

REAL PROPERTY – TRESPASS BY SURFACE WATER – NUISANCE

Docket No. S546-10-03 Wmcv

TOWN OF WINDHAM

v.

SEAN REESE and ELIZABETH REESE

**JAMES B. McCANDLESS and NICHOLAS V. CUSANO, Jr.,
TRUSTEES OF THE BYRON W. McCANDLESS 2002 TRUST, Intervenor**

Windham Superior Court

April 4, 2007

WESLEY, J. This action was tried to the Court on October 9-12, 2006. Following the close of the evidence, the Court left the record open for proposed findings, which were submitted by the Town on December 14, Intervenor Trustees of McCandless Trust (aligned as co-plaintiffs) on December 27 and, by further leave of Court, Defendants on January 29, 2007. Based on the evidence presented at trial, the Court issues the following findings of fact, conclusions of law and orders.

Findings of Fact

Parties and Interests

1. Plaintiff is the Town of Windham, a Vermont municipality. The Town's asset at issue in this case is White Road, a Class III town highway under the exclusive control of the Town selectboard.

2. Intervenor, the Byron McCandless Trust, owns 201 acres of land at 1483 White Road Windham, Vermont. White Road runs in a northwest and southeast direction, dividing the McCandless land. The property consists of an 1820 era farmhouse and large post-and-beam barn on the northeast side of White Road sitting in an open meadow, and numerous fields on both sides of White Road. The general lay of the land tends from uphill in the southwest to downhill in the northeast, reaching the low point at "Shade Brook" to the northeast of the McCandless house.

3. The Defendants, Sean Reese and Elizabeth Reese, are the current owners of the former Hamm Talc Mine located on the southwest side of White Road. Their property abuts that of the Trust, with the location of the former mine being very close to western bound of that portion of the Trust's property lying southwest of White road. The former open pit mine has filled with water to become a nine acre pond, overflowing at its northeastern corner toward the Trust's property and along the Town's road.

4. The Reeses bought the property in 2002 and, per the deed and Purchase and Sale Contract, agreed to take the property,

"As-Is" with all defects and faults (latent or apparent) AND Buyer assumes the risk that adverse past, present, or future physical or environmental conditions may not have been revealed by its investigations; and (v) Seller has made no, and disclaims any, representations or warranty to Buyer whatsoever, express or implied, . . . relating to the physical or environmental characteristics and

conditions of the property, including any structure, improvement or fixture included in the property, and including groundwater, soil, grading, and drainage conditions and hazardous substances, and Buyer assumes all risks associated therewith, whether known or unknown by Buyer.

The property is subject to an Act 250 permit associated with the construction and operation of the mine.

Significant History of Land Use

5. Since its acquisition by the family in 1950, and likely much further back in time, the McCandless property has been maintained as a regular or seasonal home for generations. Although not devoted to intensive agricultural use, the fields have been hayed yearly and, until recently, have never been characterized by substantial wetness, as described by numerous witnesses. The fields on the southwest side of White Road were dry and had a jeep track along the edge of the woods bordering the Reese property. The road served as access to the McCandless forest land for log trucks and hunters, and was virtually always passable to off-road and recreational vehicles. This track is now impassable due to saturation of the grounds over which it runs proximate to the mine pond.

6. During the McCandless ownership, the fields on both sides of the road have never been plowed, but have remained open through haying. For the past 20 years, the fields have been mowed several times each summer by Ed McWilliam. Until recently, he never encountered any problem with standing water or muddy conditions that interfered with mowing. However, for the last two summer, significant portions of the fields have been too sodden and muddy to mow, particularly the portions of the southwest fields that are close to the mine pond, and the portions of the northeast field that are affected by the spreading discharge of water from the outflow of the pond.

7. The Reese property prior to the mine was characterized by a mix of conifer and hardwood forests running up to a ridge to the southwest, with the lowest point being along the McCandless fields in the northeast corner near White Road. Drainage patterns tended to the northeast toward White Road. However, according to Rodney Watkins, currently the town road foreman and long familiar with the land from hunting it prior to its development, before the construction of the mine there were no well-established streams or continuous water run-off associated with the watershed comprised by the Reese property.

8. Beginning in 1982, OMYA, Inc. excavated a nine acre open-face talc mine on the former Hamm property, now owned by Reeses. The mine was dug to a depth of 140 feet. Vehicle access to the heart of the mine was provided by a roadway which spiraled down the mine face. The creation of the mine required the removal and relocation of the equivalent of eleven acres of trees, vegetation, top soil and underlayment.

