

¶ 20. We agree with the trial court that defendants will continue to have a way of necessity over Parcel I for the benefit of Parcel II in the event that the 1990 mortgage is foreclosed. We believe this result is the necessary consequence of Traders, Inc.

¶ 21. This is a case of first impression in Vermont, and apparently elsewhere. **Plaintiff argues that we should follow case law from other jurisdictions holding that a preexisting mortgage has priority over a later-created way of necessity and thus extinguishes it through foreclosure.** With one exception, however, these cases involve ways of necessity created by the mortgagor's voluntary transfer of unmortgaged landlocked property to third parties. See, e.g., Bush v. Duff, 754 P.2d 159, 164 (Wyo. 1988) (easement by necessity extinguished by foreclosure of mortgage on servient estate granted prior to conveyance that landlocked dominant estate; citing cases), overruled on other grounds, Ferguson Ranch v. Murray, 811 P.2d 287 (Wyo. 1991); Penn Mutual Life Ins. Co. v. Nelson, 132 P.2d 979, 981 (Or. 1943) (way of necessity arising after mortgage is granted on servient estate is subject to foreclosure in later action). The holding in these cases protects the mortgagee by ensuring that, upon foreclosure, the mortgagee acquires exactly such title as the mortgagor owned at the time the mortgage was executed, and no less. Kling v. Ghilarducci, 121 N.E.2d 752, 757 (Ill. 1954) ("[T]he purchaser at the foreclosure sale acquires the title as it stood at the date of the mortgage."); Bush, 754 P.2d at 164 ("A mortgagor is not permitted to create an easement in mortgaged land paramount to the rights of the mortgagee."). In other words, the rule prevents the mortgagor from diminishing the collateral originally given for the loan.

¶ 22. The one exception is Leonard v. Bailwitz, 166 A.2d 451 (Conn. 1960), a case essentially identical to Traders, Inc. As in Traders, Inc., the lack of access to the landlocked parcel in Leonard was caused by the strict foreclosure of the parcel with road access. Id. at 454. Unlike Trader's, Inc., however, the Connecticut Supreme Court held that the foreclosure did not create a way of necessity for two reasons. Id. at 454-55. First, the court explained that when the purchase money mortgage was executed, legal title was conveyed to the mortgagee subject to the mortgagor's right of redemption should the mortgagee foreclose. Id. at 454. Consequently, the court held that there was no severance of the parcels at the time of the foreclosure because the mortgagee already had legal title and the foreclosure action merely cut off the mortgagor's right of redemption. Id. Second, the court held that irrespective of the conveyance of the fee to the mortgagee, because this was a purchase money mortgage it had priority over claims "arising or attaching through the purchaser mortgagor." Id. at 455. This second part of the rationale is essentially the same as that discussed above for situations where the mortgagor voluntarily transfers the landlocked parcel after the mortgage is given.

¶ 23. **If we were to accept the purchase money mortgage rationale of Leonard, which is plaintiff's position, we would not allow the foreclosure of any mortgage on the parcel with road access to create a way of necessity because in every foreclosure action a mortgagee holds legal title which precedes in time any way of necessity. Accordingly, all mortgagees could argue equally that they were entitled to a security unburdened by the way of necessity because their interest(s) had priority over the foreclosed party's.** In Trader's, Inc., we declined to follow this reasoning and held that the mortgagee's interest did not have priority over the foreclosed party's newly created way of necessity-essentially the mortgagee was treated as a purchaser of the property and its preexisting property interest was given no effect. In short, to follow Leonard is to overrule Traders, Inc.

¶ 24. Although we did not explain our holding in Traders, Inc., as the court attempted in Leonard, we think that the considerations discussed by the trial court in this case are paramount. That is, when the mortgagee took its mortgage covering only a part of the mortgagor's adjacent property, it must be charged "with foresight of a potential way of necessity in the event a foreclosure eventually resulted in a severance of the two parcels." The same can be said of the mortgagees in this case. Accordingly, the Traders, Inc. rationale requires that we recognize the way of necessity in this case.

¶ 25. We do not view a rationale that is based on the knowledge of the mortgagee when the mortgage was created as inconsistent with the holding of Traders, Inc. that a severance occurred by operation of law when the mortgagee foreclosed. Nor do we question the Traders, Inc. holding, which is the main point of theoretical disagreement with Leonard and is thus central to the decision. We must consider the mortgagees both when the mortgage was given and when the foreclosure action occurred. **We reconcile the need to look at both points in time in a case involving mortgage foreclosure in equity, because it is appropriate to look at the knowledge and expectations of the parties.** The first mortgagee knew or should have known that under Traders, Inc. if the mortgagor defaulted, its foreclosure would have created a way of necessity. This was the necessary consequence of

taking a mortgage on the property with road access, while leaving the property without road access unencumbered. It is illogical to increase its rights because of the presence of junior mortgages.

¶ 26. **Although our holding follows from the public policy rationale for the way of necessity, it is fully consistent with equitable principles**. See Merchants Bank v. Lambert, 151 Vt. 204, 206, 559 A.2d 665, 666 (1989) ("[F]oreclosure actions are equitable in nature and therefore it is proper for the court to weigh the equities of the situation."). The "first in time, first in right" rule on which plaintiff relies is, in fact, an equitable maxim that can be subject to other equitable considerations. See Beeman v. Cooper, 64 Vt. 305, 307-08, 23 A. 794, 795 (1892). For example, in a very early decision, this court held that a mortgage securing future advances gave priority to debts arising after those secured by a second mortgage, at least where the second mortgagee does not give notice to the first mortgagee that it will not be subject to the future debts. See McDaniels v. Colvin, 16 Vt. 300, 306 (1844). As another example, we have held that a mortgagee that gives up a superior position over an inferior mortgage by mistake nevertheless retains priority when creating a new, subsequent mortgage. See Burlington Bldg. & Loan Ass'n v. Cummings, 111 Vt. 447, 453, 17 A.2d 319, 322 (1941). Here, plaintiff's mortgage interest is subject to a greater equity.

¶ 27. **Further, it is entirely consistent with equitable principles to charge the mortgagee with knowledge that the mortgagor has an interest that will become a way of necessity on foreclosure. Equity recognizes both actual and implied, or inquiry, notice. Thus, if a party has "sufficient facts concerning . . . [another's] interest in the property to call upon him to inquire, he is charged with such facts as diligent inquiry would disclose."** Black River Assoc., Inc. v. Koehler & Dion, 126 Vt. 394, 399, 233 A.2d 175, 179 (1967); see also Fed. Land Bank v. Pollender, 137 Vt. 42, 46, 399 A.2d 512, 515 (1979). Here, defendants' title to the now-landlocked land was of record, and a reasonable inquiry would have shown that its only road access was through the mortgaged property. Indeed, the obligation of the mortgagee to inquire and learn of the potential way of necessity is implied in our decision in Traders, Inc. See William Dahm Realty Corp. v. Cardel, 16 A.2d 69, 71-72 (N.J. Ch. 1940) (subsequent grantee of land burdened by easement of necessity charged with notice thereof because examination of land records and inspection of area would have revealed landlocked character of land in favor of which easement was implied).

¶ 28. In reaching our holding, **we reject plaintiff's position that by sequencing mortgage foreclosures, mortgagees can create, and then extinguish, ways of necessity.** If the first mortgagee had foreclosed on its mortgage, it would clearly have created a way of necessity under Traders, Inc. As we discussed above, we can think of no reason why it is freed of that way of necessity because the third mortgagee foreclosed first. Again, we emphasize that the primary rationale for the way of necessity is the public policy against having land lay idle because of lack of access. See Simonton, supra, 25 Colum. L. Rev. at 602 ("[T]here have been very few cases where the owner of landlocked land has been unable to get an easement by necessity."). Allowing sequencing of mortgage foreclosures alone to defeat the way of necessity wholly undermines this public policy.

¶ 29. We also reject plaintiff's argument that defendants can adequately protect their interests through their right to redeem. If we were to follow plaintiff's logic and hold that the way of necessity creates only an equity of redemption, the right to redeem is of limited value. Defendants cannot redeem their way of necessity without also redeeming the legal title to the land and paying the outstanding mortgage indebtedness. See Restatement (Third) of Property (Mortgages) § 6.4 cmt. b (2000) ("The mortgagee is not obligated to discharge the mortgage, or to give it up by subrogation, unless it has received payment in full. This includes not only the principal debt, but all legally enforceable additional charges."). Of course, if defendants could pay off the mortgages, they would have done so to retain their legal title to the land, not to protect the way of necessity. In these circumstances, therefore, the right to redeem to protect the way of necessity is illusory."

Traders, Inc. v. Bartholomew, 142 Vt. 486 (1983)

At pp. 490-492: "The trial court found that by their use of the discontinued road during the period from 1943 to 1976, the prior owners of the 121-acre parcel had established a prescriptive easement to the portion of the roadway leading to their land. The court further found that the scope of the easement was limited by the use which created it: ingress and egress to and from a single dwelling house, with appurtenant agricultural uses. This easement passed to plaintiff through its predecessors in title.
…
[3] **This Court has long since ruled that when, as a result of the division and sale of commonly owned land, one parcel is left entirely without access to a public road, the grantee of the landlocked parcel is entitled to a way of necessity over the remaining lands of the common grantor or his successors in title.** *Clark* v. *Aqua Terra Corp.,* 133 Vt. 54, 329 A.2d 666 (1974); *Pennock* v. *Goodrich,* 104 Vt. 134, 157 A. 922 (1932); *Willey* v. *Thwing,* 68 Vt. 128, 34 A. 428 (1896); *Tracy* v. *Atherton,* 35 Vt. 52 (1862); *Smith* v. *Higbee,* 12 Vt. 113 (1840).

A way of necessity rests on public policy often thwarting the intent of the original grantor or grantee, and arises "to meet a special emergency ... in order that no land be left inaccessible for the purposes of cultivation." *Howley* v. *Chaffee,* 88 Vt. 468, 473, 93 A. 120, 122 (1915). "Its philosophy is that the demands of our society prevent any man-made efforts to hold land in perpetual idleness as would result if it were cut off from all access by being completely surrounded by lands privately owned." 2 Thompson on Real Property § 362, at 382 (1980).

It is apparent from the cases cited and arguments propounded by defendants Bartholomew that they have **confused the law regarding a way of necessity with the wholly distinct doctrine of easements by implication. As we have had occasion to point out,** see *Howley* v. *Chaffee, supra,* 88 Vt. at 473, 93 A. at 122, **the two are distinguishable by the circumstances which give rise to them, the policy bases which support them and the legal consequences which flow from them**. See *Tallarico* v. *Brett,* 137 Vt. 52, 57, 400 A.2d 959, 962 (1979); *Chevalier* v. *Tyler,* 118 Vt. 448, 111 A.2d 722 (1955); *Wheeler* v. *Taylor,* 114 Vt. 33, 39 A.2d 190 (1944); *Read* v. *Webster,* 95 Vt. 239, 113 A. 814 (1921); *Howley* v. *Chaffee,*

supra; Goodall v. *Godfrey,* 53 Vt. 219 (1880). See generally, 2 Thompson, *supra,* §§ 355--362.

The Bartholomews correctly argue that there was a complete failure to prove the use made of the land by the common owner prior to and at the time of the severance. However, while such failure would be fatal to a finding of an easement by implication, *Tallarico* v. *Brett, supra***, and cases cited therein, it is totally irrelevant to a finding of a way of necessity. All that is required for the latter is the division of commonly owned land resulting in the creation of a landlocked parcel.** *Howley* v. *Chaffee, supra.*

A review of the facts indicates that prior to the foreclosure action in 1931, there was unity of title in the two northern parcels and the 121-acre southern parcel. By the foreclosure decree a severance occurred by operation of law, see *Goodall* v. *Godfrey, supra,* 53 Vt. at 226, thus leaving the 121-acre parcel landlocked. At that instant, a way of necessity arose over the lands severed for the benefit of the original grantor. *Clark* v. *Aqua Terra Corp., supra,* 133 Vt. at 57, 329 A.2d at 668. This way did not (nor can it ever) lie over the Bartholomews' southern parcel to the west of the 121 acres, for those lands were never held in common with the other three parcels. See *Howley* v. *Chaffee, supra,* 88 Vt. at 473, 93 A. at 122; *Tracy* v. *Atherton, supra,* 35 Vt. at 53--54. See also *Selvia* v. *Reitmeyer,* 156 Ind. App. 203, 209, 295 N.E.2d 869, 873 (1973) (citing 5 Restatement of Property § 474, at 2972 (1944)).”

Pennock v. Goodrich, 104 Vt. 134 (1932)

At p. 139: “[3--5] At the time plaintiffs deeded the Capron farm to defendants there was no way of getting to the Howard lot, as a matter of right, except over the Capron farm; in other words the Howard lot was landlocked. Since this was so, there was then a way of necessity over the Capron farm to the Howard lot. *Willey* v. *Thwing,* 68 Vt. 128, 34 Atl. 428; *Wiswell* v. *Minogue,* 57 Vt. 616; *Dee* v. *King,* 73 Vt. 375, 50 Atl. 1109; *Howley* v. *Chaffee,* 88 Vt. 468, 93 Atl. 120, L. R. A. 1915D, 1010. Peryea was then in possession of the Howard lot under the contract with plaintiffs described above. This, as we have seen, was a mere executory agreement to convey to him the Howard lot, the title thereto still being in the plaintiffs. It would seem, therefore, that the way of necessity then existed in their favor rather than in Peryea's, but be it either way, its existence and enjoyment was not affected by plaintiffs' deed to defendants. There being no express reservation of such way in plaintiffs' deed to defendants a reservation would be implied, since a way of necessity may give rise to an implied reservation as well as to an implied grant. See cases cited. It is said in *Howley* v. *Chaffee* that the foundation of this rule regarding **ways of necessity is said to be a fiction of law, by which a grant or reservation is implied, to meet a special emergency, on the ground of public policy, in order that no land be left inaccessible for the purposes of cultivation. Public policy demands no more than that the owner of the landlocked tract may have access thereto.”**

3.2.2 Easements Implied by Prior Use (Quasi Easements)

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 2.12 Servitudes Implied from Prior Use

Unless a contrary intent is expressed or implied, the circumstance that prior to a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another, implies that a servitude was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use.

The following factors tend to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use:

(1) **the prior use was not merely temporary or casual, and**
(2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and
(3) existence of the prior use was apparent or known to the parties, or
(4) the prior use was for underground utilities serving either parcel.

Berg v. State of Vermont, 2006 VT 116

> "The term "strict necessity" first appeared in our law in Howley v. Chaffee, 88 Vt. 468, 474, 93 A. 120, 122 (1915). The issue there, however, was not whether the Court should apply a rule of "strict" or "loose" necessity in easement-by-necessity cases. Indeed, there was no dispute that the plaintiff could not show necessity because his parcel "front[ed] on one of the principal streets of the city." Id. at 473, 93 A. at 122. **The issue instead was whether a reservation of an easement by implication, a separate doctrine, required the element of necessity as defined for an easement by necessity, or some other standard easier to meet. See id. The answer was that the implied reservation required necessity as defined in the easement by necessity cases**, particularly in Dee v. King, 73 Vt. 375, 50 A. 1109 (1901). To the extent the Court used the word "strict," it was to compare the elements in the different theories; that is, the plaintiff strictly had to show necessity and nothing less. See Poronto v. Sinnott, 89 Vt. 479, 481-82, 95 A. 647, 648 (1915) (summarizing holding in Howley that "strict necessity" is required in a case of easement by implied reservation)."

Tallarico v. Brett, 137 Vt. 52 (1979)

At pp. 57-58: "[1] We first dispose of claims made by the Bretts. They primarily rely on the case of *Read* v. *Webster,* 95 Vt. 239, 113 A. 814 (1921). That case involves **the concept of an easement by implication. *Read* holds that if an owner permanently alters two parts of his land, imposing a burden on one for the benefit of the other, and conveys one portion without expressly granting or reserving the benefit, the law will imply the grant or reservation if: (1) the benefit to the dominant and the**

burden to the servient estate exist and are obvious at the time of the conveyance; (2) the common owner used the premises in their altered condition long enough to show that the change was intended to be permanent; and (3) such an easement is a strict necessity in that there is no other reasonable mode of enjoying the dominant estate. "The underlying principle is that the conveyance of a thing imports a grant of it as it actually exists at the time the conveyance is made, unless the contrary intention is manifested in the grant." *Id.* at 243, 113 A. at 816.

[2] The appellants' reliance on *Read* is misplaced. **That case applies only where the conveyance is silent regarding the easement.** The deed from the Pearsons to the Bretts grants an express right of way over the Tallarico premises, and the description in the deed controls its location. See *Holden* v. *Pilini,* 124 Vt. 166, 200 A.2d 272 (1964); *Scott* v. *Leonard,* 119 Vt. 86, 119 A.2d 691 (1956). "

Scanlan v. Hopkins, 128 Vt. 626 (1970)

At pp. 630-631:"…**If a servitude was created against lands retained by the defendants, it must be by implication based on the circumstances shown by the evidence at the time of the gran**t. *Wheeler* v. *Taylor,* 114 Vt. 33, 37, 39 A.2d 190; *Read, Administrator* v. *Webster,* 95 Vt. 239, 244, 113 A.2d 814.

According to the defendants' evidence, the discharge from the Bonneau culvert follows the natural drainage to the pond in the same manner that existed when the defendants owned the entire tract. And other than the fact that the grantors were required to contain the flow by installation of the culvert, the discharge of surface water to the land below remained the same.

[4] More important, **from the circumstances which existed at the time of the grant, it cannot be gathered that either of the parties to the deed intended to add a new benefit to the land conveyed or increase the burden on the land retained. Neither is it shown that such an easement was necessary to the full enjoyment of the land conveyed. These are essential requisites to the creation of an easement by implication**. *Chevalier* v. *Tyler,* 118 Vt. 448, 450, 111 A.2d 722; *Read, Administrator* v. *Webster, supra,* 95 Vt. at 244"

Chevalier v. Tyler, 118 Vt. 448 (1955)

At pp. 450-451: "[1,2] **The defendants, in support of their claim of right to use the two cesspools and permit their overflow to run onto the 25 acre piece, rely upon an easement by implication. To create such an easement there must be---[1] Unity and subsequent separation of title. [2] Obvious benefit to the dominant estate and burden to the servient portion of the premises existing at the time of the conveyance. [3] Use of the premises by the common owner in their altered condition long enough before the conveyance to show that the change was intended to be permanent. [4] Necessity for the easement. *Read* v. *Webster,* 95 Vt 239, 244, 113 A 814, 16 ALR 1068. There can be no reservation of an easement by implication unless the easement is one of strict necessity**. *Wheeler* v. *Taylor,* 114 Vt 33, 34, 39 A.2d 190."

Wheeler v. Taylor, 114 Vt. 33 (1944)

At pp. 36-37: "[2,3] **There can be no reservation of an easement by implication unless the easement is one of strict necessity** (*Howley* v. *Chaffee,* 88 Vt. 468, 474, 93 A 120, LRA 1915 D, 1010; *Read, Admr,* v. *Webster,* 95 Vt. 239, 244, 113 A 814, 16 ALR 1068) but it has been held that **in the case of an implied easement by grant a reasonable necessity suffices**. *Goodall* v. *Godfrey,* 53 Vt. 219, 222--3, 38 Am Rep 671. **The rule is that everything apparent and continuous that is essential to the beneficial use and enjoyment of the property designated in the grant is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the grant as far as the grantor had power to grant it.** *McElroy* v. *McLeay,* 71 Vt. 396, 398--9, 45 A 898; *Dee* v. *King,* 77 Vt. 230, 235, 59 A 839, 68 LRA 860; *Harwood* v. *Benton et al,* 32 Vt. 724, 733**. Of course the fact that the alleged dominant and servient tenements are not contiguous does not prevent the existence of an implied easement**. *Perrin* v. *Garfield,* 37 Vt. 304, 312.

[4, 5] Necessity alone, however, does not create the easement, but is a circumstance to which resort is had to determine the real intention of the parties and raise the implication of a grant. *Read, Admr,* v. *Webster,* 95 Vt. 239, 244, 113 A 814, 16 ALR 1068; *Willey, Admx,* v. *Thwing,* 68 Vt. 128, 130, 34 A 428. "**But implied easements, whether by grant or reservation, do not arise out of necessity alone. Their origin must be found in a presumed intention of the parties, to be gathered from the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.**" *Dale* v. *Bedal,* 305 Mass 102, 25 NE2d 175, 176, and furthermore **"it is the necessity at the time of the conveyance, and as things then were, without alteration, that is to govern."** *McElroy* v. *McLeay,* 71 Vt. 396, 404, 45 A 898, 901. **The existence of an easement by implication depends upon the circumstances shown by the evidence as they were at the time of the grant.** *Read, Admr,* v. *Webster,* 95 Vt. 239, 244, 113 A 814, 16 ALR 1068."

3.2.3 Easements By Prescription

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 2.16 Servitudes Created by Prescription: Prescriptive Use

A prescriptive use of land that meets the requirements set forth in § 2.17 creates a servitude. A prescriptive use is either

(1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or

(2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

§ 2.17 Servitudes Created by Prescription: Requirements

A servitude is created by a prescriptive use of land, as that term is defined in § 2.16, if the prescriptive use is:

(1) open or notorious, and

(2) continued without effective interruption for the prescriptive period.

Periods of prescriptive use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefited by the inchoate servitude.

In re Town Highway No. 20 of the Town of Georgia, 175 Vt. 626 (2003)

"¶ 21. The prescriptive easement claim deals with the Pent Road. From 1971 to 1994, Petitioner had access to the upper section of his property via the Pent Road that extends north over his property from the intersection of Bradley Hill Road and TH #20. The Town agreed to install a large culvert under the Pent Road near TH #20 in 1971, which made it possible for tractors and vehicles to access a gravel pit on Intervenors' property at the end of the Pent Road. With Petitioner's permission, Intervenors used the Pent Road to reach their gravel pit from 1973 to 1994. In 1994, apparently not long after Petitioner expressed interest in subdividing his property, Intervenor Gregory Bechard's father - who owned the farm at the time - requested that the Town remove the culvert. The culvert was subsequently removed by the Town on the order of Town Selectman Stephen Bechard, brother of Intervenor Gregory Bechard. Without the large drain, it was impossible to drive vehicles from Bradley Hill Road up the Pent Road. After the culvert removal, Petitioner refused to allow Intervenors to cross his property. Intervenors, however, did instruct a contractor to use the Pent Road to access their property after 1994, without Petitioner's permission.

¶ 22. **The elements necessary to establish a prescriptive easement are essentially the same as those for adverse possession.** Cmty. Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 155, 559 A.2d 1068, 1070 (1989). The trial court found that Intervenors used Petitioner's Pent Road, over which they claim a prescriptive easement, with the permission of the Petitioner. **Use of the road by permission is not adverse unless there has been a repudiation "either made know expressly to the owner or clearly indicated by unequivocal actions."** In re Estate of Smilie, 135 Vt. 217, 220, 372 A.2d 540, 543 (1977). Additionally, use since 1994, even if adverse, is not **sufficient to establish a prescriptive easement** because use for less than **fifteen years** does not fulfill the **statutory time requirement**. 12 V.S.A. § 501; Cmty. Feed Store, 151 Vt. at 155, 559 A.2d at 1070. Thus, Intervenors' claim to use of the Pent Road through prescriptive easement fails."

In re: .88 Acres, 165 Vt. 17 (1996)

At pp.19-21: "An action for the recovery of lands must be "commenced within fifteen years after the cause of action first accrues." 12 V.S.A. § 501. This limitations period does not apply, however, "to lands given, granted, sequestered or appropriated to a public, pious or charitable use, or to lands belonging to the state." 12 V.S.A. § 462**. In appellants' view, because the subject property was given for a public use, and has since been used or appropriated for public purposes, the limitations period in § 501 does not apply, and thus the Town may not obtain the property by adverse possession. We disagree…**

…Section 462, which has remained unchanged since 1801, see *Society for the Propagation of the Gospel in Foreign Parts v. Town of Sharon,* 28 Vt. 603, 612 (1856), is **Vermont's version of the generally accepted, common-law rule that a claim of title or right by adverse possession does not lie against public lands**. The principal policy consideration behind this rule is that it would be injurious to the public to allow adverse possession of lands dedicated to public use. 7 R. Powell, Powell on Real Property ¶1015, at 91--96--97 (Patrick J. Rohan ed., rev. ed. 1995); see *Williamstown Borough Auth. v. Cooper,* 591 A.2d 711, 715 (Pa. Super. Ct. 1991) (adverse possession does not lie against commonwealth because land is impressed with public use).

Municipal lands are presumed to be held for public use, and if that is not the case, it is usually because the municipality has failed to put the property to any use at all. See *Jarvis v. Gillespie,* 155 Vt. 633, 642, 587 A.2d 981, 987 (1991) (land owned by municipality is presumed to be given to public use; presumption can be rebutted, however, by demonstrating that town abandoned land). If we were to apply § 462 as suggested by appellants, municipalities would, for all practical purposes, be barred from obtaining lands through adverse possession. The moment a town took possession of lands for a public purpose, the property would be "appropriated" for public use, and under appellants' theory, the town could never adversely possess it. If, on the other hand, a town took possession of land but never put it to any use, the elements of an adverse possession claim would most likely not be met.

Precluding towns from adversely possessing property is unrelated to § 462's objective of preventing lands in public use from going into private hands. While we recognize that § 462 does not preclude adverse possession of municipal lands not in public use, see *id.* at 644, 587 A.2d at 988, the statute clearly was not intended to prevent municipalities from adversely possessing other lands. Indeed, it is generally recognized that public entities, including municipalities, may acquire land by adverse possession. 7 R. Powell, *supra,* ¶ 1015, at 91--102--03; 10 E. McQuillin, The Law of Municipal Corporations § 28.15, at 43 (3d ed. 1990).

Here, we need not decide whether § 462 can ever be applied against municipalities. See, e.g., 7 R. Powell, *supra,* ¶ 1015, at 91--103 (where one governmental entity claims adverse possession from another, courts have reached mixed results). Rather, we take the narrower approach dictated by the facts of this case. Section 462 is intended to enable property owners who hold land in public use to oust trespassers and preserve the public use, regardless of the length of time

the trespasser has possessed the land. Accordingly, the term "given, granted, sequestered or appropriated to a public ... use" in § 462 refers to the use made of the property by the legal owner, not the trespasser….

Appellants also contend that the Town's use of the doctrine of adverse possession to acquire title to the subject property violated their constitutional rights by taking the property without complying with the statutory condemnation procedures. We need not consider this argument, which is raised for the first time on appeal. See Houston v. Town of Waitsfield, 162 Vt. 476, 481, 648 Vt. 864, 867 (1994) (refusing to consider takings argument made for first time on appeal). **We note, however, that appellants are arguing, in effect, that a town can never adversely possess lands, a position contrary to accepted law. See 10 E. McQuillin, *supra,* § 28.15, at 43 (municipality's right to acquire property by condemnation proceedings does not necessarily exclude its right to acquire property by other means, such as adverse possession).”**

Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152 (1989)

At pp. 155-158: “[1] The elements necessary to establish a prescriptive easement and adverse possession are essentially the same under Vermont law: an adverse use or possession which is open, notorious, hostile and continuous for a period of fifteen years, and acquiescence in the use or possession by the person against whom the claim is asserted. Russell v. Pare, 132 Vt. 397, 401, 321 A.2d 77, 81 (1974); 12 V.S.A. § 501. **The difference lies in the interest claimed. The term "prescription" applies to the acquisition of nonfee interests, while "adverse possession" indicates that the interest claimed is in fee.** Russell v. Pare, 132 Vt. at 401, 321 A.2d at 81; Barber v. Bailey, 86 Vt. 219, 223, 84 A. 608, 611 (1912).

[2] **Adverse possession may be asserted either under claim of title (where claimant took possession under a deed which is for some reason defective), or under a claim of right which arises from the open, notorious and hostile possession of the land at issue. Where there is color of title, it is relatively simple to ascertain the extent of the possession claimed, since "actual and exclusive occupation of any part of the deeded premises carrie[s] with it constructive possession of the whole. ..."** Montgomery v. Branon, 125 Vt. 362, 365, 216 A.2d 41, 43 (1965). **In the absence of color of title, however, and where a lot has no definite boundary marks, adverse possession can only extend as far as claimant has actually occupied and possessed the land in dispute**. Langdon v. Templeton, 66 Vt. 173, 179, 28 A. 866, 871 (1893).

[3] Where prescriptive use is claimed, **our law requires proof similar to that needed to establish adverse possession under claim of rig**ht. In Morse v. Ranno, 32 Vt. 600, 607 (1860), this Court held that where a claim of prescriptive easement for a public highway over private land was made,

> **the extent of the acquisition, the width of the road, must be determined by the extent of the actual occupation and use. There can be no constructive possession beyond the limits which are defined by the user upon the land, or by other marks or boundaries marking the extent of the claim.**

See also Gore v. Blanchard, 96 Vt. 234, 242, 118 A. 888, 894 (1922) **(width of highway acquired by user is determined by the extent of the actual use and occupation or by other marks and boundaries indicating the extent of the claim).** In both Morse v. Ranno and Gore v. Blanchard, as with claims of adverse possession made without color of title, no constructive possession was held to exist beyond the actual occupancy or use made. The decisions did not, however, set forth any standard by which one must prove the limits of use, other than to refer to "marks and boundaries."

In Dennis v. French, 135 Vt. 77, 79, 369 A.2d 1386, 1387--88 (1977), **a prescriptive right of user of a roadway was found as to four uses: "[h]auling of firewood ... by entering said roadway from Route 302," "[e]ntering and leaving the ... property, by foot and tractor," "[h]auling hay, stones and brush from the ... property behind the house by truck or tractor," and "[t]o gain access to a chicken house maintained behind the house." This Court held that "[t]he extent of the presumed right is determined by the user, upon which is founded the presumed grant; the right granted being only co-extensive with the right enjoyed."** Id. at 80, 369 A.2d at 1388 (emphasis in original). As can be seen from the four uses found in Dennis, that Court did not require much specificity in defining the extent of the easements, but instead relied on a general outline of the uses made.

