

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

JUN 02 2003

IN THE SUPREME COURT OF THE STATE OF VERMONT

JOSEPH JONES and ANNE JONES

Appellees,

vs.

VERMONT DEPARTMENT OF FORESTS,
PARKS and RECREATION

Appellants.

Appeal From
Rutland Superior Court
Docket No.: S0202-97 RC Ca

SUPREME COURT DOCKET NO. : 2003-017

SUPPLEMENTAL PRINTED CASE

Submitted by:

Harry R. Ryan, III, Esq.
John A. Serafino, Esq.
Ryan Smith & Carbine, Ltd.
P.O. Box 310
Rutland, Vermont 05702-0310
(802) 786-1000

TABLE OF CONTENTS

1.	Judge Norton's Decision and Order dated February 8, 2001	1
2.	Excerpt of Trial Transcript dated December 20, 2001.....	5
3.	Excerpt of Trial Transcript dated November 9, 2001	10
4.	Excerpt of Trial Transcript dated November 8, 2001	18

STATE OF VERMONT
RUTLAND COUNTY, ss.

RUTLAND SUPERIOR COURT
DOCKET NO. S0202-97RcCa

JOSEPH C. JONES and ANNE J. JONES,
Appellants,

v.

VERMONT DEPARTMENT OF FORESTS,
PARKS, AND RECREATION,
Appellee.

CONFORMED COPY
RUTLAND SUPERIOR COURT

FEB 08 2001

Hayd. Johnson
Clerk

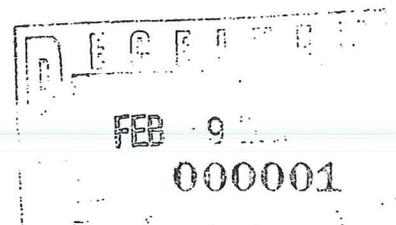
Decision and Order

On October 2, 2000, this court held a hearing on appellants' motion that their requests for admissions be deemed admitted by the appellee, and appellants' motion for an advisory jury, both of which were scheduled for oral argument. Both motions were denied. The first motion was denied as being filed beyond the April 1, 1999 discovery deadline, in the absence of any order extending the discovery date. This ruling was orally placed on the record. The motion for an advisory jury was denied by written order dated October 11, 2000.

During argument on these two motions, additional issues affecting this case were raised. The court invited memoranda on these issues, which both parties have filed. The court will address these issues to advance this litigation.

In 1980, the appellants enrolled a large parcel of their land in Vermont's "Agricultural and Managed Forest Land Use Value Program," 32 V.S.A. §§ 3751-3763a.¹ This program is designed to encourage and assist in the maintenance, conservation, and preservation of Vermont's productive agricultural and forest land by taxing such land at a reduced rate to reflect its current use, rather than its highest and best use. 32 V.S.A. § 3751. Pursuant to 32 V.S.A. § 3755(c), the appellee, the Department of Forest, Parks, and Recreation (Department), issued an adverse inspection report against the appellants in November, 1996. Adverse inspection reports may be issued following inspection of program lands based upon a finding that "the management of the tract is contrary to

¹ Hereinafter the "Land Use Value Program."



the conservation or forest management plan, or contrary to the minimum acceptable standards for conservation or forest management.” 32 V.S.A. § 3755(c). The appellants’ adverse inspection report was issued based on a finding that timber on a portion of their land had been cut in violation of their approved forest management plan. The appellants appealed the issuance of this report to the Commissioner of the Department pursuant to 32 V.S.A. § 3758(d). The Commissioner affirmed the issuance of the adverse inspection report and the appellants then filed this appeal pursuant to 32 V.S.A. § 3758(d). The issues before the court pertain to the nature of the Superior Court’s review of the decision below. In addressing these issues, it is important to have a full understanding of the statutory scheme involved in this case.

Title 32, entitled “Taxation and Finance,” is divided into two subtitles; Subtitle 1 entitled “Finance,” and Subtitle 2 entitled “Taxation.” Part 2 of Subtitle 2 is entitled “Property Taxation” and contains Chapter 124, governing, among other things, the Land Use Value Program, and Chapter 131, which governs appeals to the Board of Civil Authority, the Director of the Division of Property Valuation and Review, and the Superior Court. Section 3758(d), which details a property owner’s right to appeal from an adverse inspection report, is located in Chapter 124 and provides that appeals to the Superior Court from an adverse decision of the Commissioner of the Department may be taken “in the same manner and under the same procedures as an appeal from a decision of a board of civil authority, as set forth in subchapter 2 of chapter 131 of [title 32].” 32 V.S.A. § 3758(d). In other words, section 3758(d), in effect, imports subchapter 2, in its entirety, into that part of Chapter 124 governing the Land Use Value Program.

Subchapter 2 of chapter 131 of Title 32 governs appeals to the Director of the Division of Property Valuation and Review, and to the Superior Court. Included in this subchapter is section 4467, entitled “Determination of appeal,” which states in part:

Upon appeal to the director or the court, the appraiser or court shall proceed de novo and determine the correct valuation of the property as promptly as practicable and to determine a homestead value if a homestead has been declared with respect to the property for the year in which the appeal is taken.

32 V.S.A. § 4467. The issue before the court is whether this statute gives the appellants’ the right

to a de novo review of the Commissioner's decision affirming the adverse inspection report.