9. Throughout the duration of the operation of the mine, the accumulation of water required resort to pumping on a virtually constant basis. It is likely that this accumulation included both surface drainage from the broader watershed of approximately 30 acres, as well as subsurface springs opened due to the excavation of the mine. The water was pumped to holding ponds on the Hamm property to the southwest of the mine. While the mine was being pumped, there was no discernible effect on the

observable discharge of water from the Hamm property toward the McCandless property, which was negligible.

Overflow of the Mine

10. In 1997, OMYA ceased its mining operations, including the routine pumping of water from the mine to the holding ponds. Without the pumping, the mine began to fill with water at a rate of approximately 20 vertical feet per year. By spring 2003, the mine was completely filled and overflowing, creating an outflow at the northwest corner that gave rise to diffuse saturation in the immediate vicinity of the mine, and eventually a continuous stream running into ditches along White Road, and onto the McCandless property through culverts under the road.

11. Running northwest to southeast past the Reese property and toward the McCandless property, White Road is paved up to the entrance to the mine. Beyond, and downhill toward the McCandless house, it becomes a dirt road. As a matter of long-standing routine maintenance, the Town has placed culverts beneath the road to divert rain water from the roadside ditches and from the road. Historically, two culverts have been located between the McCandless barn and the northeast corners of the McCandless' fields to the southwest of White Road.

12. The culverts are placed intermittently at short distances to divert water from the road and ditches, as the danger of erosion makes it imprudent to have water run for long distances in roadside ditches along an uninterrupted course.

13. Prior to 2003, the maintenance of White Road was typical for a Class III town highway. The road was graded several times per year and maintained in the winter by plowing. The ditches and the culverts required no special attention prior to 2003.

14. Once the water in the mine came over the banks, the overflow was continuous and caused the McCandless' fields on the southwest side of the road to be muddy and continuously wet. The roadside ditches, as well as the culverts, flowed continuously with water. Erosion of the ditches began. Sediment soon filled in the ditches.

15. After the Reeses purchased the Hamm property in 2002, the Town became concerned that the mine appeared to be in danger of overflowing. Contacted by town officials in March 2003, Sean Reese acknowledged that the mine was spilling water.

16. While the mine was filling with water, it was the expectation of the Town selectboard and the road foreman that any danger of overflow had been anticipated by the construction of a notch in the southwest bank of the mine, away from White Road. However, apparently as a result of an engineering oversight, the notch is approximately eight feet higher than the current location of the overflow. Since the level of the notch is higher than the northeast corner of the pond, water overflowed the mine at its northeast corner, flowing onto the town road and spreading across wide portions of the McCandless property.

18. Throughout the spring and early summer of 2003, both the Town and Byron McCandless put the Reeses on notice of their concern that the overflow of the mine was creating a problem with water saturation and erosion which had never existed in the past. In his June 24, 2003 reply letter to the Windham Selectmen, Mr. Reese acknowledged that "a problem exists" and that there was visible "a clear demarcation in the water [of the mine lake] where land grasses has established themselves in recent years, and which is now under water".

19. Despite exchanges of correspondence and a number of meetings, the parties were unable to agree on either the allocation of responsibility for the overflow, or a remedial approach to resolve it.

August 2003 Flood and Other Effects on White Road

20. On August 3, 2003, in an intense summer thunderstorm, a heavy volume of water almost completely washed out White Road from the end of the pavement to Shade Brook, including virtually the entire stretch of road by the McCandless Farm.

21. According to road foreman Rodney Watkins, the August 2003 rainstorm was a “huge” storm that washed out nine or ten roads in the Town of Windham. Route 121, a nearby road unaffected by the Hamm mine watershed, was closed for two months as a result of damage from the storm.

22. In the course of repairing the damage to White Road caused by the August 2003 storm, the Town upgraded all but one of the culverts to larger sizes than those requiring replacement. The culvert furthest down White Road was changed from a three foot diameter to a six foot diameter culvert and a new concrete structure was poured for it.

23. The upgraded replacement culverts brought the Town into compliance with federal regulations necessary to obtain reimbursement from FEMA, which supported eighty percent of the Town’s cost to repair White Road and upgrade the culverts. That total cost was \$54,000.