This approach to defining the extent of a prescriptive easement is reflected in the position taken by the drafters of the **Restatement of Property, which states that "[t]he extent of an easement created by prescription is fixed by the use through which it was created**." Restatement of Property § 477 (1944).

> No use can be justified under a prescriptive easement unless it can fairly be regarded as within the range of the privileges asserted by the adverse user and acquiesced in by the owner of the servient tenement. Yet, no use can ever be exactly duplicated. If any practically useful easement is ever to arise by prescription, the use permitted under it must vary in some degree from the use by which it was created. Hence, the use under which a prescriptive easement arises determines the general outlines rather than the minute details of the interest.

Id., comment b (emphasis added).

In California, case law requires claimants to show prescriptive easements by "a definite and certain line of travel" for the statutory period. Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 564, 571, 676 P.2d 584, 587, 199 Cal. Rptr. 773, 776 (1984). Despite the apparently restrictive nature of that standard, however, the Warsaw court, on facts almost identical to ours, found that an easement existed for the purpose of trucks turning around and positioning themselves at loading docks attached to plaintiff's building, stating that **"'[s]light deviations from the accustomed route will not defeat an easement, [only] substantial changes which break the continuity of the course of travel.** ...'" Id. (quoting Matthiessen v. Grand, 92 Cal. App. 504, 510, 268 P. 675, 679 (1928)); see also Wright v. Horse Creek Ranches, 697 P.2d 384, 388 (Colo. 1985) (adopts test

for determining extent as set forth in Restatement § 477); Reynolds v. Soffer, 190 Conn. 184, 190, 459 A.2d 1027, 1031 (1983) (where right of way was "clearly visible," it met the requirement that an easement be measurable with "reasonable certainty"; remanded to trial court for further findings as to extent); O'Brien v. Hamilton, 15 Mass. App. 960, 962, 446 N.E.2d 730, 732, review denied, 389 Mass. 1102, 448 N.E.2d 767 (1983) (extent must be measured by general pattern formed by adverse use); Preshlock v. Brenner, 234 Va. 407, 410, 362 S.E.2d 696, 698 (1987) (prescriptive easement is measured by the character of the use).

[4] From the case law cited above, it is clear that when a prescriptive easement is claimed, the extent of the user must be proved not with absolute precision, but only as to the general outlines consistent with the pattern of use throughout the prescriptive period. We hold that where a claimant adduces enough evidence to prove those general outlines with reasonable certainty, it has met its burden on that issue."

Patch v. Baird, 140 Vt. 60 (1981)

At pp . 63-65: "[1,2] The elements of a claim of prescriptive right are very much like those for adverse possession, *Abatiell* v. *Morse,* 115 Vt. 254, 258, 56 A.2d 464, 466 (1948); that is, **the use must be open, notorious, continuous for the requisite period (in this case 15 years** under 12 V.S.A. § 501), and hostile. *Russell* v. *Pare,* 132 Vt. 397, 401, 321 A.2d 77, 81 (1974). The elements of adverse use are not always expressed in the cases in the same language, see, e.g., *Spencer* v. *Lyman Falls Power Co.,* 109 Vt. 294, 302, 196 A. 276, 279 (1938), and confusion sometimes results. It is essential to test the claim according to its nature and purpose, as well as with the law's intent in mind.

In this case the only element relating to a prescriptive easement that is challenged on appeal by the plaintiff is the element of "hostility." One of the problems of language, seldom appreciated, is that it is almost crudely imprecise even though most of us view it as exact and definite. Unfortunately, every word used in a descriptive way carries with it some quality derived from other usage that may lend an unwanted modifying quality to the description. This is above and beyond the infinite variations in subjective views of the word's meaning. See *Latchis* v. *State Highway Board,* 120 Vt. 120, 123, 134 A.2d 191, 194 (1957).

[3, 4] **Here we have words like "hostile," "adverse," "exclusive," and "nonpermissive." All of these terms contain the thread of a common idea that the use of the right of way is not based on a consensual privilege given by the owner and recognizing his right to forbid such use, but rather based on a claim of a right to use the way as a limitation on the ownership of the holder of the underlying fee and without regard to permission. Thus, the "adverse" or "exclusionary" aspect required of evidence supporting a claim for a right of way by prescription relates to a contesting or challenging of a right in the owner of the fee to prohibit the use of the crossing, and contesting the existence of any right to give permission to the use.** "Exclusion," in the ordinary case of adverse possession, relates to challenging the owner's right to use the land at all, and is evidenced by enclosing or fencing the land, for example, or preventing the fee owner from going on or using the land.

[5, 6] The nature of a right of way is such that travel or usage as access is encouraged, and the notion of barring or fencing off, although sometimes a part of the meaning of "exclusion" for adverse possession, is not appropriate here. Therefore, **travel upon the right of way by the fee owner does not necessarily negate the "adverse" or "hostile" nature of the claimant. That nature is evidenced, at least in part, by usage without permission or against permission and by resistance to obstruction.**

[7--9] **The same is true of the rule as to adverse possession relating to general public use of the land. The right of ownership in fee includes the right to exclude others, but if the claimant is merely one of the general public with access to the land, and does not himself attempt to exclude others, he has not evidenced a claim of right to the land as against both the fee owner and the other users. The situation is different, however, where a right of way is claimed. Evidence of general public use does not negate the "adverseness" requirement, but, in the absence of any other evidence of a claim of right as against the owner in fee, it may raise a presumption that the use is permissive. As might be expected, the effect of any such presumption is dissipated with the introduction of any evidence that the use is claimed against the rights of an owner in fee.** *Begin* v. *Barone,* 124 Vt. 421, 423, 207 A.2d 252, 254--55 (1965)."

Russell & Russell v. Pare & Rodin, 132 Vt. 397 (1974)

At pp. 401-405: "[1] **The term "prescription" is usually applied to acquisition of easements or other non-fee interests. The term "adverse possession" is usually applied to acquisition of fee interests. This distinction is not always clear, but it is settled that the rules of law applicable to the two are in harmony**. *Abatiell* v. *Morse,* 115 Vt. 254, 258, 56 A.2d 464 (1947); *D'Orazio* v. *Pashby,* 102 Vt. 480, 485, 150 A. 70 (1930); *Barber* v. *Bailey,* 86 Vt. 219, 223, 84 A. 608 (1912).

The basic requirement for either is that the adverse use or possession must be open, notorious, continuous for 15 years, and hostile. The person against whom the claim is asserted must acquiesce in the use or possession by the claimant. *Laird Properties* v. *Mad River Corp.,* 131 Vt. 268, 277, 305 A.2d 562 (1973); *Higgins* v. *Ringwig,* 128 Vt. 534, 538, 267 A.2d 654 (1970); 12 V.S.A. § 501.

The doctrine derives from two separate but related theories. The first theory is the old doctrine of presumptions. It in pertinent part provides that use, accompanied by claim of right for the 15-year period, creates a presumption that a grant of the right was made. *Mitchell* v. *Walker,* 2 Aik. 266, 269 (Vt. 1827); *Shumway* v. *Simons,* 1 Vt. 53, 57 (1827); *Tracy* v. *Atherton,* 36 Vt. 503, 514--15 (1864). **The second theory is analogous to the statute of limitations. We view the applicable statute of limitations as a part of the doctrine**. See 12 V.S.A. § 501, referred to in *Higgins* v. *Ringwig, supra,* 128 Vt. at 358. Long and uninterrupted possessions should be supported. *Tracy* v. *Atherton, supra,* 36 Vt. at 514--15. The passage of time should foreclose litigation. *Shumway* v. *Simons, supra,* 1 Vt. at 57.

The plaintiffs must come forward with evidence to show the elements of adverse or prescriptive use. *Higgins* v. *Ringwig, supra,* 128 Vt. at 538. Their claim is not

defeated simply because the defendants produce evidence which could support a contrary inference. It is for the court below, as fact finder, to weigh the evidence. We must affirm the facts found if they are fairly and reasonably supported by credible evidence, *Laird Properties* v. *Mad River Corp., supra,* 131 Vt. at 278, and are not "clearly erroneous", V.R.C.P. 52; *Wells* v. *Village of Orleans,* 132 Vt. 216, 315 A.2d 463, 466 (1974); *Seaway Shopping Center Corp.* v. *Grand Union Stores, Inc.,* 132 Vt. 111, 315 A.2d 483, 486--87 (1974).

…

The record, by the testimony of the witnesses, clearly supports the determination of the chancellor that the use of the disputed parcel by the owners of Seymour Lodge was open and notorious. Chief Justice Redfield observed in *Arbuckle* v. *Ward,* 29 Vt. 43, 53 (1856), that:

> **[T]he mere use, if so open and notorious as obviously to attract the notice of the owner of the soil, or if expressly shown to have come to his knowledge, will *prima facie* establish the right, and it will be incumbent upon the owner to show in some mode that it was not used under a claim of right ..., or that he did not understand it, and was not bound to so regard it from the nature and extent of the use.**

[2, 3] **Open and notorious use, without countervailing evidence of permission, gives rise to a presumption of claim of right**. *Higgins* v. *Ringwig, supra,* 128 Vt. at 538--39. **It is not necessary for a prescriptive claimant to voice his claim if his use is such as to indicate that a prescriptive claim is being asserted.** *Waterman* v. *Moody,* 92 Vt. 218, 238--39, 103 A. 325 (1918); *Barber* v. *Bailey, supra,* 86 Vt. at 223.

…

[5] **In the absence of permission, the use of the disputed parcel under a *prima facie* and evidentiarily established claim of right firmly establishes the hostility of that use.** *Cf. Barber* v. *Bailey, supra,* at 223--24.

…

[6, 7] The general rule is, as defendants argue, that privity is required **for tacking of adverse use periods** in establishing prescriptive easements. Deed conveyance is, however, not the only way to establish that privity**. The general rule is that in these circumstances privity results at least when the successor assumes the use of the easement directly from his predecessor as a part of his receipt of the dominant estate, irrespective of whether the instruments involved mention the easement. Se**e generally, 2 Am. Law of Property § 8.59 (A. Casner ed. 1950); Restatement of Property § 464 and comment (1944); Ballentine, *Title by Adverse Possession,* 32 Harv. Law Rev. 135, 147--59 (1919); Note, 32 Cal. L. Rev. 438--39 (1944). The evidence here clearly demonstrates that the Shaws assumed use of the easement, the subject of this litigation, directly from their predecessors, the Hopkins. The defendants take nothing by this claim. "

Sabins v. McAllister, 116 Vt. 302 (1950)

At pp. 306-307: "[7] The question of whether there is sufficient evidence to sustain the chancellor's findings of adverse possession is raised by the defendants' exceptions. Our rule for gaining title to land by adverse possession is that a possession that will

work an ouster of the owner must be open, notorious, hostile and continuous. **The tenant must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominion and planted his standard of conquest.** Adverse possession, in order to be effective to extinguish an easement, must be open, unequivocal, continued, and equivalent to an ouster of the dominant owner, and incompatible with the possession and use by him. *Scampini* v. *Rizzi,* 106 Vt 281, 286, 172 A 619.

…

[9—11] The defendants and the plaintiffs and their predecessors in title were **tenants in common in the easement.** Cotenancy, 14 Am Jur § 19. As such, each had the right to use the driveway. There is no evidence in the case tending to show that the plaintiffs, or their predecessors in title, made any such use to which objection could properly have been made by the defendants. Thus no right to the exclusive use by adverse possession was obtained. *Arnold* v. *Stevens,* 24 Pick 109, 41 Mass 106, 35 Am Dec 305. The rule in such cases has previously been stated by this Court as follows**: "If a co-tenant enter upon the whole or part of the common property, as he has a legal right to do, the law presumes that he intends nothing beyond an assertion of his right. In order to sever his relation as co-tenant, and render his possession adverse, it must be affirmatively shown that the other co-tenants had knowledge of his claim of exclusive ownership, accompanied by such acts of possession as were not only inconsistent with, but in exclusion of, the continuing rights of the other co-tenants, and such as would amount to an ouster as between landlord and tenant."** *Vt. Marble Co.* v. *Eastman,* 91 Vt 425, 465, 101 A 151, and cases cited. The plaintiffs have failed to bring themselves within the rule."

3.2.3.a Not Applicable to Certain Public Uses

12 V.S.A. § 462 Lands for a public, pious or charitable use

Nothing contained in this chapter shall extend to lands given, granted, sequestered or appropriated to a public, pious or charitable use, or to lands belonging to the state.

MacDonough-Webster Lodge No. 26 v. Wells, 2003 VT 70

"¶ 1… This dispute arises out of competing claims to ownership of land at the boundaries of a parcel owned and occupied by plaintiff MacDonough-Webster Lodge No. 26, Free and Accepted Masons. The Masons appeal both the trial court's grant of partial summary judgment on the issue of whether the lodge property qualifies for the charitable use exception to Vermont's adverse possession statute…

¶ 4. In rendering its decision on the cross motions for summary judgment, the lower court relied on our holding in Jarvis v. Gillespie, 155 Vt. 633, 641-44, 587

A.2d 981, 987-88 (1991). **In Jarvis, we considered whether 12 V.S.A. § 462 automatically applies to any parcel of land owned by a municipality, no matter whether the land was open for a public use. We held that under some circumstances a fact finder could determine that a municipal property is not "given to a public use" and in such case, the land would not be exempt by § 462 from a claim of adverse possession**. Id. at 642-43, 587 A.2d at 987-88. Following Jarvis, the legal question as framed by the trial court in the case at bar became **whether the Masons' primary use of their property benefitted the public, such that the land could be considered "given to a public use" in the Jarvis sense.** On the facts alleged by the Masons, the lower court found that although the Masons use their property for some charitable uses, the principal use of the Masons' property is to benefit Lodge members, leaving the Masons subject to adverse possession claims.

¶ 5. We agree with the trial court's conclusion, but because the rules we enunciated in Jarvis applied to publicly owned property **while the Masons' claim lies under the "charitable use" exception in 12 V.S.A. § 462, we clarify the relationship between public and charitable uses based on our interpretation of the statute and its legislative history. Section 462 exempts properties "given, granted, sequestered or appropriated to a public, pious or charitable use, or to lands belonging to the state" from Vermont's fifteen-year statute of limitations on ejectment actions, established by 12 V.S.A. § 501. This Court has interpreted the language of § 462 in the context of pious uses and public lands.** See Chittenden v. Waterbury Ctr. Comty. Church, 168 Vt. 478, 485-88, 720 A.2d 20, 25-27 (1998) (upholding "pious use" provision against an establishment clause challenge); In re .88 Acres, 165 Vt. 17, 19-20, 676 A.2d 778, 780 (1996) (applying § 462 to property dedicated to use for a town school); Jarvis, 155 Vt. at 642, 587 A.2d at 987 (applying § 462 to municipal lands); Davis v. Union Meeting House Soc'y, 93 Vt. 520, 526, 108 A. 704, 707 (1920) (holding that predecessor statute to § 462 exempts lands held for pious use from susceptibility to adverse possession claims); Hazen v. Perkins, 92 Vt. 414, 420, 105 A. 249, 251 (1918) (applying predecessor statute to § 462 to public waterways). Application of § 462's "charitable use" language, however, presents a question of first impression.

¶ 6. When construing a statute, our obligation is to identify and implement the intent of the Legislature. Brennan v. Town of Colchester,169 Vt. 175, 177, 730 A.2d 601, 603 (1999). In cases where the meaning of the statute is clear and unambiguous, we apply the plain meaning of the statute. DJ Painting, Inc. v. Baraw Enters., 172 Vt. 239, 247, 776 A.2d 413, 420 (2001). In cases where the plain meaning of the words is not obvious, we look to the "whole of the statute and every part of it, its subject matter, the effect and consequences, and the reason and spirit of the law." Sagar v. Warren Selectboard, 170 Vt. 167, 171, 744 A.2d 422, 426 (1999) (internal quotations omitted). We favor interpretations of statutes that further fair, rational consequences. See Braun v. Bd. of Dental Exam'rs, 167 Vt. 110, 117, 702 A.2d 124, 128 (1997) (statutes construed with presumption "that the Legislature does not intend an interpretation that would lead to absurd or irrational consequences"). In circumstances where the purpose and significance of a statute are unclear, we look to the statute's legislative history to "shed light" on its meaning. Sagar, 170 Vt. at 172, 744 A.2d at 426; see also Brigham v. State, 166 Vt.

246, 257-65, 692 A.2d 384, 391-95 (1997) (reviewing the "specific historical and legal origins" of the right to education in Vermont).

¶ 7. Section 462 dates back to the so-called quieting act of 1785, passed to address the widespread problem of defective land titles held by early Vermont settlers. 3 Records of the Governor and Council of the State of Vermont 341 (E. Walton ed., 1875) (hereinafter 3 Records of the Governor and Council). The act set up a remedy whereby those with legal title had to pay for the land improvements made by ejected settlers. See "An Act for Settling Disputes Respecting Landed Property," June 17, 1785, reprinted in 14 State Papers of Vermont 17-20 (J.A. Williams ed., 1966) (hereinafter 14 State Papers).

¶ 8. We have not been able to identify any records discussing why the legislature of 1785 chose to include the following exception to the rules for the resolution of conflicting land claims: "[p]rovided always . . . that this act shall not extend to any persons settled on Lands granted or sequestered for public, pious, or charitable uses." Id. at 20. This exemption clause survives today in 12 V.S.A. § 462. **The Vermont formulation is a variation on the traditional common law rule that protects public landowners at all governmental levels against adverse possession claims.** See In re .88 Acres, 165 Vt. at 19-20, 676 A.2d at 780 ("Section 462 . . . is Vermont's version of the generally accepted, common-law rule that a claim of title or right by adverse possession does not lie against public lands. **The principal policy consideration behind this rule is that it would be injurious to the public to allow adverse possession of lands dedicated to public use.**") (citations omitted); 16 R. Powell, Powell on Real Property, § 91.11[1]-[2], at 91-78 to 91-83 (M. Wolf ed., 2001) (providing an overview of the common law prohibition on adverse possession against governmental entities**). This case requires us to examine the relationship between the traditional common law "public use" exemption and § 462's "charitable use" clause.**

¶ 9. An 1866 Missouri law adopted the "public, pious, and charitable" language from Vermont's quieting act. See Dudley v. Clark, 164 S.W. 608, 612 (Mo. 1914) (noting that the statutory language came from Vermont's law). The Missouri version provides that "[n]othing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this state." Mo. Rev. Stat. § 516.090 (2002). Because of the parallel language, the Court may properly consider the Missouri Court's construction of the statute. See State v. Weller, 152 Vt. 8, 13, 563 A.2d 1318, 1321 (1989) ("Where there are similar statutes in other states, we look for guidance in the interpretations of those statutes.").

¶ 10. We find the Missouri Supreme Court's explanation of the policy behind their version of the law particularly persuasive. In Dudley v. Clark, the court noted:

Prior to [the enactment of § 516.090,] this state had, through its statutes, adopted the public policy of allowing the limitations to run against the state and municipalities. It was found to be a ruinous public policy, for under it school lands, roads, parks, streets, etc., were lost to the state and public through the laches or

ignorance of the public or of officials representing it. Is it not learned at the fireside that what is everybody's business is nobody's business?

164 S.W. 608, 612 (Mo. 1914). Missouri courts have echoed this reasoning in contemporary cases. See Empire Dist. Elec. Co. v. Gaar, 26 S.W.3d 370, 376 (Mo. Ct. App. 2000) ("[T]he rationale behind the enactment of § 516.090 was to protect against the loss of public lands due to the carelessness or oversight of the people charged with protecting the public's interests."); Reardon v. Newell, 77 S.W.3d 758, 763 (Mo. Ct. App. 2002) (citing Empire for same proposition). While these cases did not specifically invoke the "charitable use" provision of the law, we think that Missouri case law places an appropriate emphasis on the principle that the "public, pious, and charitable use" exception is designed to protect land that has been dedicated for the benefit of an indefinite segment of the public. Land qualifying for the exception lacks the protection of a discrete individual or group's long term interest in guarding the property against encroachments.

¶ 11**. Given this emphasis on ensuring that adverse possession law does not infringe upon public benefit, the case law developed to effectuate the property tax exemption for "public, pious, or charitable uses" provides a useful analytical framework for determining the appropriate application of § 462.** Section 3802(4) of Title 32 provides an exemption from property taxes for "[r]eal or personal estate granted, sequestered or used for public, pious, or charitable uses." The policies served by the two exemption laws are strikingly similar. Section 462 provides an exception from the typical application of adverse possession statutes where such laws would otherwise tend to undermine efforts to maintain property in public use. Similarly, the § 3802(4) exemption was designed for the "support of schools and churches believed necessary for the encouragement of settlement in colonial . . . Vermont." Am. Museum of Fly Fishing, Inc. v. Town of Manchester, 151 Vt. 103, 106-07, 557 A.2d 900, 902 (1989) (quoting Brattleboro Child Development Inc. v. Town of Brattleboro, 138 Vt. 402, 405, 416 A.2d 152, 154 (1980)); see also Broughton v. Town of Charlotte, 134 Vt. 270, 272-73, 356 A.2d 520, 522 (1976) (discussing the policy behind § 3802(4)). Both laws encourage public uses by preventing the normal action of property law from interfering with property uses that benefit a wide spectrum of citizens. (FN2)

¶ 12. **Legislative history provides additional support for our decision to harmonize our interpretation of § 462's charitable use exemption from adverse possession with § 3802(4)'s charitable use exemption from taxation**. The legislature originally enacted provisions providing tax and adverse possession exemptions for "public" lands on the same day: June 17, 1785. (FN3) The quieting act dealing with adverse possession has already been discussed at ¶ 7 above. The state's first law exempting public lands from property taxation, the antecedent to § 3802(4), was titled "An Act Prohibiting the Taxing [of] Public Lands." See 14 State Papers, supra, at 14-15. The law stated that "all Lands granted for public or pious uses as well as public grants within this State, while remaining for such use or uses shall be (and are hereby declared) free from taxation of every kind whatever . . . ." Id. In 1787, the legislature incorporated the same "public, pious, or charitable" language used in the quieting act into the tax exemption statute, where it is currently codified in § 3802(4). (FN4) The overlapping language, date of passage,

and policy concerns, taken together, provide convincing evidence that the Legislature intended the two exemptions from the typical legal treatment of property, one for taxation and one for adverse possession, to accomplish similar purposes. In determining what test we will use for the "charitable use" exception contained in § 462, we will therefore look to the tests we have developed for determining whether an entity qualifies for the "charitable use" exemption from property tax liability.

¶ 13. **To qualify for tax exemption under § 3802(4), a property must meet the three criteria laid out in Am. Museum of Fly Fishing, 151 Vt. at 110, 557 A.2d at 904. First "the property must be dedicated unconditionally to public use." Id. Second, "the primary use must directly benefit an indefinite class of persons who are part of the public, and must also confer a benefit on society as a result of the benefit conferred on the persons directly served." Id. (emphasis added). Third, "the property must be owned and operated on a not-for-profit basis." Id.**

¶ 14. Without reaching the other two requirements, we hold that the Masons' property fails to meet the second criteria. Even when viewed under the summary judgment standard-supplying all reasonable inferences in favor of the nonmoving party-the facts alleged by **the Masons fail to establish that the primary use of the Lodge property benefits an indefinite class of persons.** According to their responses to interrogatories included in the record, the Masons are a fraternal organization. Their mission is to "make good men better citizens, parents, moral people, and generally improve them." The Lodge building is used by the Masons and Eastern Star (the women's counterpart to the Masons) for events such as meetings, lectures, rituals, and dinners. It is regularly used only by those two groups, approximately once a month. Non-members are not allowed at regular meetings, but do attend educational meetings, as well as some dinners and other events.

¶ 15. At some monthly meetings, Lodge members vote on monetary or in-kind donations to people in need, or to charities. Although the Lodge does not keep a record of its charitable activities, their answers to interrogatories mentioned some recent charitable involvement: in-kind contribution of items for sale at a flea market, with proceeds to the Jericho Food Shelf; a spaghetti dinner, with proceeds to benefit a person in need; cooking and serving lunch at the Jericho's annual Town Meeting; and helping care for the town cemetery.

¶ 16. The primary use of the Lodge property is to benefit the Masons-a distinctly definite class of persons. No evidence in the record suggests that the Lodge was at any time used primarily for a charitable purpose. (FN5) The property is used for the Masons' monthly meetings aimed at the moral improvement of the membership. Although a portion of these meetings is devoted to planning a program of charitable actions, and the Masons' charitable activities are admirable, the primary use of the Lodge property for private meetings of a fraternal club cannot be found to benefit an indefinite segment of the public at large, and thus the Lodge property cannot qualify for an exemption from adverse possession under § 462. In so holding, we recognize and effectuate "the rule that exemption statutes are to be

construed most strongly against those claiming the benefits." Tr. of Vt. Wild Land Found. v. Town of Pittsford, 137 Vt. 439, 444, 407 A.2d 174, 177 (1979)."

Chittenden v. Waterbury Center Community Church, Inc., 168 Vt. 478 (1998)

At pp. 483-495: "**Generally, Vermont law applies a fifteen-year limitation period to actions seeking recovery or possession of land. See 12 V.S.A. § 502. Accordingly, one who seeks to maintain a claim of adverse possession or to assert a prescriptive easement must demonstrate that the use or possession in question has outlasted this limitation period.** See *Community Feed Store, Inc. v. Northeastern Culvert Corp.,* 151 Vt. 152, 155, 559 A.2d 1068, 1070 (1989) (noting that elements of adverse possession and prescriptive easement claims are "essentially the same**"). In this case, however, there is no limitation period because of the effect of 12 V.S.A. § 462. That provision exempts from any limitation period all ownership claims relating to "lands given, granted, sequestered or appropriated to a public, pious or charitable use, or to lands belonging to the state." *Id.***

…

[1]…The Vermont Legislature has shielded both religious institutions and the more broad category of charitable organizations from adverse property claims. An entity that qualifies as either may invoke the protection without implicating the First Amendment.

III. Presumed Grant

As they did in the trial court, **plaintiffs also seek to advance a theory here by which they would acquire an easement regardless of the operation of § 462. This is the so-called doctrine of presumptive (or lost) grant,** which we endorsed most recently in *University of Vermont v. Carter,* 110 Vt. 206, 3 A.2d 533 (1939). Like the present case, *Carter* involved a situation in which § 462 operated to exempt the holder of legal title---there, the University of Vermont---from the otherwise-applicable limitation period for actions to recover possession. *Id.* at 210, 3 A.2d at 535. **We nevertheless held that § 462 would not defeat plaintiffs' claim of adverse possession because, in the circumstances, "a grant can be presumed to the defendants or some of their predecessors in title from the plaintiff.**" *Id.* at 216, 3 A.2d at 537. Here, while acknowledging the principle articulated in *Carter,* the trial court refused to presume that the church had granted an easement to plaintiffs. We agree with the trial court, although for somewhat different reasons.

Some historical background is useful. Like many arcane and seemingly anomalous principles in the law of real property, the presumed grant has its roots in the common law as developed in England prior to the American Revolution. Statutes enacted by Parliament in 1540 and 1623 had the effect of imposing what would ultimately come to be a twenty-year limitation period on ejectment claims. See J. Curtis, *Reviving the* Lost Grant, 23 Real Prop., Prob. & Tr. J. 535, 536--37 (1988). The advent of this requirement was relevant only to adverse possession and not easements by prescription, since the existence of a valid ejectment claim is dispositive of the issue of who may lawfully possess (as distinct from simply use) the property. See *id.* at 537. The law of prescriptive easements developed along different lines:

> [W]ithout regard to a limitation period, an incorporeal claim was validated by proof of use alone. The requisite period of use has varied from time to time. Originally, the period may have been either 1066 (the year of the Norman Conquest) or a period beyond the memory of living persons. Eventually, the date from which the use had to be exercised was fixed as 3 September 1189, often described as the time of legal memory. There it remained, despite the statutes of 1540 and 1623, because the English courts refused to apply those enactments to cases involving incorporeal claims.

Id. at 537 (footnotes omitted). Proving that a particular use had existed since 1189 grew impractical to say the least, and, as a consequence, courts adopted the practice of presuming, based on a showing of longtime use, that an actual grant of the right had been made but the instrument granting the right had simply been lost. See *id.* at 537--38; see also Restatement (Third) of Property (Servitudes) § 2.16 cmt. a (Tentative Draft No. 3, 1993); R. Cunningham, et al., The Law of Property § 8.7, at 451 (1984); Note, *Prescription Adrift in a Sea of Servitudes: Postmodernism and the Lost Grant,* 43 Duke L.J. 845, 863 (1994) (lost grant presumption arose "to avoid the inconvenience of searching for an octogenarian with a particularly fertile memory"). Eventually, English law fixed twenty years as the period of use that would be sufficient to establish the presumption of a lost grant. See Curtis, *supra,* at 536--37; see also 4 H. Tiffany, The Law of Real Property § 1191, at 960 (3d ed. 1975) (noting that this period was established by "analogy to the period of limitation").

Although, under the English precedents, the presumption of a lost grant applied only to incorporeal claims---that is, nonpossessory interests---its adoption in the United States often did not include that limitation. **Thus, *Carter* and the Vermont cases cited therein applied the presumption of a lost grant to a possessory interest creating an alternative method of accomplishing the purpose of adverse possession that did not depend on the running of a limitation period. See Curtis, *supra,* at 542--43 (despite analogy to limitation period for ejectment actions, "in reality the requisite period may be longer or shorter than the limitation period."). Meanwhile, our decisions blended the concepts of adverse possession and prescriptive easement.** See *Community Feed Store,* 151 Vt. at 155, 559 A.2d at 1070 (elements of prescriptive easement and adverse possession claims "essentially the same under Vermont law"); *Russell v. Pare,* 132 Vt. 397, 401, 321 A.2d 77, 80 (1974) (distinction between adverse possession and prescriptive easement "not always clear" but the applicable rules are "in harmony" and have common roots in doctrine of presumed grants and analogy to statute of limitations).

