

Water Access not Sufficient to Overcome Easement by Necessity

The oft-confusing law of easements often comes into play in local land use decisions, most commonly when an appropriate municipal panel is determining whether a lot or subdivision has sufficient access. In this regard, 24 V.S.A. § 4412(3) provides that land development may be permitted on lots that do not have frontage either on a public road or public waters, provided that access through permanent easement or right-of-way has been approved in accordance with standards and processes specified in the municipality's bylaws. Such easements or rights-of-way must be, according to the statute, at least twenty feet in width.

The Vermont Supreme Court recently addressed the issue of easements by necessity. *Berge v. State of Vermont*, 2006 VT 116. Simply stated, an easement by necessity can arise when the division of commonly-owned land results in the creation of a parcel without access to a public road. The question before the Court in *Berge* was whether the public waters of Norton Pond provided sufficient access to Vermont Route 114 to overcome the granting of an easement by necessity.

The background situation is relatively common in rural areas of the state. In 1959, Florence Davis subdivided her estate and gave 7,000 acres to the State of Vermont. That conveyance comprises the majority of the acreage of what is now the Bill Slydak Wildlife Management Area (WMA). At the same time, Ms. Davis reserved a lot of approximately thirty-eight acres on the western shore of Norton Pond. The 1959 deed to the State of Vermont reserved no express easement for access to the reserved property across the land conveyed to the State.

In 1961, Davis conveyed the reserved property to George McDonald and Bruce Washburn. The 1961 deed again contained no reference to any easement across the WMA. McDonald and Washburn in turn subdivided the property into eighteen lots, reserving a right-of-way for each lot over every other lot in the subdivision. In 1997, Mr. Berge purchased two of the lots from a successor to McDonald and Washburn. Thereafter, Mr. Berge regularly accessed his property by car over a gravel road across the WMA.

Controversy arose when the State placed a gate across the gravel road, depriving Mr. Berge of overland access to his property. The State asserted that Mr. Berge did not have an express easement to use the road and that an easement by necessity was not present because Mr. Berge had access to his property from Route 114 over the public waters of Norton Pond.

The Supreme Court disagreed, holding that without the use of the road, Mr. Berge would lack any means of access for the reasonable enjoyment of his land: "We depend on roads and automobiles for transporting not only our family and friends, but all of our basic necessities to and from our homes, and it is a quaint but ultimately pointless fiction to pretend that water – much less ice – represents a sufficient substitute." The Court held that water access did not defeat Mr. Berge's easement by necessity claim and remanded the case back to the trial court for findings related to the claim, location of the easement, and any related defenses by the While local development review boards, zoning boards of adjustment, and planning commissions do not have jurisdiction to determine the existence or location of easements and rights-of-way, they are charged under 24 V.S.A. § 4412(3) with ensuring that a sufficient easement exists when a parcel to be developed lacks road or water frontage. The Court's decision in *Berge* is a significant departure from its previous precedents in this area. Seasonal camps are relatively common in the state and, as the dissent points out, water access may be entirely reasonable and practical for the limited uses such properties are subject to. This notion is reflected in 24 V.S.A. § 4412(3), which expressly recognizes frontage on a public waters as being sufficient access to allow such development. Only time and litigation will tell, but the holding in *Berge* may indicate that water access is not sufficient and that development of waterfront parcels requires year-round access by car.

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