24. Based on the observations of Watkins, and others, a certain volume of water associated with the work of beavers near the edge of the mine likely flowed into the White Road ditches during the flood, after the beaver dams gave way.

25. Nonetheless, based on the opinion of Defendant’s expert, Richard Downer, and considering the widespread magnitude of the damage to many other town roads, it is likely that the damage inflicted on White Road by the August 2003 stormwaters would have occurred in any event; whether or not the mine had been constructed, and whether or not the mine pond was in a state of overflow.

26. As a result of the increased volume of water continuously running in the ditches and culverts from the mine pond outlet along southward along White Road, the Town has been required to give greater attention to regular maintenance than in the past. This is particularly true as regards the accumulation of sediment in the culverts, and the erosion of the ditches from the increased flow.

27. The change in the flow rates also contributes to a winter maintenance problem, which began in the winter of 2002-2003 and was unknown before the overflow began. Ice builds up in the ditches and culverts, causing water to disperse thinly over the road in a “sheeting” effect. This makes travel hazardous, and requires increased and persistent maintenance. The condition is also marked by buildups of ice in the fields and around the foundation of the McCandless barn, formations uncharacteristic of winters prior to the overflow.

Present and Historic Patterns of Water Drainage

29. As analyzed by the Town’s expert, Robert Stevens, the construction of the mine, including clear cutting eleven acres of woods together with the removal of all vegetation and top soil, significantly altered the ability of the land to absorb water. Where the watershed was once characterized by a approximately thirty acres of dense forest, its salient feature now is a nine acre lake surrounded by Two acres of exposed

ledge. As observed by Mr. Stevens, this is the hydraulic equivalent of an eleven acre paved parking lot.

30. According to Mr. Stevens, the construction of the mine reduced the capacity of the overall watershed to absorb rainfall in a “spongelike fashion” and return it gradually to the atmosphere as water vapor through transpiration from leaves and plants. Although evaporation from the lake still accounts for some return to water vapor, the “impervious surface” of the mine and lake promote significantly higher levels of peak water discharge from the total of the rainfall accumulating in the watershed.

31. By analyzing topographical records, including the aerial photographs used to formulate USGS maps, it is reasonably clear that the present outlet from the mine pond overflow conforms closely to the location of water-courses during peak flow prior to the construction of the mine. However, it is unlikely that such streams running from the former Hamm property onto the McCandless property were ever more than seasonal or intermittent.

32. As observed by Mr. Stevens, now that the mine pond has reached an apparently “steady state” of permanent overflow, the flow pattern of the water from the present Reese property onto the McCandless property is markedly different from the likely historical pattern, which was characterized only by the occasional presence of surface water during spring runoff or heavy rain. Furthermore, any rain event now produces a heavier, “peak discharge” than would have been true historically.

33. The conclusion that the presence of the mine has substantially altered drainage patterns is convincingly supported by the testimony of Plaintiffs’ experts, Bruce Tease and Ron Miller. Mr. Miller’s dye testing observations confirmed that broadly dispersed water flows across the McCandless fields have their origin at the outlet of the mine pond.

34. The soil testing undertaken by Mr. Tease confirms that much of this pattern of water distribution from the mine pond is now associated with newly established wetland vegetation. He noted that the trees around the quarry, now afflicted and dying due to the water drowning out their roots, were all upland species which would not normally have taken root and grown in wetland soils. On the other hand, cattails and softbrush now grow across much of the soggy flow areas, which are indicative of early development of a wetland.

35. As noted by Mr. Tease, it is now appropriate to designate many areas on the McCandless property proximate to the mine pond as wetlands, based on the presence of copious volumes of water the types of vegetation now established there. On the other hand, soil borings below the surface of these areas, and just outside of their boundaries, disclose no soils that are typical of the historic presence of a wetland. Based on soil analysis, the wetlands being promoted by the mine overflow are no more than five years old. The absence of any trace iron showing the distinctive effects of a lack of oxygen (a “gley layer”) is conspicuous evidence making it unlikely that the McCandless fields have previously been characterized by wetlands.

36. The characteristics of the subsurface soil has promoted the underground diversion of multiple rivulets originating from the mine overflow. These underground flows can be heard, and occasionally observed through the appearance of sinkholes. They run in a widening pattern from the two culverts under White Road, and spread underneath the McCandless fields behind the barn and toward Shade Brook. Eventually, it is likely that continuing erosion will result in the collapse of the surface soils, causing

one or more of these rivulets to coalesce into a permanent and newly-formed stream course across the McCandless fields.