It is fair to say that the doctrine of presumed grants is presently under siege. The American Law Institute, in its tentative draft of the third Restatement of Property, concedes that presumed grants "played a substantial role in American law for many years," but takes the position that the "vestigial remnants" of the doctrine should now be "eradicated." Restatement (Third) of Property (Servitudes) (Tentative Draft No. 3, 1993) at Introduction. According to the drafters, other historical doctrines "provide a satisfactory explanation" for the law of prescriptive easements. *Id.* Or, as other commentators have noted,

> [t]he blending of prescription and adverse possession [in American law], whether right or wrong in history and theory, has in fact made title arise simply by the running of the applicable statute of limitations. There is no need to presume usage back to 1189 (in America?) and so no need to presume a lost grant. Except for historical purposes, discussions of the subject should drop out of the legal literature.

Cunningham, *supra,* § 8.7, at 451.

Defendants urge us to eliminate presumed grants from our law as wholly inconsistent with the protection to public, pious and charitable uses that the Legislature adopted in 12 V.S.A. § 462. That position has some appeal. If, as we said in *Russell,* the theories underlying both prescriptive easements and adverse possession lead to the conclusion that "the applicable statute of limitations [is] a part of the doctrine" underlying both kinds of claims, *Russell,* 132 Vt. at 401, 321 A.2d at 81, and given that the Legislature has so plainly declared that what is essentially an infinite limitation period should protect owners of land dedicated to public, pious or charitable uses as well as the state as landowner, the presumed grant doctrine in *Carter* could plausibly be discarded as a mischievous anachronism.

We need not take that step at this time**. As discussed above, a statutory exemption from the limitation period has existed for public, pious and charitable uses at least since 1785, and the 1831 decision in *University of Vermont v. Reynolds,* 3 Vt. 542 (1831), held that the presumption of a lost grant applied to such uses despite the statutory protection. Although we are "not slavish adherents to stare decisis," *State v. Berini,* 167 Vt. 565, 566, 701 A.2d 1055, 1056 (1997), we do not "lightly overrule settled law especially where it involves construction of a statute which the legislature could change at any time." Estate of *Girard v. Laird,* 159 Vt. 508, 515, 621 A.2d 1265, 1269 (1993). Here, our construction of the statute has existed, without legislative change, for almost two centuries.**

We do believe, however, that the doctrine of presumed grants is at least in need of a modern restatement, at least as applied to uses covered by § 462. "[T]here is a presumption that the Legislature does not intend to enact meaningless legislation ... [and], thus, when we construe a statute, we must do so in a manner that will not render it ineffective or meaningless." *State v. Yorkey,* 163 Vt. 355, 358, 657 A.2d 1079, 1080 (1995) (citations omitted). The result urged upon us by the plaintiffs would render § 462 a meaningless nullity by allowing a party with a claim adverse to an entity protected by the statute to defeat it by simply repeating the magic words: presumed grant. We cannot accept a doctrine, the only remaining purpose of which is evading a statutory protection in all cases where it would arise.
The key to any modern application of the doctrine of a presumed grant is that it involves a presumption. As noted by a contemporary defender of the presumed grant doctrine, a decision like *Carter,* applying the theory in the face of the legislative determination made by § 462, "assume[s] that legislators know the difference between a statute of limitation and a rule of evidence and that legislative qualifications to limitation periods do not repudiate this ancient evidentiary rule."

Curtis, *supra,* at 549. Our cases reflect the view that Vermont's doctrine of presumed grants is indeed a rule of evidence and involves a presumption, although the nature of that presumption has been at times ill defined. See *Trustees of Caledonia County Grammar Sch. v. Howard,* 84 Vt. 1, 11--15, 77 A. 877, 879--82 (1910) (discussing when the presumption of a lost grant arises); *Tracy v. Atherton,* 36 Vt. 503, 511--13 (1864) (discussing nature of presumption of lost grant); *Townsend v. Administrator of Estate of Downer,* 32 Vt. 183, 205 (1859) (noting, in discussion of lost grant presumption, that "[s]ometimes these presumptions are held to be conclusive, at others open to be rebutted" and concluding that "[t]he line between conclusive and disputable presumptions is not well defined"); *Reynolds,* 3 Vt. at 560 (long standing possession was "evidence" that possession was commenced under title and jury should have been instructed, inter alia, "to presume an antecedent grant").

In *Tyrrell v. Prudential Ins. Co. of America,* 109 Vt. 6, 23, 192 A. 184, 192 (1937), this Court attempted to bring method and order to our law on presumptions after concluding "that a false doctrine has dominated the subject and persisted in our law too long." We went on to hold that a disputable presumption is "locative, merely"---i.e., "[i]t points out the party on whom lies the duty of going forward with evidence on the fact presumed"---and of itself contributes "no evidence and has no probative quality." *Id.* at 23, 192 A. at 192. By Vermont Rule of Evidence 301(a), we have now adopted the policy that all presumptions in civil cases are *Tyrrell* "bursting bubble" presumptions "except as otherwise provided by law." See Reporter's Notes to V.R.E. 301 (noting that, under "bursting bubble" theory, "a presumption shifts only the burden of production, losing its mandatory effect as soon as evidence sufficient to support a finding of the nonexistence of the presumed fact is introduced."). The exception "recognizes the possibility that for reasons of policy in a particular situation, the legislature, by statute, or the Court by judicial decision, may give different effect to a presumption than that accorded by the rule." *Id.*

We believe that much of the lack of definition in our cases about the presumption of a lost grant involves the doctrinal conflicts resolved by Tyrrell. See *id.* (contrasting "bursting bubble" with other formulations of presumption theory); *Tyrrell,* 109 Vt. at 22--23, 192 A. at 191--92 (discussing inconsistent presumption theories in prior Vermont cases). Despite the then-existing confusion, this Court noted in *Tracy,* 36 Vt. at 513, that "whether the presumption arising from the length of possession is one of law, or one of fact, ... whichever it may be it is liable to be rebutted in various ways." Since the presumption could be rebutted, it was subject to the "bursting bubble" rule of *Tyrrell* and is covered by Rule 301(a).(fn4) We have no policy reason to reach a different result, particularly where § 462 is involved. Indeed, treating the presumption of a lost grant as a rebuttable, "bursting bubble" presumption is fully consistent with the policy behind § 462.

Although the trial court did not analyze the presumption of a lost grant under V.R.E. 301, we have no doubt that it reached the correct conclusion. The trial court declined to invoke the presumed grant doctrine, concluding:

> Plaintiffs are not entitled to the presumption of the grant of church property merely because their business activities currently enjoy a greater attendance than church services. Moreover, the plaintiffs' commercial use of the driveway has altered and swelled with the growth of their business to such a degree that it fundamentally affects the church's pious use of its property. The noise and fumes that accompany the comings and goings of buses and motorcoaches transporting up to 6,000 customers daily to the mill excessively intrude on church uses of its land.

Accordingly, the trial court determined that presuming a lost grant "would be unjust and unreasonable where plaintiffs' commercial use has been in common with church's religious use but has steadily expanded to overwhelm it."

[2] We reach the same result under V.R.E. 301. **The church's title to the property traces to a conveyance expressly providing that it shall use and occupy the land for religious purposes and no other. The trial court determined that the church's grantor retained a right of reentry in certain circumstances.(fn5) We believe that the existence of the right of reentry was sufficient to rebut any presumption of a lost grant because it establishes that the church would have put its title to the driveway at risk if it gave plaintiffs, or their predecessors in title, an easement to use the driveway for commercial purposes**. Cf. *Reynolds,* 3 Vt. at 560 ("If it was necessary in this case to presume a deed from the trustees of the university to establish the defendant's claim, it would not be established, as the trustees never had any power to convey by deed."). Because any presumption of a lost grant was rebutted and was no longer in the case, see V.R.E. 301(c)(3) (providing that issues involving rebutted presumption are presented to factfinder "on the evidence as a whole without reference to the presumption"), the trial court properly applied 12 V.S.A. § 462 to resolve the dispute in defendant's favor.

IV. Laches

Finally, plaintiffs contend that the trial court erred in not applying the equitable doctrine of laches so as to bar any effort by the church to defeat plaintiffs' claim to an easement in the driveway. We disagree.

"**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."** *In re Vermont Elec. Coop.,* 165 Vt. 634, 635, 687 A.2d 883, 884--85 (1994) (citation omitted). **The delay must be "unexcused" and prejudicial.** *In re Estate of Neil,* 152 Vt. 124, 132, 565 A.2d 1309, 1314 (1989). **"[L]aches is so much a matter of discretion by the lower court that its action will not be disturbed unless clearly shown to be wrong**." *Vermont Elec. Coop.,* 165 Vt. at 635, 687 A.2d at 885 (citation and internal quotation marks omitted). The trial court did not commit clear error.

[3] We are unable to agree with plaintiffs that they suffered the requisite prejudice. Any delay by the church in asserting its exclusive right to possess the driveway actually benefitted rather than harmed plaintiffs because it tended to bolster their claim of a prescriptive easement. Moreover, even if prejudice were established on

this record, we cannot find that church's delay in asserting its rights was unexcused. Because of § 462, it had no legal obligation to raise its rights at any particular time. It could consent to shared use of the driveway until the frequency and intensity of plaintiffs' use became inconsistent with the functioning of the church. **Laches is not an elixir that automatically relieves landowners of the effects of any erroneous assumptions they may make as they use and develop their property---particularly in the face of public policy determinations that conflict with the assumptions in question.** See, e.g., *State v. Central Vermont Ry.,* 153 Vt. 337, 353, 571 A.2d 1128, 1136 (1989) (holding that laches would not bar claim deriving from prerevolutionary public trust doctrine). Assuming arguendo that there was both some delay and some prejudice here, the trial court still acted within its sound discretion.

V. Conclusion

12 V.S.A. § 462, which prevents the statute of limitations period from running against the church's claim of exclusive rights to the church's north driveway, is neither constitutionally infirm nor evaded by the doctrine of presumed grants in the circumstances of the case. The trial court correctly so concluded and did not abuse its discretion in declining to change the result based on laches. Accordingly, we leave undisturbed the trial court's ultimate determination that the church owns the property at issue free of any claim by plaintiffs and that plaintiffs have no right to use or to cross over any part of the church's premises without its permission."

Jarvis v. Gillespie, 155 Vt. 633 (1991)

At pp. 636-644: "The trial court found that at various times between the years 1947 and 1986 **plaintiff had used the land for a variety of purposes, such as grazing cattle and horses, parking vehicles, as a staging area for a logging operation on surrounding property, and to store slab wood from a sawmill which was located on adjacent property. The court also found that during that period plaintiff, at various times, maintained a fence on the roadside boundary of the parcel, tapped maple trees on the parcel, planted trees on the parcel, cut Christmas trees and firewood from the parcel, posted "No Trespassing" signs on the parcel, and built a loading ramp on the parcel for the logging operation which remained in use to load and unload his tractor after the logging operation ceased. The court found that these uses were clearly visible from the road which abutted the parcel. Further, the court found that plaintiff was the only person to make use of the property for any reason during the period and that neither the Town of Waterville nor the public made any use of the parcel during that time.**

…

[6] Defendant argues that except for the logging operation in 1971 and 1972 and storing the slab wood in 1983 and 1984, none of plaintiff's uses of the parcel constituted sufficient possession to establish adverse possession. Defendant relies on case law asserting that certain acts, such as tapping trees or cutting timber, by themselves are insufficient to establish possession. See *Caskey v. Lewis,* 54 Ky. (15 B. Mon.) 27, 32 (1854) (occasional use for sugaring and cutting timber and firewood did not constitute possession); *Adams v. Robinson,* 6 Pa. 271, 272 (1847) (annual use of land as a sugar camp constituted a succession of trespasses rather

than occupancy). Such a general proposition, however, is not conclusive of the particular controversy before us. "The ultimate fact to be proved in an adverse possession case is that the claimant has acted toward the land in question as would an average owner, taking properly into account the geophysical nature of the land." 7 R. Powell, The Law of Real Property ¶ 1013[2][h], at 91--62 (1990); see *Laird,* 131 Vt. at 280, 305 A.2d at 569 (acts needed to give rise to constructive possession must be consistent with the nature of the property). Thus, although certain of the acts of possession taken by a claimant may not be sufficient to establish possession in all circumstances, each case must be examined individually, viewing the claimant's acts in light of the nature of the land.

In this case, the land is a 1.2-acre parcel surrounded on three sides by 280 acres of plaintiff's land and bounded on the fourth side by a road. The area in which it is located is rural and agricultural in nature. In 1947 there were no buildings on the property and there had not been any for many years. **Grazing cattle and horses, cutting hay, planting and tapping trees, and cutting firewood and Christmas trees are the types of acts which are consistent with the nature of the parcel.**

[7] Defendant contends, however, that these acts are not the uses an average owner would have made of the parcel. He argues that because at one point before 1947 there had been a house on the parcel, because the parcel is flat, open, dry and well drained, because more trees could have been planted on it, and because defendant plans to build a house upon it, plaintiff did not use the parcel as an average owner might. We do not agree. Simply because a parcel may be susceptible to uses other than those to which the claimant chose to put it does not necessarily lead to the conclusion that the claimant failed to act toward the parcel as an average owner would have. "**'The possession is gauged by the actual state of the land, and not with reference to its capability of being changed into another state which would reasonably admit of a different character of possession.'"** ***B****ergen v. Dixon,* 527 So. 2d 1274, 1278 (Ala. 1988) (quoting *Goodson v. Brothers,* 111 Ala. 589, 595, 20 So. 443, 445 (1896)). Plaintiff used the parcel for purposes which were consistent with its condition as he found it. He was not required to change nor necessarily improve the land, but was merely required to perform acts of possession which were consistent with the parcel's nature. Plaintiff's acts, while not necessarily sufficient to constitute possession of every piece of land, were sufficient to establish his possession of this parcel of rural, agricultural land.

…

Another basis for the argument raised by defendant is that the acts of possession were merely fragmentary and occasional.

> **"To constitute continuous possession of lands, the law does not require the occupant to be present on the site at all times. The kind and frequency of the acts of occupancy, necessary to constitute continuing possession, are dependent on the nature and condition of the premises as well as the uses to which it is adapted."**

There may be lapses of time between acts of possession….

The uses made of the parcel from 1965 until 1986(fn3) consisted of cutting firewood and Christmas trees, parking vehicles, staging the logging operation, building the loading ramp, loading and unloading a tractor using the ramp, storing slab wood, cutting brush, and posting "No Trespassing" signs. Further, plaintiff testified that although there were times when he had not been on the parcel for as long as a month, he was never absent for as long as a year.

[9] **This Court has held that using property only at certain times of the year for certain activities and not using it for the rest of the year can constitute sufficiently continuous use for adverse possession.** *Thibault v. Vartuli,* 143 Vt. 178, 181, 465 A.2d 248, 250 (1983) (using island only in summer for recreational activities); *Montgomery,* 129 Vt. at 386, 278 A.2d at 748 (using hunting camp only during season); *Amey,* 123 Vt. at 67--68, 181 A.2d at 73 (using logging camp only during cutting times). Although plaintiff did not use the parcel constantly, he used it each year during certain seasons in ways which were both consistent with the season and with the nature of the parcel. The uses, therefore, were more than fragmentary and occasional, and were sufficiently continuous. Thus, plaintiff established a continuous period of use from 1965 until 1986, which is more than sufficient to satisfy the statutory requirement of fifteen years.

Defendant also contends that plaintiff's acts were not open and notorious. **Acts of possession are deemed sufficiently open and notorious if they are conducted in a manner which would put a person of ordinary prudence on notice of the claim.** *Waterman v. Moody,* 92 Vt. 218, 238--39, 103 A. 325, 334 (1918). As the parcel bordered on the road, anyone passing would have been able to see plaintiff's activities. Further, there was testimony from a former town lister and from the town clerk, who had worked in the town clerk's office since 1939, that they both knew that plaintiff claimed to own the parcel. There was no error in finding plaintiff's possession to be open and notorious.

[10, 11] **Lastly, defendant argues that the plaintiff's acts were not hostile because they "were beneficial to the Town." Hostility, when used in the context of adverse possession, does not require the presence of ill will toward the actual owner nor destructiveness toward the land.** *Grubb v. State,* 433 N.W.2d 915, 918 (Minn. Ct. App. 1988); *Sinicropi v. Town of Indian Lake,* 148 A.D.2d 799, 800, 538 N.Y.S.2d 380, 381 (1989); 7 R. Powell, The Law of Real Property ¶ 1013[2][c], at 91--23 to 91--26 (1990). Rather, what is required is that the adverse possessor intends to claim the land and treat it as his own. *Lathrop v. Levarn,* 83 Vt. 1, 4, 74 A. 331, 331--32 (1909). The trial court properly found that plaintiff's claim was hostile.

III.

Defendant argues that while the parcel was owned by the Town of Waterville it was exempt from adverse possession claims by 12 V.S.A. § 462. The statute reads: "Nothing cong to the limitations of actions] shall extend to lands given, granted, sequestered or appropriated to a public, pious or charitable use, or to lands belonging to the state." 12 V.S.A. § 462. While we have applied the statute in the past, we have yet to face the issue presented by this case, namely, how to

determine whether property owned by a municipality is "given, granted, sequestered or appropriated to a public ... use."

Defendant urges that the proper focus of such an inquiry is whether the Town was acting in its "governmental capacity" or its "proprietary capacity" when it acquired the property. The significance of this distinction, defendant contends, is that land which is acquired or held by a municipality in its governmental capacity is within the meaning of the statutory phrase "given ... to a public ... use." We do not find this argument persuasive.

Other jurisdictions which have faced the question are split. New Hampshire, for example, in applying N.H. Rev. Stat. Ann. § 477:34 (1983), which reads "[n]o person shall acquire by prescription a right to ... any public ground by ... occupying it adversely for any length of time," has held that "'mere retention of title, without more,'" is a public use for lands owned by a municipality. *Kellison v. McIsaac,* 131 N.H. 675, 681, 559 A.2d 834, 837 (1989) (quoting *McInnis v. Town of Hampton,* 112 N.H. 57, 60, 288 A.2d 691, 694 (1972)). This, in essence, exempts all municipal lands from adverse possession claims. This standard, however, is in conflict with our statute which only exempts lands given to a "public, pious, or charitable use." Our statute does not provide a blanket exemption for municipally owned lands, which it easily could have, as evidenced by the provision exempting state-owned land. Therefore, we decline to follow New Hampshire's example.

[12, 13] We find the approach of the Supreme Court of Connecticut to be more in accord with our statute. In *American Trading Real Estate Properties, Inc. v. Town of Trumbull,* 215 Conn. 68, 574 A.2d 796 (1990), **the court held that land which is owned by a municipality is presumed to be given to a public use. *Id.* at 80, 574 A.2d at 802. However, this presumption can be rebutted by demonstrating that the town has abandoned any plans for the land. *Id.* Evidence to be considered in determining this issue may include the reason the property was acquired by the town, uses the town has made of the property since acquisition, and whether the town has manifested an intention to use the property in the future.**

This standard is a simple, balanced approach for determining which municipal lands are given to a public use and thereby exempt from claims of adverse possession. It allows a municipality to be protected from adverse possession claims on property which it is not using at present but may have future plans for or on property which it has set aside as open space or to be left in its natural state for the benefit of the community and the environment. It does not, however, clash with 12 V.S.A. § 462 by giving a town a blanket exemption to adverse possession claims. It provides only for a presumption that the property is given to a public use which can be rebutted by evidence to the contrary.

In *American Trading,* the court reviewed an older Connecticut case which found that a piece of property could be adversely possessed although it was owned by a municipality because it was not given to a public use. *Id.* at 81, 574 A.2d at 802 (examining *Goldman v. Quadrato,* 142 Conn. 398, 114 A.2d 687 (1955)). *Goldman* involved a claim of adverse possession against a piece of property which

a city had acquired by tax foreclosure. *Goldman,* 142 Conn. at 400, 114 A.2d at 689. The city then did nothing with the property for twenty-four years until it conveyed it to a private individual. *Id*. The *American Trading* court found that *Goldman* was in accord with the rebuttable-presumption standard because the city acquired the property only to protect its fisc from a delinquent taxpayer, because the city never used the property for any reason, and because the city, by selling the property to a private individual, manifested "no intention to develop the property, then or later, for any public purpose whatsoever." *American Trading,* 215 Conn. at 81, 574 A.2d at 802.

The facts of the case at hand are very similar to those of *Goldman*. The Town of Waterville acquired the parcel in 1935 as settlement for the support it had provided for the owner. The Town then did nothing with the parcel for fifty-one years. Finally, in 1986, the Town conveyed the property to defendant by quitclaim deed.

[14, 15] Based on these facts, we find that plaintiff has carried his burden of rebutting the presumption that the parcel, while owned by the Town of Waterville, was given to a public use. The Town acquired the parcel as settlement of a debt, **the parcel was not used by the public while the Town had title, and by conveying the parcel to defendant, a private individual, the Town manifested that it had no intention of ever using the parcel for a public use.** Therefore, the trial court properly concluded that the parcel was not given to a public use and that it was not exempt from claims of adverse possession by 12 V.S.A. § 462.

3.2.3.b Not Applicable to Utilities

30 V.S.A. § 2519 No prescriptive rights

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.

Dodge v. Washington Electric Coop., 134 Vt. 320 (1976)

At pp. 321-322: **"Although the 25 foot right of way has been in use and occupied by the transmission lines since 1939, under 30 V.S.A. § 2519 such use and occupancy could not ripen into adverse possession:**

> **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.**

As a consequence, the conclusion of the trial court that a right of way 25 feet across the plaintiffs' land existed in the defendant is not supported by the facts found…."

Vt. Electric Power Co., Inc v. Anderson, 121 Vt. 72 (1959)

"The petition seeks the acquisition of this particular right of way "together also with the right to enter upon and cross other property owned by the petitionees for the purpose of gaining access to said one hundred fifty foot strip and right of way in order to thereon exercise any of the rights hereby conveyed, provided that said right must be exercised in a careful manner and any damage to the property of the Petitionees caused by the Petitioner shall be borne by the Petitioner. Reserving to the petitionees, their heirs, executors, administrators and assigns the right to cross and recross said strip at such places as may be necessary in using the land adjacent to said strip provided such crossing and recrossing shall not interfere with the rights herein granted."

[3] **The interest in land sought to be taken in condemnation proceedings must be described with certainty and accuracy. This is the general requirement of the law.** *Otter Tail Power Co.* v. *Von Bank,* 72 ND 497, 8 NW2d 599, 145 ALR 1343, 1347; *Winchester* v. *Ring,* 312 Ill 544, 144 NE 333, 36 ALR 520, 526. See also 18 Am. Jur., Eminent Domain, §325, pp. 969--970; 29 CJS, Eminent Domain, §259, pp. 1228--1231.

[4] **The requirement of the law is fulfilled if the description is such that the landowner is not misled and its defect may be cured upon demand.** ***Il****lyes* v. *White River Light & Power Co.,* 175 Ind 118, 93 NE 670, 671--672; *State ex rel Chelan Elec. Co.* v. *Superior Court,* 142 Wash 270, 253 P 115, 58 ALR 779, 787. Here the defendant makes no claim he was misled. And he did not request that the description of the property be amplified or more particularly stated.

[5] That the principal right of way is described with sufficient certainty is manifest from a reading of the petition**. The secondary right of access, although set forth in less precise terms, purports to acquire nothing more than the law implies from the primary easement. Where the right of access is not expressly defined or limited, the grantees are entitled to a convenient and reasonable approach, with proper regard to the interest and convenience of the dominant and servient owners**. *Lafleur* v. *Zelenko,* 101 Vt 64, 70, 141 A 603; *Stevens* v. *MacRae,* 97 Vt 76, 81, 122 A 892; *Kinney* v. *Hooker,* 65 Vt 333, 337, 26 A 690.

[6] **To draw a precise line of demarcation between the reciprocal rights and obligations that obtain between the landowner and the condemning grantee, to cover every eventuality that might arise in the future use of the property, would be impossible. The creation of an easement or right of way for an electric power line carries with it a reasonable right of access to enable the utility to discharge its legal obligation to render adequate and dependable service. It has the right to enter upon the land to construct and service the facility. In the first instance the route of entry may be designated by the defendants, as owners of the servient**

estate, since the precise way of access is not defined. *Lafleur* v. *Zelenko, supra,* 101."

West River Power Co. v. Bussino, 111 Vt. 137 (1940)

At pp. 138-143: "…plaintiff has a power line leading from a sub-station at Mt. Holly across defendants' farm to Hortonville. This branch was laid out in October, 1919, locating twenty poles on defendants' farm and was completed by plaintiff in August, 1920, since which time it has been in continuous operation, serving about fourteen customers. **At the time of this construction work upon defendants' farm Fred Bussino was not at home but Mrs. Bussino was there and knew about this matter. Defendants are the first customers to receive service after leaving the said sub-station…**

Defendants made their first objection to this line crossing their farm in 1931 which was after they had been receiving electrical service for some time. On this occasion Mr. Bussino demanded that plaintiff should pay to defendants $200 damages because of plaintiff having built and maintained the line in question across their lands. This demand was not complied with and in 1933 defendants brought their suit in trespass against plaintiff in Rutland County Court which suit is now pending. The line as originally constructed is the one now in service.

Plaintiff in its brief presents two questions for consideration. First. It is claimed that defendants have acquiesced in the construction and maintenance of said line across their premises as a matter of law because of their failure to object thereto for a period of about eleven years. Therefore it is contended that defendants are now not in a position to insist that what plaintiff has done in building and maintaining its distribution system across said farm has been done without right.

[1, 2] **This claim is without merit. When plaintiff built this line upon defendants' farm it knew, through its officers, that it was building on defendants' land and that no permission had been obtained to do so. Under these circumstances, as disclosed by the record, there was no duty on the part of defendants to warn plaintiff and so they are not prejudiced by failure to do so**. *Boynton* v. *Hunt,* 88 Vt. 187, 189, 92 Atl. 153.

[3, 4] **A cardinal principal in the doctrine of equitable estoppel is that he who claims it must show that he has been misled, and thereby prejudiced, by the conduct of the other party**. *Boynton* v. *Hunt, supra,* 88 Vt. 187, 189, 92 Atl. 153; *Weinberg* v. *Norton,* 107 Vt. 279, 292, 178 Atl. 913. **No claim is made that plaintiff has been misled by defendants' conduct, hence there is no equitable estoppel here.**

Second. Plaintiff contends that defendants have made **an implied waiver** of any rights they might otherwise have had by asking for and receiving electrical service as hereinbefore stated.

[5, 6] **A waiver is an *intentional* relinquishment of a known right. Since plaintiff claimed there had been an implied waiver, it had the duty of establishing same by**

showing some act or conduct on the part of defendants that was unequivocal in character. *Barber* v. *Vinton et al.,* 82 Vt. 327, 334, 73 Atl. 881; *Rogers* v. *Whitney,* 91 Vt. 79, 81, 99 Atl. 419."

3.2.4 Easements By Estoppel

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 2.10 Servitudes Created by Estoppel

If injustice can be avoided only by establishment of a servitude, the owner or occupier of land is estopped to deny the existence of a servitude burdening the land when:

(1) the owner or occupier permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief; or

(2) the owner or occupier represented that the land was burdened by a servitude under circumstances in which it was reasonable to foresee that the person to whom the representation was made would substantially change position on the basis of that representation, and the person did substantially change position in reasonable reliance on that representation.

Cassani v. Northfield Savings Bank, 2005 VT 127

"¶ 18. Next, defendants argue that reformation is not available against a bona fide purchaser.

> "A party who purchases property for value and without notice will have a defense in an action to reform a deed involving that property. The purpose of this limitation is clear. When a bona fide purchaser acquires an interest in land and makes an investment in the land, that party is entitled to have his or her expectations protected. . . . A person should not be deprived of his or her investment when he or she had no means of discovering the defect."

Morse v. Murphy, 157 Vt. 410, 416, 599 A.2d 1367, 1370 (1991) (mem.) (Gibson, J., dissenting) (quoting 6A R. Powell, Powell on Real Property ¶ 901[3], at 81A-166 (rev. ed. 1991)) (emphasis added); accord Lockwood v. White, 65 Vt. 466, 468-69, 26 A. 639, 640 (1893).

¶ 19. The court found that all the relevant evidence established that defendants had notice of a right-of-way across the 49.5-acre parcel. Evidence relied upon by

the court included discussions between Robert Cassani and Ernest LaBrie in the spring of 1996 concerning the location of the right-of-way and the long familiarity of LaBrie with both the geography of the parcels and the existence of the road constructed by Cassani across the 49.5-acre parcel for access to the 178.5-acre parcel. Most persuasive on this issue was the letter prepared by defendant Linda LaBrie, in her offer to the Bank to buy the 49.5-acre parcel in October 1997, in which she acknowledged that "[t]he property contains a right-of-way through it, right past the camp, that is the sole access for the Quensler acreage." **The existence of the right-of-way was used in support of the price offered by defendants to purchase the property. Given this evidence of notice, the court correctly ruled that defendants were not bona fide purchasers without notice. Thus, reformation was available as a remedy for plaintiffs."**

Richart v. Jackson, 171 Vt. 94 (2000)

At pp. 4-6: "…thus the existence of the dock at the time of defendants' purchase was admitted and uncontroverted. See V.R.C.P. 56(c)(2); Samplid Enters., Inc. v. First Vermont Bank, 165 Vt. 22, 25-26, 676 A.2d 774, 776 (1996). Based upon its finding that **"the dock was in use at the time Defendants purchased the property," the court concluded that "[d]efendants should have been on inquiry notice" concerning plaintiffs' interest.**

The principle of inquiry notice is a venerable one in Vermont. We have explained the concept as follows:

> [T]he courts of equity are vigilant . . . to see that . . . a purchaser shall not be allowed to take any benefit resulting from any want of care and watchfulness. If there exist any circumstance of suspicion, whereby he might be said to be fairly put upon his guard, and he neglects to follow out the inquiry, he is affected with notice of all facts, which such inquiry would have brought to his knowledge, and if he purchases with his eyes shut, he acquires only the title of his grantor impeded with its attendant equity.

Hart v. Farmers & Mechanics Bank, 33 Vt. 252, 264-65 (1860). This principle has been continually reaffirmed in Vermont and elsewhere. See, e.g., Tomasi v. Kelley, 100 Vt. 318, 323, 137 A. 196, 198-99 (1927) ("The circumstances being such as then to put defendant on inquiry, he is chargeable with notice of all such facts as his inquiry, had it been made, would have revealed."); In re Ryan, 851 F.2d 502, 507 (1st Cir. 1988) ("Inquiry notice follows from the duty of a purchaser, when he has actual or constructive notice of facts which would lead a prudent person to suspect that another person might have an interest in the property, to conduct a further investigation into the facts."); Methonen v. Stone, 941 P.2d 1248, 1252 (Alaska 1997) ("It is well established that a purchaser will be charged with notice of a interest adverse to his title when he is aware of facts which would lead a reasonably prudent person to a course of investigation which, properly executed, would lead to knowledge of the servitude."); Hall v. Allen, 771 S.W.2d 50, 53 (Mo. 1989) (en banc) (purchaser of real estate is charged with notice of easement where existence of servitude is apparent upon ordinary inspection of premises).

The uncontroverted facts supported the court's finding that the dock was in use at the time of defendants' purchase, and this finding supported the conclusion that defendants were on inquiry notice of plaintiffs' interest. See Methonen, 941 P.2d at 1252 (purchaser "is considered apprised of those facts obvious from an inspection of the property"). **A diligent inquiry, in turn, would have readily revealed the existence of the Declaration, which was discovered and disclosed in defendants' own title insurance report. Accordingly, it is immaterial whether, as defendants claim, the Declaration was technically outside their chain of title, as defendants were not bona fide purchasers without notice.** See Hemingway v. Shatney, 152 Vt. 600, 602-604, 568 A.2d 394, 396 (1989) (Vermont is "notice" state and timing of recording affects only rights of subsequent purchaser "without actual or inquiry notice"); see also Hall, 771 S.W.2d at 53 (although easement was not recorded in defendants' chain of title, ordinary inspection would have revealed existence of boat dock and footpath leading to it, and thus defendants may "properly be charged with notice of a servitude in favor of the plaintiffs").

While not disclaiming knowledge of the dock and shed, defendants nevertheless argue that plaintiffs' interest in the use of these improvements was extinguished when defendants purchased their lot from a predecessor-in-title who had no notice of plaintiffs' interest when he purchased the property. The argument is premised on a doctrine known as the "shelter rule," which generally provides that "[o]ne who is not a bona fide purchaser, but who takes an interest in property from a bona fide purchaser, may be sheltered in the latter's protective status." Sun Valley Land & Minerals, Inc. v. Burt, 853 P.2d 607, 613 (Idaho Ct. App. 1993) ; see also Reiner v. Danial, 259 Cal. Rptr. 570, 574 (Cal. Ct. App. 1989) (successors in interest to bona fide purchaser entitled to receive same protection against unrecorded encumbrance; any knowledge by successor irrelevant). Because defendants' predecessor, Mossman, purchased prior to the recording of the Declaration, defendants claim that it cannot be enforced against them.

The premise of the argument is flawed, however, as the record does not support the conclusion that Mossman lacked notice of plaintiffs' interest. Although he purchased the property one year before the Declaration was recorded, the Goldsmith-to-Mossman deed plainly referenced the existing easement in favor of plaintiffs in the "beach area." While the deed did not specify the permitted uses of the beach area, the record demonstrates that a dock and shed for swimming and boating purposes were fully compatible with the parties' intentions. See Directors of Seasons on Mount Snow Owners Ass'n v. Seasons Assocs., 166 Vt. 618, 618, 693 A.2d 735, 737 (1997) (mem.) (character of easement depends upon intent of parties). The deed to Mossman referenced a State land use permit which noted that a variety of moorings and docks existed along the shoreline of the area; the Declaration underscored the parties' understanding that a dock and shed were compatible with the beach easement; and the dock was installed a year after Mossman's purchase and remained in seasonal use thereafter without objection. Accordingly, we are not persuaded that Mossman was a bona fide purchaser without notice of plaintiffs' interest. (fn2)“

Tallarico v. Brett, 137 Vt. 52 (1979)

At pp. 59- 61 : "The appellants rely in part on language in the Tallaricos' deed. The deed recites: "Included in this sale is a driveway... subject to the right of Elizabeth B. Brett to travel same." The parties agree that the driveway referred to is the private road involved here. ..

> [8] **The burden of proving an estoppel rests on the party claiming it.** *Black River Associates, Inc.* v. *Koehler,* 126 Vt. 394, 233 A.2d 175 (1967). **In the absence of proof to the contrary, we interpret this exception as being in confirmation of a pre-existing right, *i.e.,* the right of way granted to the Bretts in their deed from the Pearsons. The document creating that right controls its scope.** See Annot., 88 A.L.R.2d 1199, 1202 (1963).
>
> [9] Furthermore, the Tallaricos' deed makes specific reference to the deed from Pearsons to Elizabeth Brett. This practice is as effective as if the deed referred to had been copied into the deed making the reference. *Basso* v. *Veysey,* 118 Vt. 399, 110 A.2d 706 (1954). This being so, no more is excepted from the Tallaricos' deed than the right of way specifically described in the deed referred to, because the specific controls the general. *Pareira* v. *Wehner,* 133 Vt. 74, 330 A.2d 84 (1974).
> …
> **An easement may be created by an executed oral agreement. Here the change in position by Mr. Ambrose of enlarging his garage and his maintenance work on the right-of-way with the acquiescence, if not the urging of Mr. Pearsons, and the later similar statement by Mr. Pearsons to Mrs. Berger confirm an executed oral agreement for an easement to use the right-of-way to the garage premises at the rear of the Berger property.**

3.2.5 Easements By Reference To Plats

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 2.10 Servitudes Implied from Map or Boundary Reference

In a conveyance or contract to convey an estate in land, description of the land conveyed by reference to a map or boundary may imply the creation of a servitude, if the grantor has the power to create the servitude, and if a different intent is not expressed or implied by the circumstances:

(1) **A description of the land conveyed that refers to a plat or map showing streets, ways, parks, open space, beaches, or other areas for common use or benefit, implies creation of a servitude restricting use of the land shown on the map to the indicated uses.**

(2) A description of the land conveyed that uses a street, or other way, as a boundary implies that the conveyance includes an easement to use the street or other way.

§ 2.10 Servitudes Implied from General Plan

Unless the facts or circumstances indicate a contrary intent, conveyance of land pursuant to a general plan of development implies the creation of servitudes as follows:

(1) **Implied Benefits: Each lot included within the general plan is the implied beneficiary of all express and implied servitudes imposed to carry out the general plan**.

(2) **Implied Burdens:**

(a) Language of condition that creates a restriction or other obligation, in order to implement the general plan, creates an implied servitude imposing the same restriction or other obligation.

(b) A conveyance by a developer that imposes a servitude on the land conveyed to implement a general plan creates an implied reciprocal servitude burdening all the developer's remaining land included in the general plan, if injustice can be avoided only by implying the reciprocal servitude.

Noble, et al. v. Kalanges, 2005 VT 101

> "¶ 1 …In this appeal, we consider **whether plaintiffs have the right to prevent defendant from developing his property, which at one time was designated on a subdivision plat as "reserved" for an elementary school. Plaintiffs argue that because their deeds reference the subdivision plat, they acquired an implied easement that limited the use of the site to a school. Alternatively, they argue that through a reversionary clause of a 1985 warranty deed, they acquired an equitable servitude that required the site to remain open space…**
>
> ¶ 12… The court first addressed the Countryside plaintiffs' implied easement claim. It acknowledged that **under Clearwater Realty Co. v. Bouchard, 146 Vt. 359, 364, 505 A.2d 1189, 1192 (1985), "lot owners acquire rights in all roads, streets, parks, and other designated ways shown on the plat map unless a contrary intent is affirmatively shown."** The court distinguished Clearwater, however, explaining that a designated school site did not create the same kind of third-party easement as would a right-of-way, street, or park. The court concluded that its analysis of plaintiffs' claim resembled more of an equitable evaluation, and the equities in this case favored defendant. The court noted that implied easements are disfavored and that enforcing the right would create a particularly heavy burden to run with the land, for a purpose that had been disavowed by the intended party. In light of these facts, the court found it difficult to see how plaintiffs would have a right to the reserved school site parcel merely because it was part of the plat referenced in their deeds. It therefore rejected plaintiffs' implied easement claim.

¶ 14. The court found that the purpose of the option in conjunction with the 1985 deed was to provide the school district with one school site while reserving one as open space; the fact that the school district had walked away from both parcels did not change this effect and intent. The court thus concluded that the reversion clause in the school site deed had not been triggered by the 1992 transfer of title for the Essex site and any equitable servitude that might arise out of the deed was not kindled. The court therefore granted defendant's motion for summary judgment. Plaintiffs appealed.

¶ 15. Plaintiffs first argue that the trial court erred in granting summary judgment to defendant on their implied easement claim. According to plaintiffs, the trial court misread and misapplied Clearwater, 146 Vt. 359, 505 A.2d 1189. Plaintiffs maintain that the touchstone of Clearwater is "inducement," and because they were induced to purchase their lots by the promises of the subdivision plat, the promises of the plat are enforceable. Plaintiffs argue that Clearwater should apply to reserved school sites because schools convey an image analogous to a park, the inducement test was met, and the underlying evil ("bait and switch") was shown.

¶ 17. In Clearwater, we recognized the "familiar principle of law that where lots are sold by reference to a recorded plat, lot purchasers acquire the right to keep open and use roads, streets, highways, and park areas as indicated on the plat." 146 Vt. at 363, 505 A.2d at 1191. The Clearwater case involved a dispute over a beach path that had been depicted on a subdivision plat, which was referenced in defendants' deed. The path did not abut defendants' property, however, and we noted that a minority of jurisdictions held that lot purchasers only acquired easements over platted streets or ways that touched their land or that were necessary for the use and enjoyment of their property. Id. We rejected this approach in Clearwater, holding with the majority of jurisdictions that **"lot owners acquire rights in all roads, streets, parks, and other designated ways shown on the plat map unless a contrary intent is affirmatively shown."** Id. at 363-64, 505 A.2d at 1192. **We explained that the object of this principle was " 'not to create public rights but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated.**' " Id. (quoting Callahan v. Ganneston Park Dev. Corp., 245 A.2d 274, 278 (Me. 1968)); see also Crabbe v. Veve Assocs., 150 Vt. 53, 55-56, 549 A.2d 1045, 1047 (1988) (explaining that implied easement rule is rooted in equitable considerations).

¶ 18. **In Lalonde v. Renaud, 157 Vt. 281, 283, 597 A.2d 305, 306 (1989), we clarified that Clearwater set forth an objective test for evaluating implied easement claims. In that case, the trial court held that plaintiffs had acquired an implied easement in a lot that had been depicted as a park on a subdivision plat**. Id. at 283, 597 A.2d at 305. Defendants argued that they had been denied the opportunity to show that one of the plaintiffs had not actually relied on the existence of the park in purchasing his lot. Defendants asserted that absent reliance on the plat or reliance on the park itself, plaintiff had not been injured by the subsequent development of the lot. Id. at 283, 597 A.2d at 306. We rejected this argument, explaining that **under Clearwater, lot owners were granted "rights as a**

result of purchasing 'with reference to' a plat, without adding a requirement of specific reliance on depictions in the plat." Id.

¶ 19. In reaching our conclusion, we noted that Clearwater did not absolutely bar a different analysis in a significantly different factual setting. Id. at 284 n.2, 597 A.2d at 306 n.2. We explained that Clearwater involved rights-of-way, not parks, and parks might well be considered distinguishable on the basis of a different degree of necessity to the lot owner. Id. at 284, 597 A.2d at 306. We indicated that we had had no occasion in Clearwater to consider a third line of cases that had adopted the "intermediate" or "beneficial enjoyment" rule, under which the extent of the private right is limited to streets, alleys, or parks that are reasonably or materially beneficial to the grantee. Id. Even under this test, we explained, the inquiry into whether a lot owner is benefitted would involve an objective test, not one that depends on an owner's specific reliance on what was depicted on the plat map. Id.

¶ 20. Plaintiffs argue that, as in Clearwater, they acquired an implied easement in the reserved school site because it is "reasonable to infer" that they were induced to purchase their lots by the promises of the plat.(fn4) **While plaintiffs correctly assert that inducement is an integral component of the implied easement analysis, there can be no reasonable inducement under the circumstances of this case. The construction of a school, unlike a platted road or park, is completely outside of the developer's control. Thus, unlike Clearwater, and the cases on which plaintiffs rely, plaintiffs could never acquire or enforce a "private right" to the construction of a school building on the Countryside site**. Cf. Clearwater, 146 Vt. at 363, 505 A.2d at 1191 (platted path); Lalonde,157 Vt. at 283, 597 A.2d at 305 (platted park); Ute Park Summer Homes Ass'n. v. Maxwell Land Grant Co., 427 P.2d 249, 253 (N.M. 1967) (confirming lot owners' "private right" to construction of golf course depicted on plat where lot sales were based on plat and specific representations to this effect had been made to buyers).

…

> The rationale of the [implied easement] rule is that a grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do. It is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use, or upon the filing or recording of the plat.

Id. at 253.

¶ 23. **Unlike the cases discussed above, and similar cases involving platted streets, parks, and open space areas, the grantor in this case lacks authority to construct a school on the Countryside site and its reservation of the school site cannot reasonably be seen as a promise to purchasers that such construction would actually occur. See generally Restatement (Third) of Property: Servitudes, § 2.13, Reporter's Note at 174 (2000) (stating that "[u]nless the grantor has the**

power to create the servitude, there would be no point to implying the servitude," and citing cases). Indeed, in this case, the grantor was required by the planning commission to reserve the school site and convey the site to the school district to secure approval of the plat."

Lalonde v. Renaud, 157 Vt. 281 (1989)

At pp. 282-285: "…All of the plaintiffs' deeds refer to a map, which the trial court found was recorded(fn1) and which depicted an area north of lot 10 of the subdivision as a park. **The deeds, however, did not expressly refer to a park, nor did the declaration of restrictions in any of the deeds expressly prohibit construction in the area designated as a park. Nevertheless, there was no dispute that the area was used and maintained as a park at least since 1966, and the trial court so found.**

Ownership of the area north of lot 10 designated as a park remained with the developers until they sold it by quitclaim deed, along with other land, to defendants' predecessors in title in 1977. Defendants purchased the area in 1982, and in 1984 erected a fence between the beach and the grassy portion of the park. When they made it known that they intended to develop the area, the present action ensued.

The trial court concluded that the original lots were sold by reference to a recorded plat indicating a park area and that the purchasers acquired rights in the park. In *Clearwater Realty Co. v. Bouchard,* 146 Vt. 359, 505 A.2d 1189 (1985), we held that where lots are sold with reference to a recorded plat that indicates a park, "lot purchasers acquire the right to keep open and use roads, streets, highways, and park areas as indicated on the plat." *Id.* at 363, 505 A.2d at 1191.

Defendants contend that the trial court erred in disallowing cross-examination of plaintiff James' Ruddy aimed at exploring Ruddy's reliance (or lack of reliance) on the existence of the park in purchasing his lot in 1981. The underlying substantive argument would have been that, absent reliance on the plat denominating the park or reliance on the park itself, plaintiffs were not injured by the subsequent development of the lot denominated "park" in the subdivision plan.

Defendants misapprehend the nature of the rights created in lot owners who have purchased by reference to a park in a recorded plat. **The holding in *Clearwater* sets forth an objective test, granting lot owners rights as a result of purchasing "with reference to" a plat, without adding a requirement of specific reliance on depictions in the plat.** In *Clearwater,* we clearly rejected holdings in some jurisdictions that "lot purchasers only acquire an easement over streets or ways which touch their land or which are *necessary* for the use and enjoyment of their property." *Id.* at 363, 505 A.2d at 1192 (emphasis added). We chose instead what is sometimes called the "broad" or "unity" rule (see generally Annotation, *Conveyance with Reference to Plat,* 7 A.L.R.2d 607, 612 (1949)) that "lot owners aquire rights in all roads, streets, parks, and other designated ways shown on the plat map unless a contrary intent is affirmatively shown." *Id.* at 364, 505 A.2d at 1192.(fn2)

Clearwater addressed rights of way, not parks, which might well be considered distinguishable on the basis of a different degree of necessity to the lot owner. We had no occasion in *Clearwater* to consider a third line of cases adopting the "intermediate" or "beneficial enjoyment" rule, under which the extent of the private right is limited to streets, alleys, or parks that are reasonably or materially beneficial to the grantee. See, e.g., *Whitton v. Clark,* 112 Conn. 28, 151 A. 305 (1930). Even if we were to apply the "reasonable benefit" rule in the present case, an inquiry into whether a lot owner is benefited involves an objective test, not one that depends on an owner's specific reliance on what was depicted on the plat map. Moreover, in the present case the findings below were ample to support the conclusion that the park benefited plaintiffs. The court stated:

> There is no doubt that the character of the neighborhood will be adversely affected should the park be no more. What was there (beach and lawn) for all lot owners to use and enjoy will be no more and those lot owners across the road from the park will look out upon a cottage lot should Defendants prevail.

[2, 3] Defendants' argument that each present owner of a lot must demonstrate reliance on the map filed in 1957 would effectively limit the beneficiaries of the protections contained in *Clearwater* to the original purchasers from a developer since only these persons are likely to have relied directly on the plat. Subsequent purchasers would be unable to prove such reliance and would lose the right to the park. Such a position is clearly inconsistent with our holding in *Clearwater.*(fn3) Additionally, it would, if adopted, undermine the promises made by developers who seek to attract buyers to a subdivision with dedications of common land. Finally, it would create an undue hardship to subsequent purchasers, whose benefits might depend on proof that they had knowledge of and relied on plats filed at the commencement of the development. There is no reason why purchasers who purchased their properties from someone other than the developer should not enjoy all of their predecessors' rights and interests, unless "a contrary intent is affirmatively shown." *Clearwater,* 146 Vt. at 364, 505 A.2d at 1192."

Crabbe, Jr. & Sweeney, Jr. v. Veve Assoc., 150 Vt. 53 (1988)

At pp. 55-57: "In *Clearwater Realty Co.* v. *Bouchard,* 146 Vt. 359, 505 A.2d 1189 (1985), we held that, in certain circumstances, lot purchasers acquire permanent rights to use streets indicated on the subdivision plat. *Id.* at 363--64, 505 A.2d at 1191--92. Defendant urges that *Clearwater* does not apply in situations where a subdivision plan has been abandoned and emphasizes the public policy against control of real property by the "dead hand" of an original owner. Although we agree that the rule espoused in *Clearwater* does not apply to the facts of the instant case, we reach this conclusion on different grounds.

Clearwater involved lots sold through deeds that contained specific references to a recorded subdivision plat. The plat depicted a roadway twenty-five feet wide leading from a subdivision access road to Lake Champlain, and plaintiffs sought an injunction against a lot owner's use of the roadway. This Court held for the lot

owner, noting the familiar principle that "where lots are sold by reference to a recorded plat, lot purchasers acquire the right to keep open and use roads, streets, highways, and park areas as indicated on the plat. *Id.* at 363, 505 A.2d at 1191. **This implied easement rule is rooted in equitable considerations, and it simply recognizes that the sale of a lot under such circumstances also conveys rights to use the platted roadways and park areas.**

Here, in contrast, the deeds executed to plaintiffs include *express* grants of easements - to plaintiff Sweeney over specific platted roadways and to plaintiff Crabbe over all the roadways depicted on the subdivision plat. Although the deeds do refer to the subdivision plat, they do so in the course of granting the express easements. Where a deed to a subdivision lot contains express provisions regarding easements over the subdivision roadways, there is no need for resort to equitable rules. …

…In any event, a real estate developer's abandonment of a subdivision plan cannot alter the property rights of individual lot owners to whom he has already granted easements.

Defendant notes that courts in other jurisdictions have held that an easement granted for a particular purpose is extinguished as soon as the purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment. See, e.g., *URS Corp* v. *Ash,* 101 Ill. App. 3d 229, 236, 427 N.E.2d 1295, 1300 (1981). This Court has applied an analogous, though much more limited, rule in a case where an easement explicitly reserved the right to a particular view from an existing house; because the house was later moved to a location from which the view could not be maintained under any circumstances, we held that the easement was extinguished. *Hopkins the Florist, Inc.* v. *Fleming,* 112 Vt. 389, 393, 26 A.2d 96, 98--99 (1942).

Here, defendant asserts that the easements at issue were created for the sole purpose of providing access to lots in the subdivision. Defendant maintains that, because the subdivision plan has been abandoned, the purpose of the easements has ceased to exist and that the easements have been extinguished. **In general, we think that the rule regarding extinguishment by cessation of purpose should be applied only where easements are qualified by express limitations**. See *Delconte* v. *Salloum,* 336 Mass. 184, 188--90, 143 N.E.2d 210, 213--14 (1957). We need not decide this question, however, because defendant's argument is fundamentally unsound. **The easements at issue belong to plaintiffs, not to the subdivision, and the purpose of easements is to provide them with a direct route to and from a public road. Although they have access to the road by means of an alternative, circuitous route, this does not mean that the purpose of the easements has ceased to exist**. See *Sabins* v. *McAllister,* 116 Vt. 302, 308, 76 A.2d 106, 109 (1950) (fact that grantee of right of way finds another way more convenient does not deprive him of right of way); cf. *American Oil Co.* v. *Leaman,* 199 Va. 637, 101 S.E.2d 540, 551--52 (1958) (where public road to which an easement gave access was closed, the easement was extinguished by cessation of purpose for which it was granted). Defendant does not argue that plaintiffs themselves have abandoned their easements, and we hold that plaintiffs' rights are viable with respect to the platted

Clearwater Realty Co. v. Bouchard, 146 Vt. 359 (1985)

At pp. 361-364: "The 1946 deed from Clearwater Realty Company conveyed to the Conways a right-of-way over company property. The deed did not specify the location or the dimensions of the right-of-way. Both parties agree, however, that the right-of-way is properly located; the dispute here concerns only its width.

[1] **When a deed merely recites a general right-of-way over the servient estate, the owner of the easement is "'entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own.'"** *Patch* v. *Baird,* 140 Vt. 60, 66, 435 A.2d 690, 692 (1981) (quoting *Lafleur* v. *Zelenko,* 101 Vt. 64, 70, 141 A. 603, 605 (1928)). **More particularly, when the width of an easement is undetermined by the deed "the law says that it shall be of a reasonable width, considering the purpose for which it was intended."** *County of Addison* v. *Blackmer,* 101 Vt. 384, 388, 143 A. 700, 701 (1928).

… The beach path dispute can be resolved on the basis of the following findings. In 1945 Clearwater Realty recorded a subdivision plat covering the land in question. It sold lots to defendants' predecessors in title and others through deeds which contained specific references to the recorded plat. The plat pictured a 25-foot-wide road leading from the Clearwater access road to Lake Champlain.

…The majority position, however, and the one we now adopt, **is that lot owners acquire rights in all roads, streets, parks, and other designated ways shown on the plat map unless a contrary intent is affirmatively shown. 2 G. Thompson, *supra,* at 461--62 & n.23; *Cohen, supra,* 385 Pa. at 355--56, 123 A.2d at 717.**

> **The object of the principle is, not to create public rights, but to secure to persons purchasing lots under such circumstances those benefits, the promise of which, it is reasonable to infer, has induced them to buy portions of a tract laid out on the plan indicated."**

3.2.6 Easements by Dedication

RESTATEMENT OF THE LAW, PROPERTY, SERVITUDES (American Law Institute, 3rd Edition, 2000)

§ 2.18 Acquisition of Servitudes by Governmental Bodies and the Public

(1) **Governmental bodies may acquire servitudes by dedication and condemnation, as well as by the methods set forth in §§ 2.1 through 2.17. The public may acquire servitudes by dedication and prescription.**

(2) Unless application of the rules set forth in §§ 4.1 through 4.3 leads to a different conclusion as to the intention of the parties creating the servitude, the

right to control a servitude for the benefit of the public is located in the state and the right to use the servitude benefit extends to the public at large.

Town of South Hero v. Wood, 2006 VT 28

"¶ 10. "**Dedication is the setting apart of land for public use, either expressly or by implication of law."** Druke v. Town of Newfane, 137 Vt. 571, 574, 409 A.2d 994, 995 (1979). **Dedication of a roadway requires both an offer to dedicate the land and an acceptance of that offer.** Smith v. Town of Derby, 170 Vt. 553, 554, 742 A.2d 757, 759 (1999) (mem.). **In determining whether there has been a dedication and acceptance, "[i]ntent is a question of fact"** that we review for clear error. Id. (quotations omitted). Accordingly, we will uphold the trial court's determination that defendants intended to dedicate land for the road "unless, taking the evidence in the light most favorable to the prevailing party, and excluding the effect of modifying evidence, there is no reasonable or credible evidence to support [it]." Mann v. Levin, 2004 VT 100, ¶ 17, 177 Vt. 261, 861 A.2d 1138.

¶ 11. **Because dedication may be express or implied, the offer to dedicate need not come in the form of a writing or an affirmative act by the owner**. Druke, 137 Vt. at 574, 409 A.2d at 995. For example,

> **long acquiescence in use[] by the public, if the attending circumstances clearly indicate an intent by the owner to devote the land to public use, is evidence upon which a dedication may be predicated. The allowance by the owners of repairs at public expense is one circumstance that strongly tends to show the intent to dedicate.**

Id. at 575, 409 A.2d at 996 (citations omitted). **This follows because the "theory underlying dedication is that owner-permitted use of private property by the public creates . . . an expectation of continued use that estops the owner from preventing it."** Town of Newfane v. Walker, 161 Vt. 222, 226, 637 A.2d 1074, 1076 (1993); see also Druke, 137 Vt. at 576, 409 A.2d at 996 **("[D]edication is actually a form of estoppel in pais, in which the offer by the owner is the representation, and the use by the public is the reliance that completes the estoppel.").** Thus, in the context of an implied dedication, the public's use of the land or resource in question looms large. See Walker, 161 Vt. at 226, 637 A.2d at 1076 (noting that "[u]se, not ownership, is the crux of dedication").

¶ 15. When, as here, the boundaries of a road are not properly recorded, (FN4**) the law presumes a roadway width of "one and one half rods on each side of the center of the existing traveled way." 19 V.S.A. § 32 (emphasis added). This presumption applies regardless of whether the existing traveled way has wandered from its original route.** Town of Ludlow v. Watson, 153 Vt. 437, 441, 571 A.2d 67, 69 (1990). Thus, 19 V.S.A. § 32 creates a rebuttable presumption that East Shore Road extends one-and-one-half rods from the centerline of the traveled way as it existed prior to the 2000 construction. See Watson, 153 Vt. at 440, 571 A.2d at 69 (interpreting the statute as "an evidentiary method of proving the boundaries of a public highway otherwise incapable of ascertainment from public

records" (quotations omitted)). Defendants argue that they have rebutted the presumption because there was no evidence that they "intended to dedicate any land farther inland than the northerly edge of the road" as it existed prior to the 2000 maintenance.

¶ 16. The evidence shows instead that the land was dedicated to public use as a road. **Dedication "passes an easement to use the property in a manner consistent with the dedication**." Walker, 161 Vt. at 226, 637 A.2d at 1076. Thus, because the dedication was based in part on the public's long use of the land as a road, the scope of the dedication necessarily included the public's interest in the right-of-way, in addition to the portion actually traveled. This interpretation is supported by the deeds held by defendants, which state that the lands conveyed are subject to the road and its right-of-way. (FN5) Similarly, **the dedication was based in part on defendants' long acquiescence in the Town's maintenance of the road as a town highway. Thus, the town should be entitled to rely upon the three-rod presumption when maintaining roads in the absence of evidence to the contrary. Accordingly, we affirm the trial court's ruling as to the location and width of the road.**

¶ 18. We disagree with the Town's analysis. **A "common-law dedication . . . does not pass fee simple; rather, it passes an easement to use the property in a manner consistent with the dedication**." Walker, 161 Vt. at 226, 637 A.2d at 1076. Thus, **the implied dedication discussed above resulted in the Town acquiring an easement to use the land occupied by the traveled way as it existed** prior to the August 2000 construction and nothing more. **The Town cannot justify further inland relocations of the road by successive applications of § 32's three-rod presumption because doing so would amount to a unilateral change in the location of the easement without the consent of defendants, the owners of the servient estates.** See In re Shantee Point, 174 Vt. 248, 261, 811 A.2d 1243, 1254 (2002) (recognizing that once an easement is fixed, it cannot be unilaterally enlarged or relocated by the owner of the dominant estate without consent of the owner of the servient estate). Accordingly, we reject the Town's argument that § 32 allows it to undertake "gradual changes" that move the road beyond the inland boundary established by the dedication without compensating defendants. To hold otherwise would enable the Town to rebuild the road within, but at the far inland edge of, the current right-of-way, and then apply § 32 to "slide" the right-of-way inland by centering it at the centerline of the new traveled way-a process which, in theory, could continue indefinitely."