37. Defendant's expert, Professor Richard Downer, raised no significant disagreement with Mr. Stevens analysis regarding the effect of the mine on the peak discharge rates from the watershed. He disputed, however, whether the effect of such a change could be particularly significant, noting that it ought to be confined to a relatively brief period during any particular rain event. Prof. Downer supports this conclusion by reference to early USGS maps and aerial photographs indicating, in his view, the historical presence of a watercourse running across the present McCandless lands from a point on the former Hamm property virtually coincident with the present outlet from the pond overflow. He doubts that the present dispersal of waters from the mine pond outlet is appreciably different from the historic drainage.

38. The Court is not persuaded by this opinion. First, as noted by Prof. Downer and others, a factfinder faces a daunting challenge when confronted by the distinctions on various topographical depictions between lightly drawn solid lines, and lightly drawn dashed lines. Drawing inferences from such distinctions concerning the historic presence of permanent or seasonal watercourses is a perilous endeavor. In this case, however, all doubts must be resolved in favor of the likelihood that the drainage patterns have undergone a recent and significant change, based on the soil testing undertaken by Mr. Pease in connection with his wetlands assessment. Simply put, there are newly established and expanding wetlands for which there is no historic precedent, evidence of which would be most convincingly found by soils testing.

Claimed Damages to McCandless Property

39. At present, it is unlikely that the McCandless property has sustained any permanent damage as a result of the change in water dispersal patterns from the mine pond. As noted by Mr. Tease, it takes some time for wetlands to become well-established. Thus, assuming the discharge from the pond is regulated in the near future to approximate historic flows, the Court concludes that any lasting alteration to the McCandless lands is likely to be minimal.

40. In attempting to prove its damages, the Trust offered the opinion of a real estate appraiser, William Scranton. Using the sales comparison approach to valuation, Mr. Scranton appraised the McCandless property using sales from 2004, a time that preceded the bulk of the claimed water damage. He concluded that based on those comparisons of sales of properties having roughly similar characteristics in terms of the quality of the sites and the structures, the property would have been worth \$375,000 at that time. Mr. Scranton made a separate assessment based on three comparable sales in 2006, a time after the establishment of the wetlands and underground streams. Based on that assessment, the property would have been worth \$400,000 in 2006.

41. Mr. Scranton acknowledged that there was no market data of comparable properties affected by water incursion. Thus, he adjusted the assessment based on "comparables" by a factor of 10%-30% to account for the impact on market value likely to be attributable to the overflow and flooding from the mine pond. He candidly acknowledged that this was a "ballpark" figure, derived from his own professional opinion as informed by discussions with other real estate agents and appraisers.

42. Mr. Scranton assumed that of roughly 30 acres of open land associated with the premises, about five acres on the south side of White Road and ten acres on the nor

side, were adversely affected by the water overflow. Applying his “adjustment” approach, and using a factor of 20%, Mr. Scranton concluded that the flooding would have diminished the 2004 value of the property by \$75,000, and the 2006 value by \$90,000.

43. The Court acknowledges that appraisals of market value inevitably require some degree of subjective assessment by the appraiser, based on the application of judgments born of experience. In this matter, nonetheless, the Court must conclude that a straight discount rate of 20% for the claimed impact of the water incursion is too speculative an assessment to command reliance, particularly as the injunctive relief to which Plaintiffs are entitled is likely to spare them from any actual diminishment in the market value of the property, once Defendants undertake appropriate remedial measures.

Injunctive Relief

44. The evidence substantially concentrated on the comparison between drainage patterns and effects before and after the construction of the mine, and the episodic account of the August 2003 storm and its aftermath. Although he had not been retained to design an engineered solution, Mr. Stevens gave a general description of an approach which might address the persistent overflow. As the Court understood it, such an approach would involve first lowering the level of the pond substantially, and then constructing a mechanical system that would allow controlled discharge from the pond, using the created capacity above the lowered surface to absorb peak runoff from the watershed.

45. It is unclear from the evidence, which was tempered by the exclusion of settlement negotiations, the degree to which the parties have squarely considered the feasibility of any particular engineered approach. It appears that disagreement persists as to what duty, if any, the Trust would bear in facilitating some regulated flow of water across its property and into Shade Brook.