Town of Newfane v. Walker, 161 Vt. 222 **(1993)**

At pp. 223-228: "… the public's right of access to and use of the Williamsville swimming hole.

…

[2] The court's conclusion that the dam and swimming hole property had already been dedicated to the public by 1943 is supported by its findings and the record. Both the facts and the analysis here parallel those of *Druke*. "**Dedication is the setting apart of land for public use, either expressly or by implication of law. It may be shown by the owner's writings, affirmative acts, acquiescence in public use, or some combination thereof, so long as the owner's intent to dedicate**

clearly appears." 137 Vt. at 574, 409 A.2d at 995. The court found that, at least since 1912, **the public had actively and continuously made use of the waters both above and below the dam for a variety of activities, including fishing, swimming, skating, ice cutting, washing vehicles, sunbathing, and picnicking. John Williams, during the long period he owned the property, did nothing to discourage and much to encourage the public's enjoyment of it. He continued to repair the dam even after the mill ceased to function and the dam was no longer necessary to generate power. Here, as in *Druke,* the public's use of the land for more than forty years "for the purpose for which it was dedicated is in law equivalent to an acceptance" and completed the dedication.** *Id.* at 576, 409 A.2d at 996.

Finally, here, as in *Druke,* the language in Williams's **deed to Fitzmorris, reserving the "dam and water power rights" for "the public generally," is further evidence of his intention to dedicate the swimming hole property.** *Id.* at 575, 409 A.2d at 995. The dedication predated the deed. The deed did not create an interest in the public; it recognized a pre-existing interest in the public created by dedication. *Id.* at 576, 409 A.2d at 996.

[3] **Questions remain about the nature of the dedication, that is, what interest it conveyed to the public. Although we agree with the trial court that the swimming hole property and dam area have been dedicated, we do not agree that the dedication was a fee. A common-law dedication, unlike a more formal statutory dedication, does not pass fee simple; rather, it passes an easement to use the property in a manner consistent with the dedication.** See, e.g., *Chester v. Gilchrist,* 497 A.2d 820, 821 (Md. Ct. Spec. App. 1985), *rev'd on other grounds,* 514 A.2d 483 (Md. 1986); *Town of Reydon v. Anderson,* 649 P.2d 541, 543 (Okla. 1982); *Boyd v. Hyatt,* 364 S.E.2d 478, 482 (S.C. Ct. App. 1988); see also *County of Bennington v. Town of Manchester,* 87 Vt. 555, 557, 560, 90 A. 502, 503, 504 (1914) (affirming that town dedicated courthouse to county but defining dedication as an easement only and holding that town retained fee interest in courthouse property). The theory underlying dedication is that owner-permitted use of private property by the public creates an "estoppel in pais," see *Druke,* 137 Vt. at 576, 409 A.2d at 996, that is, an expectation of continued use that estops the owner from preventing it. **Use, not ownership, is the crux of dedication.**

[4] The dedication here was an easement, but the scope of the dedication, not the nature of the property interest it conveys, determines how the public may use the property.

…

Here, the easement is not limited to the dam and water rights reserved by John Williams in the 1943 deed. Rather**, the public has an easement by dedication, not only to use water power but to pursue a wide variety of activities in the area of the stream. It is an easement not only in the structure but also in the surrounding land. Although the loss of the dam restricts those activities, water and gravel may still be taken and some recreational uses remain. John Williams himself repaired previous breaches in the dam; the intent of the dedication survives a breach of the dam."**

4.0 INTERPRETATION OF EASEMENTS

4.1 Intent Of The Parties

Rowe & Banschbach v. Lavanway, 2006 VT 47

> "¶11. …**Our goal in interpreting a deed is to implement the intent of the parties.** Kipp, 169 Vt. at 105, 732 A.2d at 129; see also Barrett v. Kunz, 158 Vt. 15, 18, 604 A.2d 1278, 1280 (1992) ("The 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."). **We look first to the language of the written instrument because we presume that it declares the parties' intent.** Kipp, 169 Vt. at 105, 732 A.2d at 129. **The parties' intent, "when ascertainable from the entire instrument, prevails over technical terms or their formal arrangement**." Id. (quotations omitted). In interpreting a deed, **we "read the entire written instrument as a whole, giving effect to every part so as to understand the words in the context of the full deed. In so doing, we construe the various clauses of the document, wherever possible, so that the deed has a consistent, or harmonious meaning**." Id. (citations and quotations omitted).
>
> ¶ 12. In this case, the trial court concluded that the deed as a whole reflected the grantor's intent to convey an appurtenant easement. We agree. An appurtenant easement is one that serves a parcel of land rather than a particular person, and a construction that an easement is appurtenant is favored. Barrett, 158 Vt. at 18, 604 A.2d at 1280 (explaining that, in contrast, personal easements, or easements in gross, are intended only to benefit the holder, and they are usually created for a limited purpose and a limited duration); Scott v. Leonard, 119 Vt. 86, 98, 119 A.2d 681, 698 (1956) ("A construction that an easement is one appurtenant rather than in gross is favored."). We reject plaintiffs' assertions that the absence of the words of inheritance in the granting clause controls the interpretation of the deed. See Kipp, 169 Vt. at 105, 732 A.2d at 130 ("Although we agree that in some cases according priority to the granting clause over other deed language is appropriate, we stress that such priority is only an aid to determining the intent of the grantor, to be used along with other such aids."). We similarly reject plaintiffs' assertion that the deed's imposition of an obligation on Brown to "put up all bars in the lane" necessarily rendered the conveyance a personal license. This phrase does not conclusively demonstrate that Brown had any personal interest in securing a right-of-way distinct from his interest as owner of the lot. See Leonard, 119 Vt. at 98, 119 A.2d at 698 ("[T]here is nothing in the relation of the grantors to the grantee, to each other, nor in the nature of the right in question, that shows it to be a mere personal right or that it was so intended.").
>
> ¶ 13. As the trial court found, its interpretation of the deed gave meaning to the word "appurtenances." We reject plaintiffs' suggestion that we should give the term a different meaning from that identified by the trial court. **With no evidence that the easement was personal to Brown or created for a limited purpose or duration, the intent of the parties to convey a way of ingress and egress to Brown's land is accomplished in the deed. Mindful that appurtenant easements are favored over**

easements in gross, we note that the trial court's interpretation is also consistent with the common understanding of the term "appurtenance." See Webster's Ninth New Collegiate Dictionary 98 (9th ed. 1985) (defining "appurtenance" as "an incidental right (as a right-of-way) attached to a principal property right and passing in possession with it). When a term is unambiguous, we give it its plain meaning. See, e.g., N. Sec. Ins. Co. v. Perron, 172 Vt. 204, 209, 777 A.2d 151, 154 (2001) (Court gives disputed terms their "plain, ordinary and popular meaning"). The trial court did not err in finding that the deed established an appurtenant right-of-way."

Tilley v. Green Mountain Power Corp., 156 Vt. 91 (1991)

At pp. 92-94: "…**South Burlington property owners, sued defendant Green Mountain Power Corporation (GMP) to prevent GMP from running additional power lines along an existing easement across their property.** The trial court granted plaintiffs a permanent injunction preventing construction. The court found that when the easement was initially created in 1961, **a GMP representative, in conversation with Helen Tilley and Russell Tilley"s father, Rollin, had assured them that "the power line would not be enlarged in scope."** Relying on *Isbrandtsen v. North Branch Corp.,* 150 Vt. 575, 579, 556 A.2d 81, 84 (1988), the court reasoned that GMP"s verbal assurance was a circumstance surrounding the creation of the 1961 easement deed, which rendered that deed ambiguous. The court concluded that the only fair and reasonable interpretation of the deed, given the verbal assurance, was that no significant expansion of the power lines was intended, and gave relief to plaintiffs. We hold that the court misconstrued *Isbrandtsen* and violated the parol evidence rule. Accordingly, we reverse.

The 1961 deed granted GMP:

> the perpetual right and easement to construct, reconstruct, repair, maintain, operate and patrol, for the transmission of high and low voltage electric current and for a line of poles, which may be erected at different times, with wires and cables strung upon and from the same, and all necessary foundations, anchors, guys, braces, fittings, equipment and appurtenances, over, across and upon our land. ...
>
> Also the perpetual right and easement from time to time without further payment therefor ... to renew, replace, add to and otherwise change the line and each and every part thereof. ...

After this deed was executed, GMP constructed a line of poles supporting a crossarm with four electrical cables. The trial court heard testimony from Russell Tilley that, prior to signing the easement, Helen and Rollin were shown a survey and plan by GMP and were assured that "there wouldn"t be any changes in it." In 1977, Rollin and Helen entered into a second easement deed with GMP for the sole purpose of relocating a portion of the preexisting easement. The court found, and we agree, that the 1977 easement did not alter the intent of the 1961 deed as to GMP"s right to enlarge the scope of the power line.

The event giving rise to this lawsuit was GMP"s attempt to add three cables to the existing line of poles for transmission of low-voltage electrical current to customers in the Dorset Street area. To accomplish this plan, GMP proposed adding a second crossarm to each pole and raising the height of the poles by ten feet. The trial court found that this project would adversely affect plaintiffs" view from their property of Mount Mansfield and other mountains and that GMP could build the project underground for an added cost of over $190,000 but declined to do so without a subsidy in that amount.

[1] **The language of the 1961 easement deed is unambiguous on its face. The trial court, however, considered parol evidence that the deed does not mean what it says and concluded an ambiguity exists.** In *Isbrandtsen,* we stated:

> [W]e believe it appropriate, when inquiring into the existence of ambiguity, for a court to consider the circumstances surrounding the making of the agreement. **Ambiguity will be found where a writing in and of itself supports a different interpretation from that which appears when it is read in light of the surrounding circumstances, and both interpretations are reasonable.**

150 Vt. at 579, 556 A.2d at 84. In a footnote, however, we cautioned **that the parol evidence rule is still good law; an oral agreement may not replace or modify a contemporaneous or subsequent written agreement**. *Id.* at 579 n.*, 556 A.2d at 84 n.*.

[2] **The court here indirectly substituted the verbal understanding for the written language, by holding that the verbal assurance was a surrounding circumstance that caused the deed to become ambiguous and then resolving the ambiguity in plaintiffs" favor. This reasoning fails because the verbal assurance was not simply a context giving meaning to the written agreement; rather, the verbal assurance was an oral, contractual term directly contradicting the later written expression of agreement. The rule permitting contracts to be read in light of surrounding circumstances should not be allowed, as it did here, to swallow up the parol evidence rule."**

Griffith v. Neilsen, 141 Vt. 423 (1982)

At pp. 425-427: "…Plaintiffs commenced a declaratory judgment action against defendants seeking the location of a right-of-way leading from Town Road 4 in Mount Tabor, Vermont, across lands of the defendants to lands of the plaintiffs. In addition, plaintiffs sought damages for interference with the use of the right-of-way and an injunction enjoining defendants from interfering with its future use. After court hearing, the trial court declared the location of the right-of-way but not the width, determined that Town Highway 4 extended beyond defendants' buildings, limited plaintiffs' use of the right-of-way, and denied plaintiffs damages…

…

[4—6] The trial court limited the granted right-of-way to certain specific persons despite the fact that the grant was a general one to plaintiff and his heirs and assigns. **There is no formula for the creation of a right-of-way; the only *essential* is**

that the parties' intention be clear. *Scanlan* v. *Hopkins,* 128 Vt. 626, 629, 270 A.2d 352, 355 (1970). If the language of the instrument is not clear, the intentions of the parties must be gathered from the total language and from the circumstances which prevailed at the time of the conveyance. *Id.*…
…

…If the defendants impaired the enjoyment of the right-of-way, the plaintiffs, even though they may not be able to prove any injury or actual damage proximately caused by the defendants' actions, are entitled to a judgment of nominal damages as the law presumes a damage in order for plaintiff to vindicate his right. *Collins* v. *St. Peters,* 65 Vt. 618, 622, 27 A. 425, 426 (1893). The order here must be remanded for the trial court to award nominal damages."

Patch v. Baird, 140 Vt. 60 (1981)

At p. 66: "[12—15]…**That deed merely recited a general right of way over the servient estate, without defining or limiting it. In such a case the owner of the easement is "entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own."** *Lafleur* v. *Zelenko,* 101 Vt. 64, 70, 141 A. 603, 605 (1928). **The owner of the servient estate initially has the right to designate the location of the easement.** *Id.* at 70, 141 A. at 606. **"If he fails to do so, the person entitled to the right of way may select a suitable route, having regard for the interest and convenience of the owner of the servient estate."** *Id.* at 71, 141 A. at 606. The defendants, as claimants, had the burden of proving where the easement was located. See *Nelson* v. *Bacon,* 113 Vt. 161, 168, 32 A.2d 140, 144 (1943)."

Scanlan v. Hopkins, 128 Vt. 626 (1970)

At pp. 629-631: "[1, 2] **The law requires no technical formula of words to create a servitude against one property in favor of another. The only essential is that the parties make clear their intention to establish an easement. If the language of the instrument is not clear, the intentions of the parties must be gathered from the total language and from the circumstances which prevailed at the time of the conveyance. And all doubts in this regard are to be resolved in favor of the use of land free from such encumbrances.** *Wing* v. *Forest Lawn Cemetery Association,* 15 Cal.2d 472, 130 A.L.R. 120, 126; Thompson, Real Property § 332 (1961 Replacement).

The plaintiffs contend that the agreement concerning the culvert in the defendants' deed to Bonneau established a right in the grantees to discharge surface water through a pipe into the pond. They contend that this imposed a burden on them of maintaining the pond in its preexisting state.

[3] The bare language contained in the Bonneau grant does not impose such a burden on the grantors. It obligates the grantors to provide the material for the construction of a culvert "for the purpose of conducting surface water" to the pond on land of the grantors. The grantees agree to accomplish the construction

according to certain specifications with an undertaking by the grantors to save the grantees harmless---"from any responsibility or damage occasioned by water damage by reason of the installation of the fill and grading and culvert as herein provided." But there is no obligation on the grantees to maintain the pond in the *status quo*. If a servitude was created against lands retained by the defendants, it must be by implication based on the circumstances shown by the evidence at the time of the grant. *Wheeler* v. *Taylor,* 114 Vt. 33, 37, 39 A.2d 190; *Read, Administrator* v. *Webster,* 95 Vt. 239, 244, 113 A.2d 814.

According to the defendants' evidence, the discharge from the Bonneau culvert follows the natural drainage to the pond in the same manner that existed when the defendants owned the entire tract. And other than the fact that the grantors were required to contain the flow by installation of the culvert, the discharge of surface water to the land below remained the same.

[4] More important, from the circumstances which existed at the time of the grant, it cannot be gathered that either of the parties to the deed intended to add a new benefit to the land conveyed or increase the burden on the land retained. Neither is it shown that such an easement was necessary to the full enjoyment of the land conveyed. These are essential requisites to the creation of an easement by implication. *Chevalier* v. *Tyler,* 118 Vt. 448, 450, 111 A.2d 722; *Read, Administrator* v. *Webster, supra,* 95 Vt. at 244."

4.2 Scope Of Use By Owners Of Dominant Estates and Servient Estates

Sweezey v. Neel, 2006 VT 38

"¶ 29. Finally, we reject defendants' remaining arguments concerning the court (1) allowing plaintiff to maintain a permanent locked gate at the entrance to the easement; (2) finding that utility poles erected by plaintiff's predecessors-in-title were outside the easement; (3) concluding that a boulder placed across the upper fork of the easement did not unreasonably burden defendants; and (4) suggesting that defendants used the easement in an unreasonable manner by damaging flowers alongside the easement**. Regarding the first issue, defendants make a general argument concerning the erection of gates, without explaining the significance of a locked gate under the circumstances of this case. The evidence at trial showed that there had been a gate at the entrance of the easement for decades. Defendants failed to convince the court that a gate would unjustifiably burden access to their property. The court determined that a locked gate would be reasonable as long as plaintiff provided access to Association members, their guests, and emergency vehicles**. We find no abuse of discretion. See Lovitt v. Robideaux, 78 P.3d 389, 395 (Idaho 2003) (servient owner may erect gate to restrict use of easement to rightful users, as long as gate does not unreasonably burden dominant owner); Rupert v. Gunter 640 P.2d 36, 39 (Wash. Ct. App. 1982) (whether servient owner may maintain gate across easement depends on intention

of parties creating easement, as shown by circumstances of case, situation of property, and manner in which easement has been used)."

Rowe & Banschbach v. Lavanway, 2006 VT 47

"¶ 21. Finally, we turn to plaintiffs' assertion that the trial court erred in concluding that the right-of-way could be used for automobile travel. Plaintiffs argue that the language of the deed "strongly suggests" that the easement was intended to serve as a lane for cattle and other farm animals, and **the use of automobiles on the lane falls outside of the historical use of the right-of-way**, and it should be prohibited.

¶ 22. The trial court concluded that because **there was no limitation on the grantee's use of the right-of-way in the 1881 deed that created it, none should be imported merely because, over time, horses had been replaced by automobiles and cows by ATV**s. The court's conclusion is consistent with Vermont law and with the principle cited by plaintiffs that a servient estate must use a right-of-way in a manner consistent with the use contemplated at the time of its creation, and it may not use it in a way that materially increases the burden on the servient estate. Greenberg v. Hadwen, 145 Vt. 112, 116, 484 A.2d 916, 918 (1984). As the deed reflects, and the trial court found, there was no expressed limitation on how the right-of-way could be used at the time it was created.

¶ 23. In general, **a dominant estate is entitled to use an easement "in a manner that is reasonably necessary for the convenient enjoyment of the servitude."** Restatement (Third) Property, Servitudes § 4.10 (2000); see also F.T. Chen, Annotation, Extent and Reasonableness of Use of Private Way in Exercise of Easement Granted in General Terms, 3 A.L.R.3d 1256, 1284 (1965) (explaining that a right-of-way which is general and without limitation in its terms "is generally held properly subjected to animal and vehicular use, the theory being that such use, being necessary to the reasonable and proper use and enjoyment of the dominant estate, was within the contemplation of the parties") (collecting cases). **We recognize that "[t]he manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude."** Restatement (Third) Property, Servitudes § 4.10 (2000) (explaining that the policy underlying this rule is that "it permits servitudes to retain their utility over time and probably reflects the expectations of the parties who create servitudes of indefinite duration"); see also Skow v. Goforth, 618 N.W.2d 275-76, 278 (Iowa 2000) (deed that granted "right-of-way to drive teams" over land "must be interpreted to allow ingress and egress for modern vehicular traffic, including farm tractors and implements"); Hodgkins v. Bianchini, 80 N.E.2d 464, 467 (Mass. 1948) (holding that grant of a "cart road" did not restrict use of easement to horse-drawn vehicles but rather created a general right of way for vehicles, and stating that "[w]e should be very slow to hold that even ancient rights of way, not expressly restricted as to the type of vehicle . . . could not be employed at all for the means of transportation in common use by a succeeding generation") (quotation omitted). In addition to this general principle, it is compelling that in this case the deed contained no restriction as to use. See generally 3 A.L.R.3d at 1287 (explaining that "[w]here the grant was not limited in its terms, it has usually been held that the

right of passage included the right to pass by automobile or motor vehicle, even though such vehicles might not have been in use at the time the easement was created") (collecting cases). The trial court did not err in refusing to read a use restriction into the deed.

¶ 24. The cases cited by plaintiffs do not compel a contrary result. Plaintiffs assert that, as in Greenberg, the historical use of the easement should constitute its reasonable use. As discussed above, **however, the use of an easement can change over time to reflect modern developments**. Moreover, it is not clear that the discussion in Greenberg on which plaintiffs rely involved an easement. In Greenberg, the Court was asked to determine whether a landowner had wrongfully interfered with an adjacent landowners' use of "land in common" by allowing large trucks to obstruct the common area, which had historically been used for parking. The trial court determined that the reasonable use of the property was for parking and the plaintiffs did not challenge this finding on appeal. Greenberg, 145 Vt. at 116, 484 A.2d at 918. We upheld the trial court's conclusion that the plaintiff's use of the common land constituted "an undue interference with the parties' reciprocal rights, as defined by the parties' long usage." Id. We analogized to easements, and specifically, the requirement that "no use may be made of [a] right of way, different from that established at the time of its creation, so as to burden the servient estate to a greater extent than was contemplated at the time of the grant." Id. (citation omitted). In the instant case, as discussed above, we agree with the trial court that the use of automobiles on the right-of-way would not burden the estate to a greater extent than was contemplated at the time of the grant. The purpose of the right-of-way was to provide access to the land that lay beyond it, and the use of automobiles to traverse the route is consistent with that purpose.

¶ 25. Plaintiffs' reliance on Dennis v. French, 135 Vt. 77, 80, 369 A.2d 1386, 1388 (1977), is equally unavailing. Plaintiffs assert that, as in French, a departure from an easement's previous use unquestionably constitutes an additional burden on the servient estate. The French case involved the scope of a prescriptive easement, not an express easement, and **the use to which a prescriptive easement may be put necessarily depends on past use**. See id. ("The extent of the presumed right is determined by the user, upon which is founded the presumed grant; the right granted being only co-extensive with the right enjoyed."); see also Gutcheon v. Becton, 585 A.2d 818, 822 (Me. 1991) ("**Unlike an express easement, whose terms can usually be ascertained from the creating instrument, the permissible uses of an easement acquired by prescription are necessarily defined by the use of the servient land during the prescriptive period**."). In French, plaintiffs acquired a **prescriptive right of user over a roadway for certain discrete purposes based on their past use of the property. We concluded that plaintiffs were not entitled to make a different use of the roadway because it would increase the burden on the servient estate and it would extend the right acquired by plaintiffs' prior use of the property**. French, 135 Vt. at 80, 369 A.2d at 1388. Thus, French does not support plaintiffs' assertion that the reasonable use of the right-of-way at issue here depends on its historical use. Cf. Nelson, 113 Vt. at 172, 32 A.2d at 146 (holding that one who possess deeded easement need not use the easement to maintain his title, and easement cannot be extinguished from nonuser alone). Moreover, as previously discussed, we agree with the trial court that the use of automobiles on

the lane is consistent with the easement's purpose. We find no error in the trial court's interpretation of the deed."

Barrett v. Kunz, 158 Vt. 15 (1992)

At p. 19: "Although the language of the deed is somewhat ambiguous, in that **"farm road" may be interpreted as words of description or words of limitation,** the circumstances surrounding **the use of the road lead to the conclusion that the use was not limited.** The right-of-way was used for access to the 104-acre parcel for agricultural purposes and logging by the Strykers, and, at all material times, for recreational purposes by the general public. Although the Strykers ceased farming in 1969, the public continued to use the road for hiking, snowmobiling, skiing, hunting and horseback riding. The trial court found that it was known in the community that the public was permitted to use the road.

[6] In view of the surrounding circumstances, it is apparent **that the right-of-way was intended to benefit the land, by allowing the owners and the public to make use of it for a variety of purposes.** It benefited the Strykers only as long as they owned the dominant estate. When their ownership ceased, they had no personal interest in the right-of-way that was separate and distinct from their ownership of the 104-acre parcel. Thus, when the Strykers conveyed the land to Armstrong and Ewing in 1973, the right-of-way was conveyed by the deed. *Russell,* 132 Vt. at 407, 321 A.2d at 84; see also *Crabbe v. Veve Assocs.,* 150 Vt. 53, 57, 549 A.2d 1045, 1048 (1988) (rule regarding extinguishment by cessation of purpose should be applied only if easement is qualified by express limitations in deed)."

Community Feed Store, Inc. v. Northeastern Culvert Corporation, 151 Vt. 152 (1989)

At pp. 156-158: "In Morse v. Ranno, 32 Vt. 600, 607 (1860), this Court held that where a claim of **prescriptive easement for a public highway over private land was made,**

> **the extent of the acquisition, the width of the road, must be determined by the extent of the actual occupation and use. There can be no constructive possession beyond the limits which are defined by the user upon the land, or by other marks or boundaries marking the extent of the claim.**

See also Gore v. Blanchard, 96 Vt. 234, 242, 118 A. 888, 894 (1922) (width of highway acquired by user is determined by the extent of the actual use and occupation or by other marks and boundaries indicating the extent of the claim). In both Morse v. Ranno and Gore v. Blanchard, as with claims of adverse possession made without color of title, no constructive possession was held to exist beyond the actual occupancy or use made. The decisions did not, however, set forth any standard by which one must prove the limits of use, other than to refer to "marks and boundaries."

In Dennis v. French, 135 Vt. 77, 79, 369 A.2d 1386, 1387--88 (1977), a prescriptive right of user of a roadway was found as to four uses: "[h]auling of firewood ... by entering said roadway from Route 302," "[e]ntering and leaving the ... property, by foot and tractor," "[h]auling hay, stones and brush from the ...

property behind the house by truck or tractor," and "[t]o gain access to a chicken house maintained behind the house." This Court held that "[t]he extent of the presumed right is determined by the user, upon which is founded the presumed grant; the right granted being only co-extensive with the right enjoyed." Id. at 80, 369 A.2d at 1388 (emphasis in original). As can be seen from the four uses found in Dennis, that Court did not require much specificity in defining the extent of the easements, but instead relied on a general outline of the uses made.

This approach to defining the extent of a prescriptive easement is reflected in the position taken by the drafters of the Restatement of Property, which states that "[t]he extent of an easement created by prescription is fixed by the use through which it was created." Restatement of Property § 477 (1944).

> No use can be justified under a prescriptive easement unless it can fairly be regarded as within the range of the privileges asserted by the adverse user and acquiesced in by the owner of the servient tenement. Yet, no use can ever be exactly duplicated. If any practically useful easement is ever to arise by prescription, the use permitted under it must vary in some degree from the use by which it was created. Hence, the use under which a prescriptive easement arises determines the general outlines rather than the minute details of the interest.

Id., comment b (emphasis added).

In California, case law requires claimants to show prescriptive easements by "a definite and certain line of travel" for the statutory period. Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 564, 571, 676 P.2d 584, 587, 199 Cal. Rptr. 773, 776 (1984). Despite the apparently restrictive nature of that standard, however, the Warsaw court, on facts almost identical to ours, found that an easement existed for the purpose of trucks turning around and positioning themselves at loading docks attached to plaintiff's building, stating that "'[s]light deviations from the accustomed route will not defeat an easement, [only] substantial changes which break the continuity of the course of travel. ...'" Id. (quoting Matthiessen v. Grand, 92 Cal. App. 504, 510, 268 P. 675 679 (1928)); see also Wright v. Horse Creek Ranches, 697 P.2d 384, 388 (Colo. 1985) (adopts test for determining extent as set forth in Restatement § 477); Reynolds v. Soffer, 190 Conn. 184, 190, 459 A.2d 1027, 1031 (1983) (where right of way was "clearly visible," it met the requirement that an easement be measurable with "reasonable certainty"; remanded to trial court for further findings as to extent); O'Brien v. Hamilton, 15 Mass. App. 960, 962, 446 N.E.2d 730, 732, review denied, 389 Mass. 1102, 448 N.E.2d 767 (1983) (extent must be measured by general pattern formed by adverse use); Preshlock v. Brenner, 234 Va. 407, 410, 362 S.E.2d 696, 698 (1987) (prescriptive easement is measured by the character of the use).

[4] From the case law cited above, **it is clear that when a prescriptive easement is claimed, the extent of the user must be proved not with absolute precision, but only as to the general outlines consistent with the pattern of use throughout the prescriptive period. We hold that where a claimant adduces enough evidence to**

prove those general outlines with reasonable certainty, it has met its burden on that issue."

Clearwater Realty Co. v. Bouchard, 146 Vt. 359 (1985)

At pp. 361-362: "The 1946 deed from Clearwater Realty Company conveyed to the Conways a right-of-way over company property. The deed did not specify the location or the dimensions of the right-of-way. Both parties agree, however, that the right-of-way is properly located; the dispute here concerns only its width.

[1] **When a deed merely recites a general right-of-way over the servient estate, the owner of the easement is "'entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own.**'" *Patch* v. *Baird,* 140 Vt. 60, 66, 435 A.2d 690, 692 (1981) (quoting *Lafleur* v. *Zelenko,* 101 Vt. 64, 70, 141 A. 603, 605 (1928)). **More particularly, when the width of an easement is undetermined by the deed "the law says that it shall be of a reasonable width, considering the purpose for which it was intended."** *County of Addison* v. *Blackmer,* 101 Vt. 384, 388, 143 A. 700, 701 (1928)."

Traders, Inc. v. Bartholomew, 142 Vt. 486 (1983)

At pp. 493-495: "Having found that plaintiff is entitled to a way of necessity over those lands of defendants Bartholomew which were originally held in common, we have also to decide its duration and scope.

[7] As noted above, **a way of necessity arises out of public policy concerns that land not be left inaccessible and unproductive**. *Howley* v. *Chaffee, supra,* 88 Vt. at 473, 93 A. at 122. **Therefore such a way exists only so long as the necessity which creates it: if, at some point in the future access to plaintiff's land over a public way becomes available, the way of necessity will thereupon cease**. See *Clark* v. *Aqua Terra Corp., supra,* 133 Vt. at 56--57, 329 A.2d at 668; *Pennock* v. *Goodrich, supra,* 104 Vt. at 140, 157 A. at 924; *Smith* v. *Higbee, supra,* 12 Vt. at 122. While this Court has not had occasion to pass on the scope of a way of necessity, we adopt what appears to be the sounder, majority rule on this issue. **That is, since the easement is based on social considerations encouraging land use, its scope ought to be sufficient for the dominant owner to have the reasonable enjoyment of his land for all lawful purposes.** Contrast *Read* v. *Webster, supra,* 95 Vt. at 247, 113 A. at 818 (an easement by implication is limited to the use which gave rise to it, and can "neither be enlarged because of subsequent necessity nor cut down by a claim that some part of it was not indispensable.").