46. In this regard, while the current pattern of drainage and dispersal plainly represents a deleterious change from historic flows, it is nonetheless clear that historic flows from the watershed on the former Hamm property have always discharged across the McCandless lands following the downhill topography to Shade Brook. To the extent injunctive relief is justified, it is only justified to return the flow pattern as closely as possible to what it was historically. Although the Court rejects Defendant’s claim that there has been no deviation in this regard, Plaintiffs have failed to identify with sufficient clarity how much of a deviation has occurred and what ought to be done to approximate the historic status quo, as fairly as possible, considering the equitable parameters of appropriate injunctive relief.

Conclusions of Law

All parties agree that the critical legal principle affecting the analysis of the rights and responsibilities of landowners impacted by the flows from a common watershed is found in *Canton v. Graniteville Fire Dist. No. 4*, 171 Vt. 551, 552-53 (2000), citing *Swanson v. Bishop Farm, Inc.*, 140 Ft. 606, 610 (1982).

An upper property owner is entitled to have surface water pass to lower lands in its natural condition. . . . However, an upper property owner cannot artificially change the manner of flow by discharging it onto the lower land at a different place from its natural discharge. . . . Such interference with the flow of surface

water is a form of conduct that may result in a trespass or nuisance. See Restatement (Second) of Torts § 821D cmt.e (1979) (flooding of plaintiff's land is trespass, and, if it is repeated or of long duration, it is also a nuisance): S. Kinyon & R. McClure, *Interferences with Surface Waters*, 24 Minn.L.Rev.891,936 (1940) (arguing that rules relative to surface waters be classified under tort law as trespass or nuisance, rather than property law).

Canton is a case quite similar to its facts to this one in which the Court upheld a jury verdict for damages to a lower-lying property caused by the discharge of water from an overflowing quarry. The Supreme Court was unconcerned with whether the wrong ought to be classified as a trespass or a nuisance, holding:

An upper property owner creates a nuisance when he or she causes water to flow onto lower lands in a manner or place different from its natural state, harming the lower property owner's interest in the use and enjoyment of that land. . . . Thus, every time surface water collects in Standard Quarry and is discharged onto plaintiff's land through the grout pile, defendant is invading plaintiff's interest in the use and enjoyment of her property and creating a nuisance.

Id. at 552-53.

As Defendant argues, in order to assess liability, attention must be paid to both the place and the manner of any claimed discharge that differs from the natural flow. *Swanson* involved a claim that defendant's development activities caused increased flows of water through a culvert, resulting in interference with plaintiff's use of his land. The Supreme Court upheld the trial court's award of damages, but remanded the denial of plaintiff's request for injunctive relief for more specific findings as to the comparative increase in flow and the feasibility of any remedy. The Court observed:

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 (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, (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.

Id., 140 Vt. At 610.

In this case, Defendant insists that the point of discharge from the overflowing mine is virtually identical to the place where water gathered from the watershed would have flowed off the former Hamm property, and onto the town's road and the McCandless lands, for many decades preceding the construction of the mine, or the spillover of the mine pond. While Plaintiff's do not seriously contest this conclusion, they maintain that the volume of the present flow, and the consequent alteration in the pattern of its dispersal over the downstream topography, is strikingly different from the historic behavior of the drainage in the watershed. The Court agrees. As elaborated in the findings of fact, there is conclusive evidence of heavier flows in the ditches and culverts, greater buildup of ice dams and ice sheeting in the winter affecting White road, pronounced and widening establishment of wetlands where none previously existed, acres of saturated pasture making impossible haying operations regularly undertaken twice a summer for decades, and the creation of underground rivulets which over time pose the danger of significant erosion to the pastures between White road and Shade Brook. While the Court acknowledges that the Town's ditches and culverts, and the McCandless fields, are bound to accept the discharge of the natural flows historically associated with the upstream watershed largely comprised by Defendant's land, the volume and pattern of that flow was substantially altered by the construction of the mine, and the unregulated overflow of the mine pond. Both the Town and the Trust have presented compelling evidence that the alteration of the flow has resulted in a present and continuing interference with the rightful use of their property.¹

Having concluded that both the Town and the Trust have met their burden of proof to demonstrate a nuisance, the Court finds that fashioning appropriate relief is a more challenging task. Each of the parties aligned as plaintiffs seeks both injunctive relief as well as compensatory damages. Coming first to the claims of damages, the town seeks reimbursement for the cost of repairing the culverts along White Road after the August 2003 storm damage, while the Trust claims entitlement to the difference between the fair market value of its property before and after the inundation from the mine overflow. The Court is not persuaded that either party has demonstrated a right to a compensatory award.

The Town's claim founders due to the lack of a causal connection between the discharge from Defendant's land and the damage to the roads and culverts. Essentially, the storm was a freakish natural phenomenon that would have washed out the Town's infrastructure in any event. Citing *Nicholson v. Doyle*, 125 Vt. 538 (1966), and *Perkins v. Vermont Hydro-Electric Corp.*, 106 Vt. 367, 379-80 (1934), the Town urges that if Defendant's breach of duty was a substantial and contributing cause of the damage, it is entitled to recover even in the presence of other substantial causes, including acts of nature. Yet, resolving the expert testimony on this point in favor of Defendants, especially in the light of the magnitude of the storm as evidenced by widespread washouts and lengthy road closures in other parts of the town, the Court cannot find that the overflowing status of the mine pond was a substantial contributing factor in a storm where peak runoff would have been overwhelming, mine or no mine.²

Unlike the Town's, the Trust theory of compensation does not turn on any claimed expenses of remediation; rather, the Trust seeks damages as measured by the

diminished value of its real property as presently affected by the consequences of the mine overflow. As indicated in the findings of fact addressing the Trust's evidence as to such claimed loss of fair market value, the Court did not find particularly compelling the basis for the proffered appraisal. More fundamentally, however, the Court concludes that, even if competent, such evidence goes to a measure of damages that is inappropriate to the circumstances established by the facts, and as affected by the plaintiffs' joint requests for injunctive relief. Significantly, the evidence is devoid of any claim that the Trust lost the opportunity to sell the property as a result of saturation of portions of the pastures, or that it was compelled to offer it as a price lower than the market would otherwise support. Instead, with little authority,³ the Trust insists that its injury is properly measured by such a reduction in value, even in the absence of any efforts to market the property. Had the evidence demonstrated irremediable and substantial alterations to the real property, diminished value would have been the proper measure of damages; yet, the evidence makes out no such injury. Rather, having concluded that Plaintiffs have demonstrated their case for injunctive relief, the Court is confident that the Trust's property will sustain no long-term alteration in its character and is likely to quickly recover from any temporary impact that might have affected its market value, had the market been required to adjust for the present consequences of the overflow which have compelled the Court to require that they be abated.

This approach is consistent with the Supreme Court's analysis in *Bishop*, in which the Court also considered the balance of remedies potentially available to redress a breach of duty to maintain water discharges at normal flows.

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).

In *Bishop*, the trial court had declined injunctive relief in the apparent belief that an award of damages was sufficient. While acknowledging that such a choice of remedies might have been warranted, the Supreme Court remanded because the findings were insufficient to allow it to understand the magnitude of the breach, the extent of the injury, or the equities implicated by granting an injunction. Extrapolating from the *Bishop* discussion, this Court concludes that where injunctive relief is clearly warranted, and where such relief is likely to significantly mitigate or extinguish the prospect of future injury, it would amount to unjust enrichment to award damages measured by a claimed diminution in market value. Accord, *Phillips v. Chesson*, 58 S.E.2d 343 (N.C. 1950) (error to charge jury on market value approach to damages in claim by lower

landowner against upper landowner for injurious diversion of water, which included a prayer for injunctive relief).⁴

Finally, as already indicated, Plaintiffs have presented clear and convincing evidence warranting injunctive relief, in response to which Defendants shall be required to abate and control the discharge of water from the mine pond, approximating as much as possible the patterns of drainage which were present before the construction of the mine. Little further discussion is necessary to explain this conclusion, which follows inescapably from the findings regarding the alteration to historic patterns of water flow, and the findings regarding the deleterious changes to the town's road and culverts, and to the Trust's pastures, which have directly resulted from the overflows from the mine pond. See *Bishop*