[8, 9] **While the way of necessity is thus expansive, it may not grow to such proportions as to interfere materially with the reasonable uses of the servient estate. Thus, "it would seem to be coextensive with the reasonable needs, present and future, of the dominant estate for such right or easement, and to vary with the necessity, in so far as may be consistent with the full reasonable enjoyment of the servient tenement**." *Tong* v. *Feldman,* 152 Md. 398, 405, 136 A. 822, 824 (1927); accord, *Soltis* v. *Miller,* 444 Pa. 357, 282 A.2d 369 (1971); *Davis* v. *Sikes,*

254 Mass. 540, 151 N.E. 291 (1926); *Whittier* v. *Winkley,* 62 N.H. 338 (1882); *Myers* v. *Dunn,* 49 Conn. 71 (1881). See generally, 2 Thompson, *supra,* § 362. We recognize, however, that additional burdens will inevitably be imposed on the servient tenement as a consequence of the open-ended scope of a way of necessity. Therefore, we further hold that the grantee of the dominant estate who thus enlarges the scope of an existing way of necessity must bear those costs to the servient tenement reasonably attributable to such enlargement. These costs, which may include such items as necessary fencing, should be determined by the trial court along with such questions as the width and location of the easement.

It remains to determine the extent of the use of the way, its precise location, and its width. In addition, the court must assess those additional expenses to defendants Bartholomew which are reasonably attributable to the enlarged scope of the way, and charge them to plaintiff. For those purposes we must remand to the trial court. As we have already stated, the scope of such a way must be coextensive with the reasonable needs, both present and future, of the dominant estate. Such use must be consistent with the full and reasonable enjoyment of the servient estate as well, and must not create unreasonable burdens on the land of the Bartholomews. Simply stated, the trial court must strive for a balancing of interests in fashioning the way, having before it evidence of the intended use of the land of both plaintiff and defendants Bartholomew."

Sabins v. McAllister, 116 Vt. 302 (1950)

At pp. 304-305: "…In the deed (Defts.' Ex. C) the following language appears: "The driveway on the lot herein conveyed is to be used in common with the lot adjoining on the south (not herein conveyed)."

…

[1, 2]…In determining this question the intent of the parties, to be gathered from the nature of the subject matter and the language used in the deed, must control. *Hill* v. *Shorey,* 42 Vt 614, 619; *Cooney* v. *Hayes,* 40 Vt 478, 482, 94 Am Dec 425; Easements, 17 Am Jur § 10; Easements, 28 CJS page 636 et seq. …"

Kelbro, Inc. v. Myrick, 113 Vt. 64 (1943)

At pp. 69-70: "[6] **It is said in Goddard on Easements p. 383, 8th ed. that "a right of way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement. It cannot be used for any purpose unconnected with the enjoyment of the dominant tenement, neither can it be assigned by the dominant owner to another person and so be made a right in gross, nor can he license anyone to use the way when he is not coming to or from the dominant tenement**." *McCullough* v. *Broad Exch. Co.,* 101 App Div 566, aff'd 184 NY 592, 77 NE 1191; *Bang* v. *Forman,* 244 Midi 571, 222 NW 96; *Miller* v. *Weingart,* 317 111 179, 183, 147 NE 804, 805--6. While this principle has been applied most frequently to rights of way it is applicable to other appurtenant easements and should, in our opinion, be applied in the present case where the servient tenement is the public highway, built with public funds, designed for public use, and under the exclusive regulation and control of the Legislature. Especially is this so since it is a principle which underlies the use of all easements that the owner of the easement cannot materially

increase the burden of it upon the servient estate or impose thereon a new and additional burden. 17 Am Jur Easements Sec. 98; *Hopkins the Florist, Inc.* v. *Fleming,* 112 Vt. 389, 391, 26 A2d 96; *Dernier* v. *Rut. Ry. L. & P. Co.,* 94 Vt. 187, 194, 110 A 4.

[7] The result, as to the claim here made, is that the right of view of the owner or occupant of the abutting property is limited to such right as is appurtenant to that property and includes the right to display only goods or advertising matter pertaining to business conducted thereon. His appurtenant easement does not include the right to display advertising matter foreign to a business conducted on the property, and he could not convey to this plaintiff a right that he did not himself possess."

4.3 Duty Of Care And Maintenance

Hubbard v. Bolieau, 144 Vt. 373 (1984)

At pp. 374-376: "…action to apportion among the defendants their pro rata share of costs for the **maintenance** of a common roadway.

…

[1, 2] This Court has long recognized **the equitable principle that "when several persons enjoy a common benefit, all must contribute rateably to the discharge of the burdens incident to the existence of the benefit."** *Thomas* v. *Clark,* 133 Vt. 492, 494, 346 A.2d 189, 191 (1975); accord *Sanborn* v. *Braley,* 47 Vt. 170, 171 (1874). **The obligation to contribute applies in the absence of an express agreement,** *Kelly* v. *Alpstetten Association, Inc.,* 131 Vt. 165, 168, 303 A.2d 136, 138 (1973), its purpose being to prevent unjust enrichment. See *Thomas* v. *Clark, supra,* 133 Vt. at 494, 346 A.2d at 191. However, the implied obligation to contribute "is subject to modification by the specific terms of a particular grant." *Kelly* v. *Alpstetten, supra,* 131 Vt. at 168, 303 A.2d at 138.

The court below concluded that the exclusion of an express agreement regarding road maintenance was intentional and, therefore, a modification within the meaning of *Alpstetten, supra.* We do not agree.

[3] It is difficult to imagine how a rule that applies in the absence of express language can be modified by the absence of the language it was intended to replace. Under *Alpstetten, "specific terms"* must appear in a conveyance which express an intent to abrogate one's obligation to contribute their fair share to the maintenance of a common benefit. Otherwise, being a remedy at equity, *Sanborn* v. *Braley, supra,* 47 Vt. at 171, the implied obligation to contribute can only be altered by contravening equitable considerations. See *Black River Associates, Inc.* v. *Koehler,* 126 Vt. 394, 401, 233 A.2d 175, 180 (1967) (on balancing of equities between parties).

[4] There being no specific terms effecting a modification of the equitable duty, the requirement of *Alpstetten* is not satisfied. While the equitable defenses of estoppel and waiver might have ordinarily weighed against plaintiffs and their predecessors for their failure to seek contribution for nearly seventeen years, neither defense was affirmatively pled. V.R.C.P. 8(c). Accordingly, they are waived. *R. Brown & Sons, Inc*. v. *Credit Alliance Corp.,* 144 Vt. 142, 145--46, 473 A.2d 1168, 1170 (1984). Therefore, the judgment is reversed. "

Ives v. Central Vermont Public Service Corp., 134 Vt. 67 (1975)

At pp. 68-69: "…The issue in this case is whether or not defendant public utility company has an affirmative duty to maintain its right-of-way for transmission lines so as to protect passersby from injury by falling trees within that right-of-way…

[1] In support of her argument that the utility company has a duty to remove decayed trees within its right-of-way, plaintiff relies primarily on the general law of easements relating to the duties of the dominant and servient tenant, citing *Walker* v. *Pierce,* 38 Vt. 94, 98 (1865), which very early recognized that **the grantor of a private right-of-way is not bound to keep in repair the way granted, but that the duty of repair instead lies with the grantee. While this is still true as between private parties, the law relating to a power company's duty to maintain its right-of-way is not as broad as the general rule.**

[2, 3] Generally**, a power company is under a duty of safeguarding the public against dangers arising from the use of the dangerous agency of electricity to the extent of exercising reasonable care to correct or remove the cause of danger.** 29 C.J.S. *Electricity* § 38. **Specifically, in regard to decayed trees or limbs, the power company's duty owed to the motoring public is limited to protecting its wires from possible falling trees by erecting the lines a safe distance away from known hazards**. See, e.g., *Tidwell* v. *Georgia Power Co.,* 60 Ga. App. 38, 2 S.E.2d 713 (1939); *Alabama Power Co.* v. *Jackson,* 232 Ala. 42, 166 So. 692 (1935); cf. *Bosley* v. *Public Service Corp.,* 127 Vt. 581, 583--84, 255 A.2d 671 (1969). That there is no broad duty to cut decaying trees is illustrated by 30 V.S.A. § 2506, which prohibits the power company from cutting decayed trees within the highway without permission from the owner, in this case the Town of Brattleboro, and provides a mandatory fine for violation thereof."

5.0 LOCATON AND RELOCATION OF EASEMENTS

Sweezey v. Neel, 2006 VT 38

> "¶ 10. We first consider defendants' argument that the superior court erred by allowing plaintiff to bend the easement up to fifty feet from his house rather than requiring him to remove his encroaching structure. In support of this argument, defendants rely upon two general principles of property law. **The first "is that the owners of both the dominant and servient estates must consent to relocate an easement.**" In re Shantee Point, Inc., 174 Vt. 248, 261, 811 A.2d 1243, 1254 (2002); see Sargent v. Gagne, 121 Vt. 1, 12, 147 A.2d 892, 900 (1958) ("**It is the general rule that a way, once located, cannot be changed thereafter without the mutual consent of the owners of the dominant estate**."). This rule is tempered, however, by the accepted notion that **mutual consent to a relocation "may be implied from the acts and acquiescence of the parties.**" Sargent, 121 Vt. at 12, 147 A.2d at 900. If the actions of the dominant estate's owner indicate acquiescence to an easement's changed location, the dominant estate is equitably estopped from claiming an entitlement to the former location. Wagoner v. Jack's Creek Coal Corp., 101 S.E.2d 627, 630 (Va. 1958); cf. Mann v. Levin, 2004 VT 100, ¶ ¶ 25-28, 177 Vt. 261, 861 A.2d 1138 (determining whether facts supported applying doctrine of equitable estoppel to preclude enforcement of restrictive covenant).
>
> ¶ 12. Contrary to enforcing restrictive covenants, locating easements often allows some flexibility in terms of creating a remedy that is satisfactory to all parties. Although the owner of an easement is generally entitled to injunctive relief when the servient estate encroaches upon the easement, see Knudson v. Leach, 142 Vt. 648, 651, 458 A.2d 1140, 1142 (1983) ("If the right-of-way is illegally obstructed, the owner of the right-of-way is entitled to injunctive relief."), the trial court is not necessarily confined to requiring the removal of the encroaching structure irrespective of the extent or impact of the encroachment. Cf. Renaissance Dev. Corp. v. Universal Props. Group, Inc., 821 A.2d 233, 238 (R.I. 2003) (stating general rule that continuing trespass entitles owner of easement to mandatory injunction, but noting that coercive relief may be withheld in exceptional cases where encroachment causes little or no damage). Further, as indicated above, acquiescence may equitably estop the owner of an easement from demanding removal of an encroaching structure.
>
> ¶ 21. Although we uphold the superior court's order allowing plaintiff to bend the easement around his addition, we decline plaintiff's request on cross-appeal for this Court to hold that a servient landowner, with court approval, may unilaterally relocate an easement without obtaining the consent of the dominant owner. Plaintiff seeks a new rule of law based on § 4.8 of the Restatement (Third) of Property: Servitudes (2000). Section 4.8(3) of the Restatement provides as follows:
>
> > Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not

(a) significantly lessen the utility of the easement

(b) increase the burdens on the owner of the easement in its use and enjoyment, or

(c) frustrate the purpose for which the easement was created.

Id. § 4.8(3), at 559.

¶ 22. **The drafters of the Restatement acknowledged that this section rejects the rule espoused by most jurisdictions in this country, including Vermont**, see In re Shantee Point, 174 Vt. at 261, 811 A.2d at 1254; Sargent, 121 Vt. at 12, 147 A.2d at 900, **that the servient landowner may not unilaterally relocate an easement.** Restatement (Third) of Property: Servitudes § 4.8 cmt. f, at 563. Instead, the drafters adopted "the civil-law rule that is in effect in Louisiana and a few other states." Id. As the drafters explain, "[t]he primary purpose of the rule is to increase the value of the servient estate by limiting the easement's potential to prevent development even when a relocated easement would equally well serve the interests of the easement holder." Id. at 564.

¶ 23. A few courts have adopted § 4.8 because its flexible approach prevents intransigent easement holders from unnecessarily thwarting development of the servient estate. See, e.g., Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1237 (Colo. 2001) ("[E]ach property owner ought to be able to make the fullest use of his or her property allowed by law, subject only to the requirement that he or she not damage other vested rights holders."); M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057 (Mass. 2004) (Restatement approach "strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder's rights"); Lewis v. Young, 705 N.E.2d 649, 653-54 (N.Y. 1998) ("consonant with the beneficial use and development of property," servient landowner can move undefined right-of-way so long as new location does not frustrate parties' intent in creating right-of-way or increase burden on right-of-way's owner); cf. Goodwin v. Johnson, 591 S.E.2d 34, 38 (S.C. Ct. App. 2003) (court may relocate easement of necessity when evidence supports such relocation).

¶ 24. **On the other hand, the traditional approach-which effectively requires servient landowners to purchase, or obtain by consent, the right to relocate a legally established right-of-way-"favors uniformity, stability, predictability, and property rights.**" MacMeekin v. Low Income Hous. Inst., 45 P.3d 570, 579 (Wash. Ct. App. 2002) (declining to adopt Restatement approach). As the Georgia Supreme Court explained in rejecting the Restatement approach, the traditional rule

> provides certainty in land ownership. Allowing unilateral avoidance of the contract by the owner of the servient estate not only would violate fairness principles, it also would create uncertainty in real property law by opening the door for increased litigation over "reasonableness" issues based on today's conditions rather than those considered in the original bargain. No doubt, when the servitude was first created both parties considered all

market factors, including their respective costs and benefits, before agreeing on the consideration for the transaction. If the benefits of relocation become substantial enough, it is the market that should ultimately bring the parties together again, not the courts.

Herren v. Pettengill, 538 S.E.2d 735, 736 (Ga. 2000).

Along the same lines, the Supreme Judicial Court of Maine explained that permitting unilateral relocation of easements would definitely introduce considerable uncertainty into land ownership, as well as upon the real estate market, and serve to proliferate litigation.

. . . Indeed, the owner of the dominant estate would be deprived of the present security of his property rights in the servient estate and could be subjected to harassment by the servient owner's attempts at relocation to serve his own conveniences. A unilateral relocation rule could confer an economic windfall on the servient owner, who presumably purchased the land at a price which reflected the restraints existing on the property. Such a rule would relieve him of such restraints to the detriment of the owner of the dominant estate whose settled expectations would be derailed with impunity."

Cassani v. Northfield Savings Bank, 2005 VT 127

"¶ 20. Finally, defendants argue that if an easement across their land does exist, then they should be permitted to designate its course. Defendants are correct that **when a right-of-way is described in a deed in general terms, the owners of the servient estate initially have the right to designate its course.** Patch v. Baird, 140 Vt. 60, 66, 435 A.2d 690, 692-93 (1981); Lafleur v. Zelenko, 101 Vt. 64, 70, 141 A. 603, 605-06 (1928). Here, the trial court concluded that, based on the evidence, it is possible to "establish the route of the right-of-way, despite the lack of survey or detailed metes and bounds description, upon review of Mr. Cassani's sketch of its location and confirmation of same on the ground." Thus, the trial court did not err by declining to allow defendants to designate the course of the easement."

In re Shantee Point, Inc., 174 Vt. 248 (2002)

At p. 15: "Dana correctly points out that the general rule is **that the owners of both the dominant and servient estates must consent to relocate an easement. Se**e Sargent v. Gagne, 121 Vt. 1, 12, 147 A.2d 892, 900 (1958) ("It is the general rule that a way, once located, cannot be changed thereafter without the mutual consent of the owners of the dominant and servient estates."); see also 80 A.L.R. 2d 743, 748 (1961) (collecting cases). **An exception to the general rule, however, is that the parties may agree to grant or reserve to either or both parties the power unilaterally to relocate the easement.** See Holden v. Pilini, 124 Vt. 166, 170, 200 A.2d 272, 275 (1964) (deed gave defendants right to change location of right of way on their land); Davis v. Bruk, 411 A.2d 660, 664 (Me. 1980) (). **A party may relocate an easement "where the document creating the easement [] contains an**

express or implied grant or reservation of power to relocate." Davis, 411 A.2d at 664…"

Davis v. Bruk, 411 A.2d 660, 665 (1980)

"¶ 25. We find these arguments persuasive. Although there are legitimate arguments in favor of adopting the Restatement approach, the potential negatives of doing so demand caution before abandoning our established law foreclosing unilateral relocation of established easements. Accordingly, **we reject plaintiff's argument on cross-appeal that we should remand the matter for the trial court to apply the Restatement approach to require defendants to use the alternative road he constructed.**

¶ 27 …to use the Kimibakw property for family recreational purposes rather than develop it, the court concluded that developing the property now would unduly burden the servient estate. Consequently, the court ruled that the scope of the easement does not include the right to use it as an avenue for future development.(fn3) The court made this ruling even though there was no controversy concerning future development. No development was planned, and neither party sought to limit the scope of the easement with respect to any future development.(fn4)

¶ 28. Under these circumstances, **the superior court's ruling that the scope of the easement does not include its use as an avenue for future development is an impermissible advisory opinion. "For a court to make a declaratory judgment, it must have before it an actual or justiciable controversy."** Mass. Mun. Wholesale Elec. Co. v. State, 161 Vt. 346, 363, 639 A.2d 995, 1006 (1994). Thus, declaratory relief is available only when a party is threatened with "actual injury to a protected legal interest." Id. The claimed consequences of the controversy must be reasonably expected rather than based on fear or anticipation. Id. Here, the trial court should have refrained from ruling on the scope of the easement as to any future development because there was no actual controversy with respect to that issue. Accordingly, we strike from the court's decision both that ruling and the findings in support of that ruling.

IV.

¶ 29. Finally, we reject defendants' remaining arguments concerning the court (1) allowing plaintiff to maintain a permanent locked gate at the entrance to the easement; (2) finding that utility poles erected by plaintiff's predecessors-in-title were outside the easement; (3) concluding that a boulder placed across the upper fork of the easement did not unreasonably burden defendants; and (4) suggesting that defendants used the easement in an unreasonable manner by damaging flowers alongside the easement. Regarding the first issue, defendants make a general argument concerning the erection of gates, without explaining the significance of a locked gate under the circumstances of this case. The evidence at trial showed that there had been a gate at the entrance of the easement for decades. Defendants failed to convince the court that a gate would unjustifiably burden access to their property. The court determined that a locked gate would be reasonable as long as plaintiff provided access to Association members, their

guests, and emergency vehicles. We find no abuse of discretion. See Lovitt v. Robideaux, 78 P.3d 389, 395 (Idaho 2003) (servient owner may erect gate to restrict use of easement to rightful users, as long as gate does not unreasonably burden dominant owner); Rupert v. Gunter 640 P.2d 36, 39 (Wash. Ct. App. 1982) (whether servient owner may maintain gate across easement depends on intention of parties creating easement, as shown by circumstances of case, situation of property, and manner in which easement has been used)."

6.0 EXTINGUISHMENT AND ABANDONMENT OF EASEMENTS

6.1 Merger

Fletcher v. Ferry, 2007 VT 295

> "¶ 1. The case before us arose out of a dispute over a right-of-way that defendant Ferry claims over plaintiff Fletcher's property…
>
> ¶ 5. **Under the common-law merger doctrine, an easement ceases to exist when the dominant and servient estates come into common ownership.** Capital Candy Co. v. Savard, 135 Vt. 14, 15, 369 A.2d 1363, 1365 (1976); R. Powell, 4 Powell on Real Property § 34.22[1], at 34-203 (M. Wolf ed. 2005). "When the burdens and benefits [of an easement] are united in a single person . . . the servitude ceases to serve any function. Because no one else has an interest in enforcing the servitude, the servitude terminates." Restatement (Third) of Property (Servitudes) § 7.5 cmt. a (2000). Merger occurs by operation of law.
>
> ¶ 11. **Once a right-of-way has been extinguished by merger, it "[can]not be re-created by the mere subsequent separation of the parcels**." Capital Candy, 135 Vt. at 16, 369 A.2d at 1365. **Although defendant's deed to the Scribner woodlot purported to convey the right-of-way to him over the Fletcher parcel, the easement was extinguished by merger and no longer existed in plaintiff's chain of title. As the Scribner woodlot was not landlocked, the easement was not revived by necessity, and no one in plaintiff's chain of title recreated the easement by reservation or grant. See Id. (where right-of-way is extinguished, it can only be recreated by "proper new grant or reservation"). Therefore, defendant has no legally cognizable interest in crossing the Fletcher parcel."**

Capital Candy v. Savard, 135 Vt. 14 (1976)

At pp. 15-16: " [1--3] **Once the title to the adjoining properties vested in Comolli & Company, Inc., in 1944, the right-of-way was extinguished by the unity of ownership and possession.** *First National Bank* v. *Laperle,* 117 Vt. 144, 150, 86 A.2d 635 (1952); *Plimpton* v. *Converse,* 42 Vt. 712, 717 (1870). **This right-of-way, once it had been extinguished by the merger of the two parcels of land, could not be re-created by the mere subsequent separation of the parcels. In order for a new right-of-way to exist over the defendant's property, it must be shown that such an easement was re-created by a proper new grant or reservation**. *Fitanides* v. *Holman,* 310 A.2d 65, 67 (Me. 1973); Comment(h) to § 497 of the Restatement of Property (1944)…"

6.2 Extinguishment and Abandonment

Rowe & Banschbach v. Lavanway, 2006 VT 47

¶ 14. Plaintiffs next argue that the trial court erred in concluding that they had not established **ouster. They assert that Bortz's conduct was sufficiently hostile, pointing to evidence of a three-foot high pile of rocks and dirt in the middle of the lane, a barbed wire fence at the end of the lane, and Bortz's actions in personally preventing Higgins from using the lane on several occasions. Plaintiffs also argue that the trial court erred in requiring evidence of continuous "conduct" for a period of fifteen years rather than evidence of continuous "possession" of the right-of-way during that period.**

¶ 15. We reject these arguments. **To extinguish an easement held by a dominant estate, a servient estate must establish an ouster, which requires "open, notorious, continuous, hostile and adverse possession" of an easement maintained for fifteen years; "[t]he possession must be unequivocal and incompatible with possession and use by the dominant owner."** Percival v. Fletcher, 121 Vt. 291, 296, 155 A.2d 737, 740 (1959); see also Okemo Mountain, Inc. v. Town of Ludlow, 164 Vt. 447, 452, 671 A.2d 1263, 1268 (1995) (same). **To start the prescription period, the one claiming ouster must show that it acted "clearly wrongful as to the owner of the easement. Its use of the land must be incompatible or irreconcilable with use of the easement."** Okemo Mountain, Inc., 164 Vt. at 453, 671 A.2d at 1268 (citations and quotations omitted).

¶ 16. **Use of the road by the servient owner during periods of non-use by the dominant owner is not adverse use.** Id. **While an easement may be extinguished by an abandonment, non-use alone will not suffice, no matter how long continued**. Lague, Inc. v. Royea, 152 Vt. 499, 503, 568 A.2d 357, 359 (1989); Nelson v. Bacon, 113 Vt. 161, 172, 32 A.2d 140, 146 (1943) (explaining that deeded easement-holder has same right of property therein as owner of the fee and thus it is not necessary that he make use of his right to maintain his title). "[**T]o establish an abandonment there must be, in addition to non user, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence."** Id.; see also Royea, 152 Vt. at 503, 568 A.2d at 359 (applying same standard and recognizing **that party claiming abandonment "bears a heavy burden**"). As we noted in Okemo Mountain, Inc., "**it is difficult to establish adverse possession of an easement where the dominant owner abstains from using the easement.**" 164 Vt. at 453, 671 A.2d at 1268 (citing R. Powell & P. Rohan, 3 Powell on Real Property § 34.21, at 34-264-65 (1994)).

¶ 17. **In this case, the trial court found that Bortz's construction of a driveway, and the berm that resulted, were insufficient from an objective standpoint to put Higgins on notice that Bortz was attempting to oust Higgins from his easement. In a supplemental order,** the court also found that while there were instances in which Bortz blocked Higgins from accessing the right-of-way between 1967 and 1975, it was not persuaded that Bortz's conduct extended over fifteen continuous years. The court also rejected plaintiffs' assertion that Bortz had installed what was

now a barbed wire pasture fence at the end of the disputed right-of-way or that the fence had been in place for fifteen years prior to plaintiffs' commencement of legal action.

¶ 18. Plaintiffs do not challenge the court's findings of fact. Instead, they maintain that the facts as found do not support the court's conclusion. More specifically, they assert that the trial court should not have considered whether the right-of-way was accessible despite the berm but rather whether the berm itself was sufficient to commence a ouster. Plaintiffs also maintain that "there can be no doubt" that Bortz's actions in preventing Higgins from using the lane constituted a hostile act.

¶ 19. We find plaintiffs' arguments without merit. In conducting its analysis, the trial court properly considered whether the creation of the berm demonstrated Bortz's unequivocal "possession" of the right-of-way and whether it was "incompatible with possession and use by the dominant owner." Percival, 121 Vt. at 296, 155 A.2d at 740. The court concluded that the **berm did not completely block access to the right-of-way** and this finding is supported by the record. We reject plaintiffs' assertion that the trial court should have found the berm sufficient to commence the ouster period even if it did not completely prevent use of the right-of-way. In support of this argument, plaintiffs rely on Okemo Mountain, Inc., 164 Vt. at 453, 671 A.2d at 1268 ("Less permanent obstructions may be considered adverse where the dominant owner recognizes the purpose is to prevent use of the easement."). Unlike the case on which they rely, however, plaintiffs failed to show that Higgins ever recognized that the purpose of the berm was to prevent his use of the right-of-way. Indeed, it appears that the berm was merely a byproduct from the driveway construction. The evidence that Bortz and Higgins had a long-standing dispute over the right-of-way, and that Bortz occasionally blocked Higgins from using the lane, does not show that the creation of the berm was a hostile act intended to initiate an ouster. As to the barbed wire fence, the trial court found that it had not been erected by Bortz, nor had it been in place for the requisite time period. As noted, plaintiffs do not challenge these findings.

¶ 20. Plaintiffs are left then with an assertion that Bortz's personal confrontations with Higgins were sufficient to extinguish the deeded easement. The trial court rejected this argument and its decision is supported by the evidence. **The personal confrontations between Higgins and Bortz did not deprive Higgins of his ability to use the right-of-way for the statutory fifteen-year period, nor did Bortz use the land in a way that was incompatible or irreconcilable with the use of the easement**. See id. We need not decide, therefore, whether the trial court erred in considering whether Bortz's "conduct" continued throughout the statutory period rather than whether his "possession" of the property was continuous throughout this period. To the extent that plaintiffs suggest that Bortz's conduct caused Higgins to abandon the easement, the evidence does not support their argument. While Higgins may not have used the easement, he lawfully and physically could have, and plaintiffs have not established that Higgins "conclusively and unequivocally" manifested a present intent to relinquish the right-of-way. Nelson, 113 Vt. at 172, 32 A.2d at 146. We find no error in the trial court's rejection of plaintiffs' claim that the right-of-way was extinguished by their predecessor-in-title."

Barrett v. Kunz, 158 Vt. 15 (1992)

At p. 20: "Defendants also contend that the right-of-way was abandoned by the Strykers when they stopped farming, and, therefore, nonuse extinguished it prior to the conveyance to Armstrong and Ewing. In *LaGue,* 152 Vt. at 503, 568 A.2d at 359, we held that **the burden on a party claiming abandonment of an easement is a heavy one. "Such an abandonment may be established only by 'acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence**.'" *Id.* (quoting *Nelson,* 113 Vt. at 172, 32 A.2d at 146). Here, the trial court found there were no acts by the Strykers indicating their intent to abandon the easement. When they ceased farming, the predominant use of the easement changed from agricultural to recreational, but this did not manifest any purpose inconsistent with the future existence of the easement. Rather, it confirmed its purpose."

Traders, Inc. v. Bartholomew, 142 Vt. 486 (1983)

At pp. 492-495: "The Bartholomews raise two arguments against such a way: first, that if it did exist as of 1931, it was extinguished in 1971 by operation of the state's **so-called marketable title act, 27 V.S.A. §§ 601--606**; and in the alternative, they contend that any such way was extinguished in 1958, when the plaintiff's predecessors in title acquired a prescriptive easement over the way, thus eliminating the element of strict necessity. We dispose of these contentions in turn.

[4] Among those property interests specifically excepted from the operation of the marketable title act is the following:

> **Any easement or interest in the nature of an easement, the easement, the existence of which is clearly observable by physical evidences of its use.**

27 V.S.A. § 604(a)(6). 1969, No. 235 (Adj. Sess.), § 2, eff. July 1, 1970. In this case the trial court found that the way now claimed by plaintiff was regularly and openly used by its predecessors in title from 1943 to 1976. In addition, the court found that over the way **"there are visual indications on the ground outlining what appears to be the remains of a one time road."** Finally, through testimony and photographs, there was ample evidence presented to support a finding that the roadway continues to exist and is visibly apparent. **Thus, the easement falls within this exception, and is not barred by the failure to file statutory notice. See 27 V.S.A. §§ 601--606.**

[5, 6] Nor do we find merit in defendants' second argument, that the requisite necessity was lost in 1958, the date of the prescriptive easement found by the trial court. A prescriptive easement may only be acquired by hostile and adverse use for the fifteen-year statutory period. *Russell* v. *Pare,* 132 Vt. 397, 405, 321 A.2d 77, 81 (1974). In this case, plaintiff's predecessors acquired a way of necessity in 1943, through their grantor, the common owner. *Clark* v. *Aqua Terra Corp., supra.* Thus, their use of the way was at no time adverse and could not ripen into a prescriptive

easement. *Russell* v. *Pare, supra*. Consequently, the element of strict necessity remains.

Having found that plaintiff is entitled to a way of necessity over those lands of defendants Bartholomew which were originally held in common, we have also to decide its duration and scope.

[7] As noted above, a way of necessity arises out of public policy concerns that land not be left inaccessible and unproductive. *Howley* v. *Chaffee, supra,* 88 Vt. at 473, 93 A. at 122. Therefore such a way exists only so long as the necessity which creates it: if, at some point in the future access to plaintiff's land over a public way becomes available, the way of necessity will thereupon cease. See *Clark* v. *Aqua Terra Corp., supra,* 133 Vt. at 56--57, 329 A.2d at 668; *Pennock* v. *Goodrich, supra,* 104 Vt. at 140, 157 A. at 924; *Smith* v. *Higbee, supra,* 12 Vt. at 122. While this Court has not had occasion to pass on the scope of a way of necessity, we adopt what appears to be the sounder, majority rule on this issue. That is, since the easement is based on social considerations encouraging land use, its scope ought to be sufficient for the dominant owner to have the reasonable enjoyment of his land for all lawful purposes. Contrast *Read* v. *Webster, supra,* 95 Vt. at 247, 113 A. at 818 (an easement by implication is limited to the use which gave rise to it, and can "neither be enlarged because of subsequent necessity nor cut down by a claim that some part of it was not indispensable.").

[8, 9] While the way of necessity is thus expansive, it may not grow to such proportions as to interfere materially with the reasonable uses of the servient estate. Thus, "it would seem to be coextensive with the reasonable needs, present and future, of the dominant estate for such right or easement, and to vary with the necessity, in so far as may be consistent with the full reasonable enjoyment of the servient tenement." *Tong* v. *Feldman,* 152 Md. 398, 405, 136 A. 822, 824 (1927); accord, *Soltis* v. *Miller,* 444 Pa. 357, 282 A.2d 369 (1971); *Davis* v. *Sikes,* 254 Mass. 540, 151 N.E. 291 (1926); *Whittier* v. *Winkley,* 62 N.H. 338 (1882); *Myers* v. *Dunn,* 49 Conn. 71 (1881). See generally, 2 Thompson, *supra,* § 362. We recognize, however, that additional burdens will inevitably be imposed on the servient tenement as a consequence of the open-ended scope of a way of necessity. Therefore, we further hold that the grantee of the dominant estate who thus enlarges the scope of an existing way of necessity must bear those costs to the servient tenement reasonably attributable to such enlargement. These costs, which may include such items as necessary fencing, should be determined by the trial court along with such questions as the width and location of the easement.

It remains to determine the extent of the use of the way, its precise location, and its width. In addition, the court must assess those additional expenses to defendants Bartholomew which are reasonably attributable to the enlarged scope of the way, and charge them to plaintiff. For those purposes we must remand to the trial court. As we have already stated, the scope of such a way must be coextensive with the reasonable needs, both present and future, of the dominant estate. Such use must be consistent with the full and reasonable enjoyment of the servient estate as well, and must not create unreasonable burdens on the land of the Bartholomews. Simply stated, the trial court must strive for a balancing of interests in fashioning

the way, having before it evidence of the intended use of the land of both plaintiff and defendants Bartholomew."

Lague v. Royea, 152 Vt. 499 (1989)

At pp. 500-503: "The first issue is therefore squarely presented: **May an easement be extinguished by abandonment absent reliance by the owner of the servient tenement upon acts of abandonment on the part of the owner of the easement?**

The clear weight of authority does not require such reliance although a minority of jurisdictions hold "that an indication of intention to abandon the easement is not effective to extinguish the easement unless the owner of the servient tenement is induced thereby to make expenditures or otherwise to alter his position, thus in effect making the question of abandonment a question of estoppel." 3 H. Tiffany, The Law of Real Property § 825, at 388 (3d ed. 1939). The Restatement adopts the majority view. Restatement of Property § 505 (1944).

Vermont has long recognized the principle of abandonment. *Rogers v. Stewart,* 5 Vt. 215, 216--17 (1833). **We have been clear that an easement acquired by deed cannot be extinguished by nonuse alone, no matter how long it continues. However, our precedents as to the requirement of reliance are confusing and inconsistent.** Initially, we clearly adopted the minority view and held that an abandonment must "originate in, or be accompanied by, some unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; *and* the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted." *Mason v. Horton,* 67 Vt. 266, 271, 31 A. 291, 292--93 (1894) (emphasis added). We subsequently cited *Mason* with approval in *Percival v. Williams,* 82 Vt. 531, 538, 74 A. 321, 323 (1909), and *County of Addison v. Blackmer,* 101 Vt. 384, 391, 143 A. 700, 702 (1928).

The seeds of future confusion were sown in *Nelson v. Bacon,* 113 Vt. 161, 32 A.2d 140 (1943). In that case we set forth the rule that "to establish an abandonment there must be, in addition to nonuser, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence," but did not refer to reliance. *Id.* at 172, 32 A.2d at 146. To support this position we relied upon various cases from Massachusetts, Illinois, Connecticut, Michigan and New York. We did not cite *Mason,* which had explicitly required reliance, but neither was *Mason* explicitly overruled.

However, in *Sabins v. McAllister,* 116 Vt. 302, 76 A.2d 106 (1950), we unequivocally returned to the requirement of reliance. We relied upon *Nelson* for the general abandonment rule, and we relied on *Mason* for the element of reliance. *Id.* at 307--08, 76 A.2d at 109.

Six years later the rule was again set forth without reference to reliance, citing *Nelson. Scott v. Leonard,* 119 Vt. 86, 99, 119 A.2d 691, 702 (1956). (Curiously,

Sabins was also cited.) *Scott* was followed by *Sargent v. Gagne,* 121 Vt. 1, 147 A.2d 892 (1958), the only case cited by the court below, and by *Welch v. Barrows,* 125 Vt. 500, 218 A.2d 698 (1966). As in *Scott,* neither *Sargent* nor *Welch* referred to reliance as an element of abandonment.

Therefore, from 1956 to 1966, it appeared that we had embraced the majority rule. In 1968, however, there was an explicit return to the minority position. Quoting *Mason,* we emphasized the requirement of reliance and reaffirmed the holding of *Sabins*. *Massucco v. Vermont College Corp.,* 127 Vt. 254, 258, 247 A.2d 63, 65--66 (1968). *Scott* and *Sargent* were distinguished. *Id.*

Since that time, relying on *Massucco,* we have continued to apply the minority rule with its requirement of reliance. *Timney v. Worden,* 138 Vt. 444, 446, 417 A.2d 923, 925 (1980); *Russell v. Pare,* 132 Vt. 397, 406, 321 A.2d 77, 83 (1974).

This rule clearly merges the doctrine of abandonment with that of estoppel. Tiffany at § 825. Even without a requirement of reliance, the difficulty of proving intent to abandon an easement is such that its application is often impractical. *Id.* Indeed, the very impracticality of the doctrine has stirred some criticism. See, e.g., Note, 11 Colum. L. Rev. 777, 778 (1911). It therefore appears that the majority rule, adopted by the Restatement, is the wiser one.

[1] **Accordingly, we hold that reliance by the owner of the servient estate is not required to establish an abandonment of an easement. In doing so, we reaffirm our previous statements of the rule in *Nelson, Scott, Sargent* and *Welch*. Insofar as they are inconsistent with our holding today, *Mason, Sabins, Massucco, Russell* and *Timney* are expressly overruled.**

It follows that the trial court's application of the rule as set forth in *Sargent* was correct. The absence of reliance was not fatal to the finding of an abandonment of the easement.

II.

[2] Although "[w]e realize that **the question whether there has been an abandonment ... is one of fact,**" *Sabins v. McAllister,* 116 Vt. at 308, 76 A.2d at 110, a trial court is nonetheless required to make findings and conclusions, helpful for appellate review, which indicate to the parties and to this Court not only what was decided but how the decision was reached as well. *Harman v. Rogers,* 147 Vt. 11, 19, 510 A.2d 161, 166 (1986). The record below fails to do this.
[3, 4] **The burden on the party claiming an abandonment of an easement is a heavy one: Such an abandonment may be established only by "acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence**." *Nelson v. Bacon,* 113 Vt. at 172, 32 A.2d at 146. On this record it is not clear whether the trial court applied this "conclusive and unequivocal" standard. Therefore, a new trial is required."

Timney v. Worden, 138 Vt. 444 (1980)

At pp. 445-448: "…In 1948, the Deyos conveyed the southerly 3.1 acres to parties named Varnum, defendants' predecessors in title. Included in the deed was an appurtenant easement "in common with others, of a right of way 20 feet in width to be travelled on foot or by vehicles, over the remaining land of the Grantors, for the purpose of ingress or egress from the main highway to the above granted premises." The same easement was also granted in the deed by which defendants received title.

…

[2--4] It **has long been the law of this state that an appurtenant easement can be defeated either by abandonment on the part of the grantee of the easement or by extinguishment by the conduct of the owner of the servient estate**. See, e.g., *Russell* v. *Pare,* 132 Vt. 397, 321 A.2d 77 (1974); *Sargent* v. *Gagne,* 121 Vt. 1, 147 A.2d 892 (1958); *Sabins* v. *McAllister,* **116 Vt. 302**, 76 A.2d 106 (1950); *Mason* v. *Horton,* 67 Vt. 266, 31 A. 291 (1894). **In the former instance, acts on the part of the holder of the easement that evidence an intent to relinquish the easement or a purpose inconsistent with its future existence,** *Scott* v. *Leonard,* 119 Vt. 86, 99, 119 A.2d 691, 699 (1956), coupled with detrimental reliance by the owner of the servient estate on such a manifested intent or purpose, *Massucco* v. *Vermont College Corp.,* 127 Vt. 254, 258, 247 A.2d 63, 65 (1968), will serve to defeat the easement. *Russell* v. *Pare, supra*. In the latter instance, the rule was stated by Mr. Justice Sherburne in *Scampini* v. *Rizzi,* 106 Vt. 281, 172 A. 619 (1934):

> It is obvious that an easement can be extinguished as well as acquired by adverse possession for fifteen years under our statute. Our rule for gaining title to land by adverse possession is that a possession that will work an ouster of the owner must be open, notorious, hostile, and continuous. ["]The tenant must unfurl his flag on his land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest.["] *Wells* v. *Austin,* 59 Vt. 157, 165, 10 Atl. 405. **Adverse possession, in order to be effective to extinguish an easement, must be open, unequivocal, continued, and equivalent to an ouster of the dominant owner, and incompatible with the possession and use by him.**

Id. at 286, 172 A. at 621. **In either case, mere nonuse, no matter how long, will not serve to defeat an easement.** *Nelson* v. *Bacon,* 113 Vt. 161, 172, 32 A.2d 140, 146 (1943).

…

It is difficult to conceive of a situation more open, notorious, and hostile than the digging of a cellar hole directly in the path of the alleged easement and the subsequent construction of a house thereon. Certainly there was nothing stealthy or hidden about these acts that would serve to negate their openness and notoriousness. Similarly the record indicates that plaintiffs and their predecessors used their land in a manner inconsistent with the continuance of the easement. The use was not pursuant to permission granted by defendants or their predecessors, but rather was plainly hostile."

Russell and Russell v. Pare and Rodin, 132 Vt. 397 (1974)

At p. 406: "[10] **A perfected easement may be extinguished by non-use in some circumstances.** *Massucco* v. *Vermont College Corp.,* 127 Vt. 254, 258, 247 A.2d 63 (1968). Extinguishment by non-use may result when that non-use is caused by use or conduct on the part of the owner of the servient estate adverse to and in defiance of the easement. That use or conduct must be open, notorious, equivalent to ouster, continuous for 15 years, and incompatible with the use of the dominant estate. *Id.* Extinguishment by non-use may also result from acts of the owner of the dominant estate. Unequivocal acts on his part inconsistent with continuance of the easement and manifesting an intent to abandon will extinguish the easement if the owner of the servient estate relies on those acts so that injustice will result to him if the easement is subsequently enforced. This is sometimes referred to as abandonment. *Id.*"

Clark & Clark v. Aqua Terra Corp., 133 Vt. 54 (1974)

At pp. 57-58: "…The doctrine of adverse possession creates a prescriptive right based on long, continued usage against the holder of legal title. It is sometimes described as based on a presumed grant that becomes incontestable after the passage of the statutory time. *See Russell* v. *Pare,* 132 Vt. 397, 321 A.2d 77 (1974).

[4, 5] In this case, however, the law brings the presumed grant into being at the very outset. *Wheeler* v. *Taylor,* 114 Vt. 33, 37, 39 A.2d 190 (1944). Unless it can be found to have been abandoned, the right will continue to accrue to the holding. In this case the evidence abounds in continued and constant use, entirely negating in the abandonment. **Once the grant was established, the subsequent granting of a license or understanding that the use was by permission will not divest it, even in cases where the right-of-way is established by adverse user for the required period.** *Dee* v. *King,* 73 Vt. 375, 379, 50 A. 1109 (1901). **Nor will the grant be divested on account of an accompanying public use, since the use of the plaintiffs and their predecessors is presumed to be under the original grant. Again, any presumption of permissive use may be overcome by the facts establishing the original right-of-way**. *Begin* v. *Barone,* 124 Vt. 421, 423, 207 A.2d 252 (1965).

The order of the lower court confirming the right-of-way in the plaintiffs is supported by the law as applied to the facts established in this case. No damages were awarded based on a finding in which the lower court stated it was unable to find the plaintiffs suffered any damages. The plaintiffs raise this issue in their cross appeal.

[6] **Particularly in matters involving rights relating to real property, invasion of those rights, when established, requires some recognition, even if only by way of nominal damages. Our law in this connection is admirably summarized by Mr. Justice Miles, in dissent, in *Nichols* v. *Central Vermont Railway Co.,* 94 Vt. 14, 22--25, 109 A. 905 (1919). Likewise, suits involving such rights cannot fail as *de minimus,* since the invasion of those rights, if repeated, may operate in derogation of them. *Bragg* v. *Larraway,* 65 Vt. 673, 683, 27 A. 492 (1893).**"

Massucco v. Vermont College Corp., 127 Vt. 254, (1968)

At pp. 256-258: "[2,3] The question of whether there has been an abandonment of an easement is one fact for the trial court. *Nelson* v. *Bacon,* 113 Vt. 161, 171, 32 A.2d 140. This being an affirmative defense cast the burden of proof upon the defendant. 12 V.S.A. §1024; *Sargent* v. *Gagne,* 121 Vt. 1, 10, 147 A.2d 892.

… The deed included the conveyance of a water system which furnished water to this and seven other residential properties on Charles and Barre Streets. One spring and a reservoir were located on land lying near the corner of Ridge and West Streets.

…

[4] The plaintiff argues, and correctly so, that mere non-user does not constitute abandonment. This Court held in *Mason* v. *Horton,* 67 Vt. 266, 271, 31 A. 291 that the mere non-use of an easement created by grant will not destroy or extinguish it no matter how long continued. In that case the court stated the rule thus:

> "In order to extinguish it by nonuse there must be some conduct on the part of the owner of the servient estate adverse to, and in defiance of, the easement, and the nonuse must be the result of it, and must continue for 15 years; or, to produce this effect the nonuse must originate in, or be accompanied by, some unequivocal acts of the owner, inconsistent with the continued existence of the easement, and showing an intention on his part to abandon it; *and the owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted.*" (Emphasis ours).

See also *Nelson* v. *Bacon, supra,* 113 Vt. at page 172, 32 A.2d 140; *Sabins* v. *McAllister,* 116 Vt. 302, 308, 76 A.2d 106; *Scott* v. *Leonard,* 119 Vt. 86, 99, 119 A.2d 691; *Sargent* v. *Gagne, supra,* 121 Vt. at page 10, 147 A.2d 892. In the *Scott* and *Sargent* cases there were no findings to show the requisite intent to abandon so the question of whether the owner of the servient estate relied or acted upon a manifest intention to abandon was not reached.

In *Sabins* v. *McAllister,* 116 Vt. 302, 76 A.2d 106, the court reaffirms the statement enunciated in *Mason* v. *Horton, supra,* that "The owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted." After holding that abandonment of the easement was not established by the findings, the court said, "Moreover, there is no finding that the plaintiffs are or would be harmed by the assertion of the defendants of their right in the driveway."

If there was a manifest intention by the Massucco's to abandon their water rights on defendant's land, here, as in the *Sabins* case, there is no basis in the findings that defendant, the owner of the servient estate, relied or acted upon such intention so that it would…"

Scott v. Leonard, 119 Vt. 86 (1956)

At pp. 99-103: "[6] The defendants claim the plaintiffs lost their right of way over the defendants' land by non-user and abandonment when Harris built a driveway on his land in 1936 which the plaintiffs and their predecessors in title used until June of 1949 and in that interval made little or no use of the roadway in question. **An easement created by deed is not extinguished by mere non-user, no matter how long continued. In order to establish an abandonment there must be, in addition to non-user, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence.** *Nelson* v. *Bacon,* 113 Vt 161, 172, 32 A.2d 140; *Sabins* v. *McAllister,* 116 Vt 302, 307, 308, 76 A.2d 106. Finding No. 17, to which no exception was taken, does not show such intent or purpose. The defendants' exception to finding No. 7 is not sustained.

…

[11—13]. Here the parties were tenants in common of the right to use the roadway. In such case this Court has stated the rule to be as follows: **"If a co-tenant enter upon the whole or part of the common property, as he has a legal right to do, the law presumes that he intends nothing beyond an assertion of his right. In order to sever his relation as co-tenant, and render his possession adverse, it must be affirmatively shown that the other co-tenants had knowledge of his claim of exclusive ownership, accompanied by such acts of possession as were not only inconsistent with, but in exclusion of, the continuing rights of the other co-tenants, and such as would amount to an ouster as between landlord and tenant**." *Sabins* v. *McAllister,* 116 Vt 302, 307, 76 A.2d 106, 109; *Vermont Marble Co.* v. *Eastman,* 91 Vt 425, 465, 101 A 151; *Chandler* v. *Ricker,* 49 Vt 128, 131. **Where an ouster is asserted by one who has held possession for or with his co-tenant the presumptions are against him and can only be overcome by some overt and notorious act or acts of an unequivocal character, indicating an assertion of ownership of the entire premises to the exclusion of the right of the co-tenant.** *Waterman* v. *Moody and Rogers,* 92 Vt 218, 233, 103 A 325**. It is well settled that when one joint owner is in possession of the whole, the presumption is that he is keeping possession not only for himself but for his co-tenant, according to their several rights; and the other joint owner or owners have the right to so understand, until they have notice to the contrary**. *Holly* v. *Hawley,* 39 Vt 525, 531; *Leach* v. *Beattie,* 33 Vt 195, 198, 199; *Roberts* v. *Morgan,* 30 Vt 319, 324, 325. The defendants argue that the plaintiffs could have ascertained that the defendants claimed said roadway if the plaintiffs had exercised reasonable diligence and refer us to findings 15, 16, 19, 20 and 22. The defendants rely on the following acts to indicate their claim that the plaintiffs are charged with knowledge of the defendants' adverse possession: they dug a ditch across the road; built a sluiceway; parked cars in the roadway; kept constant watch; stopped cars; repaired roadway; put up barrier. All of these acts are included in the facts found by the chancellor except the chancellor found that the watch kept was active, not constant. None of them are inconsistent with the continuing rights of the plaintiffs to the use of the roadway except the erection of the barrier in July 1949. This had no legal effect on the rights of the plaintiffs because at the time of the bringing of suit the barrier had been in existence only three years."

Sabins v. McAllister, 116 Vt. 302 (1950)

At pp. 307-308: "[12, 13] The last question to be considered is whether the chancellor erred in finding abandonment of the rights of the defendant in and to the driveway. The rule on this subject was recently stated, with citations here omitted, in *Nelson* v. *Bacon, supra,* at page 172 as follows: "An easement created by deed is not extinguished by mere non-user, no matter how long continued. One who acquires title to an easement in this manner has the same right of property therein as an owner of the fee and it is not necessary that he should make use of this right in order to maintain his title. In order to establish an abandonment there must be, in addition to non-user, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence. * * * **And the fact that the grantee of a right of way finds another way more convenient does not deprive him of this right which remains for his use and enjoyment whenever he has occasion to exercise the right."** In *Mason* v. *Horton,* 67 Vt 266, at 271, 31 A 291, 48 Am St Rep 817, it is stated that, "The owner of the servient estate must have relied or acted upon such manifest intention to abandon the right so that it would work harm to him if the easement was thereafter asserted."

[14] We will assume, without so deciding, that the findings show non-user and that there is sufficient evidence to support such findings. The only act in addition to non-user which might be considered as showing an intention on the part of the defendants to abandon their easement, or to evidence a purpose inconsistent with its future existence, **is their maintenance of the fence on the northerly side of their property. If this fence had been constructed by the defendants, the finding of abandonment might have been warranted. But the evidence is all to the effect that it was there when they bought their lot and that they have merely repaired and maintained it since that time. Such acts on their part cannot be said to manifest conclusively and unequivocally an intent to abandon their easement or to show a purpose inconsistent with its future existence**. *Rogers* v. *Stewart,* 5 Vt 215, 217, 26 Am Dec 296. Nor did the construction of their house by the defendants and their maintenance of the fence wholly obstruct the driveway, its use from such construction and maintenance being merely limited. Moreover, there is no finding that the plaintiffs are or would be harmed by the assertion of the defendants of their right in the driveway.

[15] We realize that the question whether there has been an abandonment of an easement is one of fact. *Nelson* v. *Bacon, supra,* at page 171. We agree, however, with the defendants that there is no supporting evidence for the finding of abandonment."

Nelson v. Bacon, 113 Vt. 161 (1943)

At pp. 171-173: "[11, 12]…The question whether there has been an abandonment of an easement is one of fact (*Arcise* v. *Pietrowski,* 268 Mass 140, 167 NE 298, 300; *Schroeder* v. *Taylor,* 104 Conn 596, 134 A 63, 68), and the burden of proof is upon the party asserting it---in this case, upon defendant. *Adams* v. *Hodgkins,* 109 Me 361, 84 A 530, 531, 42 LRANS 741; *Brunotte* v. *DeWitt,* 360 I11 518, 196 NE 489, 496. If

the fact were fairly inferable from the other facts found we would assume, in support of the decree, that the Chancellor drew the inference of its existence in favor of the prevailing party, but we cannot supply the omission of an essential fact which does not appear as a reasonable deduction from the findings. *Manley Bros. Co.* v. *Somers,* 100 Vt. 292, 297, 137 A 336; *Johnson* v. *Samson's Est.,* 113 Vt. 38, 29 A2d 919, 921, and cases cited.

[13, 14] An easement created by deed is not extinguished by mere non-user, no matter how long continued. *County of Addison* v. *Blackmer,* 101 Vt. 384, 390, 143 A 700; *Graham* v. *Safe Harbor etc. Corp'n,* 315 Pa 572, 173 A 311, 312; *Hasselbring* v. *Koepke,* 263 Mich 466, 248 NW 869, 93 ALR 1170, 1179; *Adams* v. *Hodgkins,* 109 Me 361, 84 A 530, 532, 42 LRANS 741; *Hayford* v. *Spokesfield,* 100 Mass 491, 494; *Les* v. *Alibozek,* 269 Mass 153, 168 NE 919, 66 ALR 1094, 1097; and see cas. cit. annotations 1 ALR 884 ff; 66 ALR 1099 ff. One who acquires title to an easement in this manner has the same right of property therein as an owner of the fee and it is not necessary that he should make use of his right in order to maintain his title. *Tichman* v. *Straffin,* 54 R.I. 356, 173 A 78; *Adams* v. *Hodgkins,* 109 Me 361, 84 A 530, 532, 42 LRANS 741. In order to establish an abandonment there must be, in addition to non user, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence. *Dubinsky* v. *Cama,* 261 Mass 47, 158 NE 321, 324; *Eddy* v. *Chace,* 140 Mass 471, 472, 5 NE 306; *Yunkes* v. *Webb,* 339 I11 22, 170 NE 709, 711; *Schroeder* v. *Taylor,* 104 Conn 596, 134 A 63, 66; *First Nat. Trust and Savings Bank* v. *Smith,* 284 Mich 579, 280 NW 57, 116 ALR 1074, 1078; *O'Neill* v. *O'Hare,* 254 NY 186, 172 NE 464, 465.

The facts as found are far from being sufficient to warrant an inference that the plaintiff or any of his predecessors in title have pursued a course of action conclusively and unequivocally demonstrating an intent to relinquish the right to the use of the passageway. At most, only a nonuser is shown, and even this, in recent years, has been more or less intermittent. **The erection of the interior stairway in the plaintiff's building by Howley, the lessee, and its existence for some ten years, does not supply the deficiency. During part of this time the passageway was in use. And the fact that the grantee of a right of way "finds another way more convenient does not deprive him of this right which remains for his use and enjoyment whenever he has occasion to exercise the right**." *Tichman* v. *Straffin,* 54 R.I. 356, 173 A 78. Obviously, the finding to the effect that whatever use was made of the passageway was permissive on the part of the defendant or her predecessors in title cannot affect the right acquired under the deeds in the plaintiff's chain of title. Upon the record, therefore, no abandonment is made to appear.

[15] An easement may be extinguished by open, notorious, hostile and continuous possession on the part of the owner of the servient tenement for the statutory period of 15 years. *Scampini* v. *Rizzi,* 106 Vt. 281, 286, 172 A 619. The burden of proof is upon the party asserting such possession. *Pope* v. *Hogan,* 92 Vt. 250, 258, 102 A 937."

7.0 SPECIFIC EASEMENT TYPES

7.1 Scenic And View Easements and Light

To my knowledge there is no common law right to a view or scenic easement in Vermont. There have been, however, some cases involving express covenants or permit conditions. The Court uses covenants and easement interchangeably.

Mann v. Levin, 177 Vt. 261 (2004)

> "¶ 1. REIBER, J. In this appeal, we consider whether the trial court erred in interpreting the terms of **a restrictive covenant that limited the "height" of any building on defendant Diane Levin's property to that of a neighboring farmhouse. The trial court found that the covenant was intended as a scenic easement,** and thus, it restricted buildings from exceeding the absolute elevation, or "ridge line," of the farmhouse. Because Levin's building exceeded the ridge line by approximately seven feet, the court granted permanent injunctive relief to plaintiffs Bette and Kelly Mann, and ordered Levin to reduce the height of her building. Levin appealed, arguing that the court erred in interpreting the covenant. We affirm.
> …
> ¶ 6. In February 2003, the court held a trial, and made findings on the record. **The court found that the covenant was a scenic easement**, and the uncontradicted evidence established that "height" referred to the ridge line of the Inn. …"

Kennedy v. Rutland Aerie No. 1001 Fraternal Order of Eagles, 111 Vt. 490 (1941)

At pp, 492-493: "... It is not found, and it cannot be inferred from the facts that are found, that the plaintiff had any right of support for his building of which he has been deprived by the acts of the defendant which are complained of. Nor is it found that the right of protection from the elements claimed by the plaintiff rests in grant, express or implied. If such right exists, therefore, it must be a right acquired by prescription, and unless such prescriptive right exists the findings do not warrant the judgment.

> ...in *Hubbard* v. *Town,* 33 Vt. 295, the plaintiff claimed a right under the so-called ancient lights doctrine; that is he asserted that by long and uninterrupted use of his windows and the light passing through them from defendant's premises he had acquired a right to the continued enjoyment thereof with which the defendant could not lawfully interfere. The Court rejected the plaintiff's claim, basing its decision on grounds that are equally applicable to the present case. It is there said, in substance, that a grant of the claimed right to plaintiff is not to be presumed because of its exercise for the required period of time except when the right is so exercised for that length of time adversely or under a claim of right by plaintiff with acquiescence by the defendant. But unless the exercise of the claimed right by plaintiff is a violation of a right of the defendant for which he has a cause of action he cannot be said to acquiesce therein, nor can the plaintiff be said to exercise the right adversely. But the mere passage of light over the premises of the defendant to the windows of the plaintiff is not a violation of any right of the defendant for which he would have a cause of action, so that for however long a period such light might come to the plaintiff's windows he could acquire no prescriptive right

thereto. It is further said that plaintiff's claim is not aided by the statute of limitations since the limitation would only run from the time that the defendant acquired a right of action against the plaintiff by reason of his exercise of the claimed right. See Goodard on Easements, Bennett's Ed., 206; 1 Am. Jur. 533, Sec. 49; *Pierre* v. *Fernald,* 26 Me. 436, 46 Am. Dec. 573. "

Timothy J. Hubbard v. IRA S. Town, 33 Vt. 295 (1860)

"…damage claimed to have been sustained by the plaintiff in consequence of the defendant's obstructing his lights…

The only question involved in this case is, whether the plaintiff by such long and uniterrupted use of his windows, and the light passing through them, has thereby acquired the right so to continue his windows and thus to have the light pass through them, so that any act of the defendant which shall materially obstruct such light, will make him a wrong doer, and liable for any damage to the defendant that may ensue therefrom.

The rule seems now, to be well settled in England, that such long and uninterrupted use of light, gives the right to continue its use, and to insist upon its remaining unobstructed by the adjoining proprietor for all time. The courts place this upon the same grounds as rights of way, and other rights acquired in and over the premises of another by long and undisturbed use; presuming from the long exercise of the privilege by the one and an acquiescence therein by the other, that the right had its origin in a grant.