Nevertheless, echoing to some extent the concerns over the sufficiency of the evidence to fashion particular injunctive relief as discussed in *Bishop*, the Court concludes that the precise scope of such relief must await a further evidentiary hearing limited to the proper scope of the remedy. In particular, the Court believes that additional engineering opinion is necessary as regards a methodology for regulating outflows from the mine pond, so that discharges are modulated to the extent possible to conform to the drainage patterns that pre-dated the construction of the mine. While the Court acknowledges that it cannot compel the Trust or the town to provide a so-called "drainage easement" to Defendants, it is by no means clear that such an easement would be necessary if the discharge from the mine pond is controlled to approximate historic patterns of flow, about which the other parties have no basis for complaint or injunctive relief. The Court is mindful of Plaintiffs' request for a simple injunctive declaration requiring Defendants to control the outflow to the normal historic patterns, which presumably would necessitate further proceedings only in the event a party sought enforcement. In the Court's view, given the present state of the evidence and the posture of the parties at trial, this would likely postpone the inevitable, and yield a more deeply rutted road to a workable resolution than if all parties and the Court grapple now with a carefully tailored remedial order.

Order

Based on the above findings of fact and conclusions of law, it is hereby ORDERED:

1) As to the claims by the Town of Windham and the McCandless Trust that Sean and Elizabeth Reese have failed to control the flow of water to approximate historic levels, and that such failure has caused significant present and continuing injury to each of the Plaintiffs, the Court enters DECLARATORY JUDGMENT IN FAVOR OF PLAINTIFFS.

2) As to the claims by the Town of Windham and the McCandless Trust for compensatory damages, they are denied for lack of proof, and the Court enters JUDGMENT IN FAVOR OF DEFENDANTS.

3) As to the claims by the Town of Windham and the McCandless Trust for injunctive relief, they will be GRANTED, subject to further evidentiary hearing and supplemental findings as to the proper scope of relief in further consideration of all the equities.

4) The parties shall consult regarding a schedule for the further development of such evidence as is necessary to the hearing on appropriate relief, and shall notify the Court no later than April 18 as to a stipulated scheduling order, or shall submit individual proposals as to such an order in the absence of a stipulation.

Notes to Text:

1. Defendants urge the Court's consideration of their contention that they "have done nothing to cause or to contribute the damage alleged by the intervenors." A similar futile plea was rejected by the Supreme Court with respect to the present quarry owners' appeal in *Canton*. "Regardless whether we treat the diversion of surface water as a trespass or nuisance, it was not error for the jury to find defendant liable for plaintiff's damages. . . . The fact that the culvert and granite pile was created by defendant's predecessor is irrelevant. The tort is committed when defendant releases water through the culvert, which is not the natural flow of the surface water." *Id.* at 553.

2. The Court's determination as to proximate cause renders unnecessary any ruling on whether the Town sufficiently proved its damages, except to express skepticism that the proper measure of damages is the cost of significant upgrades in the infrastructure as required to draw down FEMA reimbursement, at least without excluding the amount of such reimbursement from the scope of the collateral source rule. See *My Sister's Place v. Burlington*, 139 Vt. 602 (1981) (limiting the scope of collateral source rule to amounts subject to subrogation, or other arrangements making it inequitable for a tortfeasor to "reap the benefits of a victim's providence", and holding that a setoff should have been recognized for payments that clearly reduced plaintiff's overall losses). Except for the total cost of the FEMA supported reconstruction, the Town offered no other evidence of the cost to restore the roads and culverts to the condition that pre-existed the storm.

3. In *Sheldon Slate Products Company, Inc. v. Jurjiaka*, 124 Vt. 261, 270 (1964), the Supreme Court upheld an award for flood-related damages based on the diminished value of the real property. Stating only that the \$300 difference "seems to be supported by the findings", the Court did not elaborate on those findings, especially as regards whether the property damage was temporary or permanent.

4. "The great weight of authority where the point has been squarely presented sine nubibus clearly rejects the diminution of market value as neither accurate, convenient nor just where, as here, temporary damages only will be allowed, where the cause of the injury is impermanent in the sense that it may be removed by the offender voluntarily or abated by equitable proceedings which the plaintiff has here invoked. 'As a general rule the diminished market value of the property will not be used as a measure of damages for a temporary injury to real estate, but only when the injury to the realty is permanent'. 15 Am.Jur., *Damages*, § 84, p. 605; McCormick, *Damages*, loc. cit., *supra*." *Id.*

Robert Fisher, Fisher & Fisher, Brattleboro, for plaintiff
John Boylan, Springfield, for defendants
Bradley Myerson, Manchester Center, for Intervenor