While the *general* doctrine has been universally adopted in this country, its application to cases of this kind has not been generally recognized, and in many of the States has been expressly denied…

How then can this doctrine of presumption apply to a case like the present? The erection of the building by the plaintiff on the line between him and the defendant was no violation of any right of the defendant; he could not complain of, or prevent it, and his assent or dissent could in no manner affect the transaction. The legal right to do the act was perfect in the plaintiff. His right to erect his building on the division line is not controverted, the wisdom of the act is more questionable. He might have made his walls solid, thus entirely excluding the light from that direction; he chose to leave apertures therein, thereby allowing the light to remain unaffected to that extent; but how can it be said that by excluding the greater part, he acquires any better right to the remainder, than he would have had to the whole, if he had not excluded any? He has not done any act which has had any effect to control or influence the light, except to exclude it. He did not draw or cause the light to pass in upon his premises in any other than its natural manner; it remained upon and over the defendant's premises as it had alwaysbe en. As there was no interference with the rights of the defendant, it is difficult to see upon what the presumption of a grant can be based. Lapse of time and the presumption arising therefrom are resorted to, only to justify in one, that which would otherwise be a usurpation of the *rights* of another.

If a man can acquire, by use, a right to an uninterrupted enjoyment of light under circumstances like the present, why not acquire a right to a like enjoyment of the prospect from the same windows, or to a free access of the air to the outside of his building to prevent decay, and many other rights of a similar and no more ethereal character? The result of which would be, if allowed, an utter destruction of the value of the adjoining land for building purposes.

Windows are often of more importance for the prospect they afford, than for the light they admit. The light may be obtained from other directions, the prospect cannot. A pleasant prospect from the windows of a dwelling, always contributes more or less to the enjoyment of the occupants, and often enters largely into its pecuniary estimate. But to admit that a mere enjoyment of such prospect for fifteen years, gives him the right to insist that it shall remain uninterrupted for all future time, would be to recognize a principle at variance with well established rules, and one that could not be tolerated in this country.

No such right can be acquired by use for the same reason that its exercise by one is no infringement of the rights of another, for which the law gives an action…

We see no reasons growing out of the nature or necessities of this class of cases, that require us to extend the doctrine of the presumption of grants to them, but on the other hand, the establishment of a rule that would require a man to erect a building or wall, that he did not need, on his own premises, for the sole purpose of excluding the light from his neighbor's windows, would lead to continual strife and bitterness of feeling between neighbors, and result in great mischief."

7.2 Water

7.4.1 Flowing

Powers v. Judd, 150 Vt. 290 (1988)

At pp. 291-292: "This case involves a dispute between neighbors arising from the drainage of water from defendants' property onto plaintiff's property.

…

The law regarding the natural drainage of surface waters may be summarized briefly. Upper and lower property owners have reciprocal rights and duties as to surface water drainage. *Scanlan* v. *Hopkins,* 128 Vt. 626, 631, 270 A.2d 352, 356 (1970). **The upper owner has the right to have the surface water pass to lower lands in its natural condition. *Id.* The lower owner must accept the natural flow of such waters upon his land. *Id.* As a general proposition, an upper property owner cannot artificially increase the natural flow of water to a lower property owner or change its manner of flow by discharging it onto the lower land at a different place from its natural discharge. *Id.* But, in cases involving only increased flowage and not a change in the place of discharge, *an upper owner may increase the flow as long as it causes no injury to the lower property.*** *Kasuba* v. *Graves,* 109 Vt.

191, 207, 194 A. 455, 462 (1937). *Swanson* v. *Bishop Farm, Inc.,* 140 Vt. 606, 610, 443 A.2d 464, 465--66 (1982) (emphasis added), *overruled on other grounds, Soucy* v. *Soucy Motors, Inc.,* 143 Vt. 615, 619, 471 A.2d 224, 226 (1983).

> **While the total amount of water flowing from defendants' property onto plaintiff's property may not have changed as a result of the installation of defendants' road and culverts, the trial court found that the road, which was raised one foot above the level of the land, and the culverts accumulated the natural surface flow of water and discharged it in artificially increased amounts onto plaintiff's property. Such concentrated discharge was actionable if it caused damage to plaintiff's land. The trial court found that the artificially increased flow of water from defendants' property was the proximate cause of the damages complained of by plaintiff. In such circumstances, it was appropriate for the trial court to issue an injunction.**"

Swanson v. Bishop Farm, 140 Vt. 606 (1982), *overruled on other grounds by*, 143 Vt 615 (1983)

At pp. 609-611: "…Robert and Mary Swanson, sought an injunction and damages from the defendant for causing surface water in excess of the natural flow to be dispersed on plaintiffs' adjoining property. The trial court denied the plaintiffs' request for an injunction but awarded them $2,500 in damages. Plaintiffs appeal from that part of the judgment denying an injunction.

…

[1--6] The law regarding the natural drainage of surface waters may be summarized briefly. Upper and lower property owners have reciprocal rights and duties as to surface water drainage. *Scanlan* v. *Hopkins,* **128 Vt. 626**, 631, 270 A.2d 352, 356 (1970). The upper owner has the right to have the surface water pass to lower lands in its natural condition. *Id.* The lower owner must accept the natural flow of such waters upon his land. *Id.* As a general proposition, an upper property owner cannot artificially increase the natural flow of water to a lower property owner or change its manner of flow by discharging it onto the lower land at a different place from its natural discharge. *Id.* But, in cases involving only increased flowage and not a change in the place of discharge, an upper owner may increase the flow as long as it causes no injury to the lower property. *Kasuba* v. *Graves,* 109 Vt. 191, 207, 194 A. 455, 462 (1937). The burden is on the plaintiff to show that the defendant increased the natural flow and this increase resulted in injury to the plaintiff. *Nicholson* v. *Doyle,* 125 Vt. 538, 539--40, 218 A.2d 689, 690 (1966). "If this is established, the mere fact that flood conditions existed, or that the water was unusually high, will not protect the defendants." *Id.* at 540, 218 A.2d at 690. Of course the defendant will be liable only for that portion of the damage attributable to its increased flowage.

[7--11] **In cases where the damage is repetitive or continuous in nature, injunctive relief is entirely appropriate to protect the lower landowner**. *S. L. Garand Co.* v. *Everlasting Memorial Works, Inc.,* 128 Vt. 359, 362, 264 A.2d 776, 778 (1970). **In certain cases, however, an award of future damage might be appropriate in lieu of an injunction. A proper resort to equity does not always invoke the application of extraordinary or severe relief by way of a mandatory injunction.** *Thompson* v. *Smith,* 119 Vt. 488, 509--10, 129 A.2d 638, 651--52 (1957**). It is the duty of the**

court to consider and weigh the relative convenience or inconvenience, the relative injury sought to be cured as compared with the hardship of injunctive relief, and to consider whether injunctive relief can cure the problem. *Id.* Such consideration may dictate instead substitution of future or anticipatory damages. *Id.* See *Pine Haven North Shore Association* v. *Nesti,* 138 Vt. 381, 384, 416 A.2d 147, 149 (1980); *Sykas* v. *Alvarez,* 126 Vt. 420, 421--22, 234 A.2d 343, 345 (1967)."

Town of Manchester v. Cherbonneau, 131 Vt. 107 (1973)

At pp.108-109: "…This action was commenced when the plaintiff, Town of Manchester, sought an injunction in the Bennington County Court to enjoin the defendants from plugging a culvert which drained water on their property. The defendants answered and interposed a counter-claim alleging, in substance, that the waters passing through the culvert, which were polluted and contaminated, spread over areas of their property resulting in damage. Defendants also requested that plaintiff be enjoined from continuing to collect and dump the polluted waters on their property.

…

[1,2] **When a town undertakes to construct a culvert over a natural watercourse while in the process of building and maintaining its highways, it must do so as to avoid any unnecessary damage to persons owning adjacent lands. It is not only the town's duty to construct such a culvert, but also to keep it in such a condition that it will not obstruct the stream and allow the waters to flow back across the highway and damage the lands above.** *Sargent* v. *Town of Cornwall,* 130 Vt. 323, 326--27, 292 A.2d 818 (1972); *Haynes* v. *Burlington,* 38 Vt. 350, 360 (1865)."

Scanlan v. Hopkins, 128 Vt. 626 (1970)

At pp. 631-632: "…the question of whether the plaintiffs' land was in fact encumbered by the drainage of surface water resulting from the installation of the culvert. In so doing, the presiding judge instructed the jury, in substance, that **if the water continued to run in the same drainage pattern this would not constitute an encumbrance unless additional water was discharged on the land below. He pointed out that it is not permissible to add to the natural flow**. The plaintiffs objected to this aspect of the charge as not being the law of this case.

[5--7] We are inclined to agree, **since a burden imposed in this manner would not constitute an easement and servitude in the true legal sense**. Separate and apart from the contractual undertaking imposed in the deed, when the Bonneaus became proprietors of the upper terrain in the Hopkins property they acquired **the right to have the surface water pass in its natural condition to the lower lands of their neighbor.** *Miller* v. *Letzerich,* 121 Tex. 248, 85 A.L.R. 451, 456**. By the same token, the owner of the lower land is obliged to accept the natural discharge of such water which naturally flows upon his land. The lower proprietor can collect the flow and carry it off by a proper outlet so as not to damage his property, provided he does not throw it back on the land above.** *Winchester* v. *Byers,* 196 N.C. 383, 384, 145 S.E. 774; 2 Thompson, Real Property, *supra,* § 316, p. 20--21. See *Nicholson* v. *Doyle,* 125 Vt. 538, 540, 218 A.2d 689, and compare, *Capital Candy Company* v. *City of Montpelier,* 127 Vt. 357, 359, 249 A.2d 644.

[8, 9] **To be sure, the higher owner cannot artificially increase the natural quantity of water, or change its manner of flow by discharging it in the land below at a different place from its natural discharge.** *Winchester* v. *Byers, supra,* 196 N.C. at 383, 145 S.E. 774. **Such reciprocal rights and duties are not true easements and servitudes, although they bear some of their characteristics**. *Scriver* v. *Smith,* 100 N.Y. 471, 3 N.E. 675, 677; 2 Thompson, Real Property, *supra,* § 316. See also annotation 59 A.L.R.2d *et seq.*"

7.4.2 Subsurface

Drinkwine v. State, 129 Vt. 152 (1970)

At pp. 153-155: "…Sometime prior to November 1, 1969, the state had certain wells drilled in order to obtain water for use at the fish hatchery and began pumping water to supply the hatchery about the 1st of November.

The plaintiffs allege that since the pumping operations began, the defendant has pumped "unreasonable amounts of water" from the wells. They further allege that as a direct and proximate result of such unreasonable use, their water supply and springs and the percolating waters which have traditionally filled their springs have been drawn away and dried up. The plaintiffs claim that they have suffered great damage and have no adequate remedy at law. The remedy sought is an injunction against the state and the Fish and Game Department from continuing to operate the pumps and wells in question.

[2] The plaintiffs admittedly are **attempting to introduce a different doctrine into our law "to include a standard of reasonable use" in percolating waters between adjoining landowners. The established law of this State is that there are no correlative rights in percolating waters between adjacent landowners.**

Our present rule was adopted at an early date (1855) in the case of *Chatfield* v. *Wilson,* 28 Vt. 49, 54--55 (1855). The court there held that **there are no correlative rights existing between the proprietors of adjoining lands, in reference to the use of the water in the earth, or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and the law governing the use of running streams is inapplicable.**

This principle has since been followed in numerous cases which are collected and cited at page 49 in *White River Chair Co.* v. *Conn. River Power Co.,* 105 Vt. 24, 162 A. 859 (1931). In that case the court said at pages 48--49 of the opinion:

> "Our rule is the rule of the common law as laid down in the leading case of *Acton* v. *Blundell,* 12 M. & W. 324. **Such water is regarded as part of the**

land itself, and it belongs to the owner of the land as much as the land itself or the rocks and stones on it. There are no correlative rights between the owners of adjoining lands in reference to the use of such water; and the law governing the use of the water of streams flowing on the surface is not applicable. The owner of the soil may use it on his own land as he pleases or he may sell it to be used by others elsewhere although it deprives adjoining landowners of its use, or he may construct barriers which prevent such water from seeping into his soil or cause it to seep into the soil of another."

See also *Winooski* v. *State Highway Board,* 124 Vt. 496, 500, 207 A.2d 255 (1965).

[3] In support of their contention the appellants argue that our established law relating to percolating waters should no longer be followed in light of present circumstances. They state that at the time this Court adopted the doctrine in 1855 the water resources in Vermont were more than adequate for any possible need but that this is no longer the case and they now need protection. And they assert that water in *every State* is now a scarce and valuable commodity.

"It is a rule in pleading that, whatever circumstances are necessary to constitute the cause of complaint or the ground of defense, must be stated in the pleadings; facts only are to be stated and not arguments or inferences, or matters of law." *Currier* v. *King,* 81 Vt. 285, 289, 69 A. 873 (1908). See *Campbell* v. *Walker,* 24 Del. (1 Boyce) 580, 76 A. 475, 476 (1910).

The facts necessary to sustain the petitioners' position are unavailable to us from any of the allegations in the bill. The bill also lacks any allegation of facts which establish a causal relationship between the pumping from the artesian wells and the depletion of water from the plaintiffs' springs. And it does not follow as a corollary that the pumping of water from the artesian wells caused the percolating water which supplied plaintiffs' springs to dry up. No facts are alleged which show that anything done by the defendant has resulted in a drop of the water table.

If the water resources of Vermont have become inadequate and as scarce a commodity as plaintiffs argue, the facts to support this assertion are entirely lacking in the bill. Actually, there is no reference whatever to this subject matter in the bill."

10 V.S.A. § 1410 Groundwater; right of action

(a) Findings and policy. The general assembly hereby finds and declares that:

(1) surface and subsurface water are inherently interrelated in both quality and quantity;
(2) groundwater hydrology is a science that allows groundwater quality and quantity to be mapped and forecast;
(3) groundwater is a mobile resource that is necessarily shared among all users;

(4) all persons have a right to the beneficial use and enjoyment of groundwater free from unreasonable interference by other persons; and

(5) it is the policy of the state that the common-law doctrine of absolute ownership of groundwater is hereby abolished.

(b) Definitions.

(1) **"Groundwater" means water below the land surface.**

(2) "Surface water" means any water on the land surface.

(3) "Person" means any individual, partnership, company, corporation, association, unincorporated association, joint venture, trust, municipality, the state of Vermont, or any agency, department or subdivision of the state, federal agency, or any other legal or commercial entity.

(c) **Any person may maintain under this section an action for equitable relief or an action in tort to recover damages, or both, for the unreasonable harm caused by another person withdrawing, diverting or altering the character or quality of groundwater.**

(d) Notwithstanding the provisions of subsection (c) of this section, a person who alters groundwater quality or character as a result of agricultural or silvicultural activities, or other activities regulated by the secretary of agriculture, food and markets, shall be liable only if that alteration was either negligent, reckless or intentional.

(e) Factors to be considered in determining the unreasonableness of any harm referred to in subsection (c), above, shall include, but need not be limited to, the following:

(1) the purpose of the respective uses or activities affected;

(2) the economic, social and environmental value of the respective uses, including protection of public health;

(3) the nature and extent of the harm caused, if any;

(4) the practicality of avoiding the harm, if any;

(5) the practicality of adjusting the quantity or quality of water used or affected and the method of use by each party;

(6) the maintenance or improvement of groundwater and surface water quality;

(7) the protection of existing values of land, investments, enterprises and productive uses;

(8) the burden and fairness of requiring a person who causes harm to bear the loss; and

(9) the burden and fairness of requiring a person to bear the loss, who causes harm in the conduct of reasonable agricultural activities, utilizing good agricultural practices conducted in conformity with federal, state and local laws and regulations.

(f) Nothing in this section shall be construed to preclude or supplant any other statutory or common-law remedies. (Added 1985, No. 69, §§ 1, 2; amended 1989, No. 256 (Adj. Sess.), § 10(a), eff. Jan. 1, 1991; 2003, No. 42, § 2, eff. May 27, 2003.)

7.4.3 Public Trust

State v. Central Vermont Railway, 153 Vt. 337 (1989)

At pp. 341-344: "[1] Under the public trust doctrine, **the lands submerged beneath navigable waters are "held by the people in their character as sovereign in trust for public uses for which they are adapted.**" *Hazen v. Perkins,* 92 Vt. 414, 419, 105 A. 249, 251 (1918). **Title to these lands is deemed to be "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."** *Illinois Central Railroad v. Illinois,* 146 U.S. 387, 452 (1892). The character of this title is distinctive as compared to state-held title in other lands, *id.,* and different legal rules therefore apply. *Boston Waterfront Development Corp. v. Commonwealth,* 378 Mass. 629, 631, 393 N.E.2d 356, 358 (1979).

The public trust doctrine is an ancient one, having its roots in the Justinian Institutes of Roman law. *Id.* As one court has observed:

> For centuries, **land below the low water mark has been recognized as having a peculiar nature, subject to varying degrees of public demand for rights of navigation, passage, portage, commerce, fishing, recreation, conservation and aesthetics.** Historically, no developed western civilization has recognized absolute rights of private ownership in such land as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman Law nor the English common law as it developed after the signing of the Magna Charta would permit it.

United States v. 1.58 Acres of Land, 523 F. Supp. 120, 122--23 (D. Mass. 1981) (citations omitted). **After the American Revolution, the people of each state acquired the "absolute right to all ... navigable waters and the soils under them for their own common use."** *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842).

Despite its antediluvian nature, however, the public trust doctrine retains an undiminished vitality. The doctrine is not "'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'" *Matthews v. Bay Head Improvement Ass'n,* 95 N.J. 306, 326, 471 A.2d 355, 365 (1984) (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea,* 61 N.J. 296, 309, 294 A.2d 47, 54 (1972)). **The very purposes of the public trust have "evolved in tandem with the changing public perception of the values and**

uses of waterways." *National Audubon Society v. Superior Court of Alpine County,* 33 Cal. 3d 419, 434, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356 (1983) (en bane). Nor is the doctrine fixed in its form among jurisdictions, as "there is no universal and uniform law upon the subject." *Shively v. Bowlby,* 152 U.S. 1, 26 (1894)."

II.

In Vermont, the critical importance of public trust concerns is reflected both in case law and in the state constitution. Chapter II, § 67 of the Vermont Constitution provides that:

> The *inhabitants of this State shall have liberty* in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to *fish in all boatable and other waters* (not private property) under proper regulations, to be made and provided by the General Assembly.

(Emphasis added.) (fn2) Although § 67 has no direct application here, it underscores the early emphasis placed upon the public interest in Vermont's navigable waters.

[2] In 1918, this Court considered a miller's claimed right to raise and lower the level of Lake Morey by a few inches, an activity that the miller and his predecessors had been carrying out for one hundred and twenty years. See *Hazen,* 92 Vt. at 416--17, 105 A. at 250. The miller accomplished these manipulations by altering a dam constructed by the state with legislative authority. After concluding that the waters of Lake Morey were boatable as a matter of law, the Court stated:

> Being public waters according to the test afforded by the Constitution, **the grants of land bounding upon the lake pass title only to the water's edge, or to low-water mark if there be a definite low-water line. The bed or soil of such boatable lakes in this State is held by the people in their character as sovereign in trust for public uses for which they are adapted. The [miller] did not, therefore, acquire any title to the waters of the lake, as such, nor to the lands covered by such waters, by grants from private sources. And the General Assembly cannot grant to private persons for private purposes, the right to control the height of the water of the lake ... for such a grant would not be consistent with the exercise of that trust which requires the State to preserve such waters for the common and public use of all. The General Assembly being powerless to make such a grant, none can be intended as the basis of the decree.**

Id. at 419--20, 105 A. at 251 (citations omitted). Thus, while *Hazen* involved a claim of right to manipulate water levels rather than a claim of title, the case stands for the proposition that the **legislature cannot grant rights in public trust property for private purposes. In several other cases, this Court has invoked the public trust doctrine in rejecting claims of private rights with respect to public waters**. See *In re Lake Seymour,* 117 Vt. 367, 375, 91 A.2d 813, 818 (1952) (no right to control

water level of lake can be acquired by or granted to private persons for private purposes); *State v. Malmquist,* 114 Vt. 96, 106, 40 A.2d 534, 540 (1944) (same); and *State v. Quattropani,* 99 Vt. 360, 366, 133 A. 352, 355 (1926) (doctrine bars littoral owner's claim of right to boat on public reservoir)."

Cabot v. Thomas, 147 Vt. 207 (1986)

At pp. 209-211: "**As a definite low water line exists along Charcoal Creek, plaintiffs' ownership extends to that line.** *State* v. *Cain,* 126 Vt. 463, 468, 236 A.2d 501, 505 (1967); *Hazen* v. *Perkins,* 92 Vt. 414, 419, 105 A. 249, 251 (1918). Defendants contend, however, that notwithstanding **private ownership of the underlying lands, the public enjoys the right to hunt from boats on the waters overlying plaintiffs' marsh to the ordinary *high* water line.**

Essentially, defendants and amicus curiae, the Vermont Agency of Environmental Conservation, argue that the public has a navigational easement across the waters overlying plaintiffs' land between the ordinary low and high water lines, and that this easement permits recreational uses as well. Among the recreational uses the public enjoys as of right, according to defendants and amicus curiae, are hunting and fowling….

As was earlier intimated, recent duck hunters have been more inventive: they assert a public right of recreational use, including hunting, on the waters of Lake Champlain and its inlet creeks all the way to the normal high water line without regard to the ownership of the underlying land. This appeal is the second time the present defendants have presented us with such an argument. Their appeal of conditional guilty pleas in the criminal case growing out of this same incident involved an improper vehicle for presenting their claims. *State* v. *Thomas,* 140 Vt. 403, 405, 438 A.2d 400, 401--02 (1981).

The questions raised in this case and in prior Charcoal Creek controversies lie at the crosscurrents of two important concerns: the individual's desire for private enjoyment of privately owned land and the public's wish for sporting access to the forests, fields, and waterways of this state. These are concerns that have long been in conflict.

In the colonial period, residents of the New Hampshire grants (what was later to be Vermont) were well aware of the history of abuses that had occurred in England under authority of fish and game laws:

> They were then smarting under the oppression and inequalities of the English system under which individual development among the common people was impeded and often prevented, and the rights and enjoyments of the many were subjected to the pleasure of a favored few. Among the instrumentalities used to bring about this undesirable condition of life, were the iniquitous fish and game laws of England, enacted by the ruling class for their own enjoyment, and which led to a system under which the catching of a fish or the killing of a rabbit was deemed of more consequence than the happiness, liberty or life of a human being."

New England Trout & Salmon Club v. Mather, 68 Vt. 338 (1896)

"One response to the sometimes conflicting concerns of the individual and the larger group of society was Chapter II, Section 39 of the Vermont Constitution of 1777. Now found at Chapter II, Section 67, this provision guarantees to the public the "liberty," subject to legislative regulation, to hunt and fish in certain places:

> The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly.

Section 67 is an accommodation of competing goals. It offers a general delineation of not only the respective rights of landowners and sportsmen but also the authority of government to regulate those rights in the context of hunting and fishing.

Understanding Section 67 requires a knowledge of the common law which it altered. English law, as we received it, treated hunting on privately owned land as a personal privilege of the landowner. See, e.g., *Sterling* v. *Jackson,* 69 Mich. 488, 497, 37 N.W. 845, 851 (1888) ("[s]ince every person has the right of exclusive dominion as to the lawful use of the soil owned by him, no mancan hunt or sport upon another's land but by consent of the owner").

Waterways overlying private property were not in every instance entirely private, however. Tidal waters could not be privately owned. See *Mather, supra,* 68 Vt. at 342, 35 A. at 324. Although an individual could own inland lakes and rivers, the public could use them for navigational purposes if the waterways were susceptible to use for commercial passage and transportation. *Id.* at 342--43, 35 A. at 324. Thus, the common law recognized a "public easement" for navigation on such waters. *Id.* at 347, 35 A. at 326.

This public right of passage did not initially include a right to fish or hunt on nontidal waterways. The right of fishery was personal to the owner of the underlying land. See 1 R. Clark, Waters and Water Rights 182 (1967). Also personal to the landowner was the right to hunt and fowl on those overlying waters. See, e.g., *Schulte* v. *Warren,* 218 Ill. 108, 122, 75 N.E. 783, 786 (1905); *Sterling* v. *Jackson, supra,* 69 Mich. at 501, 37 N.W. at 853; *Fisher* v. *Barber,* 21 S.W.2d 569, 570 (Tex. Civ. App. 1929).

Chapter II, Section 67 extended rights to citizens which the common law had not recognized. Cf. *Payne* v. *Sheets, supra,* 75 Vt. at 347, 55 A. at 660 ("the common law ... is somewhat modified [by Section 67]"). It recognized **rights to hunt and fish, given certain circumstances, in what had previously been the landowner's private domain.**

In *New England Trout & Salmon Club* v. *Mather, supra,* this Court, focusing on the right to fish, reasoned that the constitutional provision at issue does more than just

recognize a right to fish in boatable waters under appropriate legislative regulation; it also:

> **affords the test by which to determine over what waters the State has jurisdiction *de jure,* thus, "and in like manner to fish in all boatable and other waters (not private property) under proper regulations to be hereafter made and provided by the General Assembly." Thus was jurisdiction expressly reserved to the State over boatable waters and waters not private property. ... Hence, unless the waters in question are boatable, they are not public, but private, and the State has no jurisdiction over them.** *Mather, supra,* 68 Vt. at 348--49, 35 A. at 326 (citations omitted); see also *Boutwell* v. *Champlain Realty Co.,* 89 Vt. 80, 89, 94 A. 108, 112 (1915). **By imposing the boatability requirement, Section 67 also limits the State's authority to enforce and regulate an easement across waters overlying an individual's private land. In this way, Section 67 incorporates protections for landowners as well as for those who fish.**

Mather's reasoning in the context of fishing applies equally to Section 67's hunting provision. **By virtue of Section 67, the State has authority to permit and regulate public hunting on private property, but only when that land is not enclosed**.

[1] If landowners fail to take adequate measures to enclose their lands, then individuals who hunt there without first seeking permission would not normally be trespassers. *Payne* v. *Gould, supra,* 74 Vt. at 210--11, 52 A. at 422. **We believe that the presence of water, whether boatable or nonboatable, is irrelevant for purposes of Section 67's right to hunt on nonenclosed, privately owned land. By attaching "boatable waters" and "lands not enclosed" limitations on the respective rights of fishing and hunting, the Vermont Constitution has designated those points beyond which private property becomes inviolate for fishing and hunting purposes---nonboatability for the former and enclosure for the latter.** Development of the common law must, of course, accommodate these constitutional principles.

Defendants correctly state that most states now interpret their common law to extend the navigational easement to include most water-related recreational activities, including hunting from boats. 1 Clark, *supra,* at 198--99. As noted previously, this was not always so. Moreover, those states do not have provisions like Chapter II, Section 67 of the Vermont Constitution to limit the evolution of their common law.

Nothing in Section 67 suggests that its framers intended that boatability would be the standard for hunting either from boats or while standing in water. Indeed, since the provision uses a single standard for "hunting and fowling," applying a separate standard for hunting waterfowl would comport neither with common logic nor with normal use of language. Accordingly, we conclude that the appropriate inquiry in the present case is whether the private lands were enclosed.(fn2) Such a disparate treatment of hunters and fishers is rational since hunting is normally more dangerous to and intrusive of the landowner's interests.

The lower court found that plaintiffs posted their lands in compliance with 10 V.S.A. § 5201. Defendants do not dispute that the boundary along Charcoal Creek was sufficiently marked to be enclosed according to the terms of Chapter II, Section 67. In view of defendants' stated intent to continue hunting in plaintiffs' marsh, the superior court did not err when it "enjoined [defendants] from hunting, shooting, [or] trapping ... upon the lands of the [p]laintiffs. ..."

[2] The court did not stop there, however. It also enjoined "entering upon the lands of [p]laintiffs, by boat or otherwise, at any point behind their boundary line or as marked by [p]laintiffs' posters. ..." We cannot find support in the court's findings for such a broad injunction. This portion of the court's order plainly implicates the boatability aspects of the common law's navigational easement and Section 67's guarantee to those who fish. The sole basis for this part of the superior court's injunction appears to be the nonboatability of the water at that point where defendants' boat was resting in the mud on October 3, 1979. Water level on a single day will not normally support a finding of boatability or nonboatability for a body of water subject to seasonal fluctuations. See *Mather, supra,* 68 Vt. at 347, 35 A. at 326 ("if [the lake's or stream's] periods of high water ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement"). Nor, logically, can an injunction affecting a large area rest on a finding merely that a single point in that area is nonboatable.

We accordingly affirm the superior court's injunction order as it pertains to hunting, shooting, or trapping, and we strike that portion of the order which prohibits entering by boat upon the waters overlying plaintiffs' land.

Affirmed as modified.

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Footnotes:

1 Gould was not the only hunter W.G. Payne sued for trespass. See *Payne* v. *Sheets,* 75 Vt. 335, 55 A. 656 (1903).

2 We are aware that in some sports the line between hunting and fishing might not be perfectly clear. In the present case, however, defendants plainly were hunting. "

7.4.4 Railroads

Preseault v. City of Burlington, 2006 VT 63

"¶ 13….the plain intent of the Legislature in enacting §§ 2513-2514 and predecessor statutes is to allow utilities to continue to provide electric and telecommunications services within railroad rights-of-way even after railroad operations cease."

State v. Preseault, 163 Vt. 38 (1994)

At p. 41: **"[1]It is well settled under Vermont law that the holder of a railroad easement enjoys the right to the exclusive occupancy of the land, and has the right to exclude all concurrent occupancy in any mode and for any purpose.** *Connecticut & P. Rivers R.R. v. Holton,* 32 Vt. 43, 47 (1859); *Jackson v. Rutland & B. R.R.,* 25 Vt. 150, 159 (1853)**. Indeed, the right of a railroad to the exclusive occupancy of a railroad easement is said to be virtually the same as that of an owner in fee.** ***Jackson,*** **25 Vt. at 159. Consequently, whether the State has a fee simple or an easement is not relevant to determine its rights."**