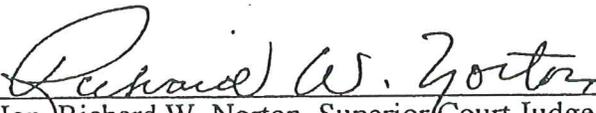
Section 4467 grants taxpayers the right to a de novo review by this court on issues of property valuation. This appeal will determine whether, for tax purposes, the appellants' property is to be valued at its highest and best use or at its current use as forest land. This determination depends on whether the appellants are responsible for the violation of their forest management plan. In other words, if the appellants are responsible for the violation of their forest management plan, then their property will be valued at its highest and best use. Conversely, if they are not responsible, then their property will be valued at its current use. Thus, in order to determine "the correct valuation for the property," 32 V.S.A. § 4467, the court must determine whether the appellants are responsible for the violation of their forest management plan. Accordingly, this court finds that 32 V.S.A. § 4467 is applicable in the instant case and that the appellants are entitled to a de novo review on appeal.

The Department has argued that the phrase "proceed de novo" in 32 V.S.A. § 4467 does not mean that the taxpayer is entitled to a second evidentiary hearing, but rather means that the reviewing court should only "give the record on appeal a fresh look." Department's Memorandum filed October 11, 2000 at 6. The Supreme Court has "consistently held that 32 V.S.A. § 4467 mandates the trial court to try the dispute anew, as though it had never been heard before . . ." *In re Milot*, 151 Vt. 615, 617 (1989). Accordingly, the appellants are entitled to a second evidentiary hearing on this matter.

In a de novo proceeding, the superior court is "under a duty to determine the probative effect of the evidence as though no decision had been previously rendered." *Id.* Thus, in considering this appeal, the court will not be limited to reviewing the Commissioner's decision, the parties are not limited to the evidence presented below, and the burden is on the Department to prove that the appellants' violated their forest management plan. This matter is to be tried anew, as though it has never been heard before. *Id.* Finally, all pleadings filed in this case shall be captioned as this order is captioned.

Based on the foregoing, this case shall be set for a de novo evidentiary hearing. The parties shall file proposed findings of fact and any legal memorandum three days prior to trial.

Dated at Rutland, Vermont, this 5th day of February, 2001.


Hon. Richard W. Norton, Superior Court Judge

STATE OF VERMONT
RUTLAND COUNTY, SS.

JOSEPH JONES

RUTLAND SUPERIOR COURT

-v-

DOCKET NO. S202-97RcCa

VERMONT DEPARTMENT OF
FOREST, PARKS and
RECREATION
- - - - -

P R O C E E D I N G S

HEARING: Court Trial

HELD: Thursday, December 20, 2001

BEFORE: The Honorable William D. Cohen, Presiding

APPEARANCES:

HARRY R. RYAN, III, ESQ., of the firm of Ryan
Smith & Carbine, 98 Merchants Row, P.O. Box
310, Rutland, VT 05702-0310, on behalf of
the Plaintiff;

REBECCA M. ELLIS, ESQ., and JEANNE ELIAS, ESQ.,
Vermont Attorney General's Office, 109 State
Street, Montpelier, VT 05609-1001, on behalf
of the Defendant.

COURT REPORTERS ASSOCIATES
117 Bank Street
Burlington, Vermont

1 A. Yes.

2 Q. Since you knew it had been cut twice prior
3 to 1992, wouldn't it have been prudent of you to
4 identify the stumps in that 15.8 acre section to make
5 a determination as to when any given tree was cut?

6 A. Yes.

7 Q. Thank you. You didn't do that, did you?

8 A. Yes, I did.

9 Q. You identified stumps?

10 A. In my visual observations of the stumps
11 when I was out on inspection.

12 Q. But you didn't make any note of them. You
13 didn't count them; you didn't measure their diameter,
14 and you didn't log the type of tree cut; is that
15 right?

16 A. No. I did not.

17 Q. You didn't do any of those things?

18 A. I didn't write down notes about the stumps
19 that were there other than that I observed stumps
20 were there.

21 Q. So the only record we've got is your memory
22 from that inspection in 1996.

23 MS. ELLIS: Objection. These
24 questions are argumentative, and they are really not
25 leading to any relevant evidence in this case.

1 Q. You had some conversations with Mr. Riley
2 and Mr. Wilcox at some point regarding the 1992
3 cutting?

4 A. I just had conversations with Mr. Riley.
5 Never with Mr. Wilcox.

6 Q. And did you and Mr. Riley discuss amending
7 the plan?

8 A. At the time of -- amending the plan when
9 they cut five.

10 Q. And you relied on Mr. Riley to take care of
11 whatever was necessary in that regard?

12 A. Yes.

13 Q. If you had been put on notice that any of
14 the cutting was done in 1992 was in violation of the
15 plan or even appeared to be in violation of the plan,
16 would you have opted out of the program without
17 penalty in 1996?

18 A. Yes.

19 Q. Have you sold that property?

20 A. Yes. Part of it. I still have a big chunk
21 of it.

22 Q. You sold the bulk of the land?

23 A. That's right.

24 Q. And that's owned by the Forest Service
25 now?

1 A. Yes, it is.

2 Q. And in order to get it to the Forest
3 Service, you first had -- you sold it to the City of
4 Rutland for the watershed?

5 A. That's right.

6 Q. And the agreement was that they would pass
7 it along to the Forest Service?

8 A. Yes.

9 Q. And you specifically required in your deed
10 to the City of Rutland that there could be no
11 development on this property whatsoever, didn't you?

12 A. That's right. Yes.

13 Q. And you did that on your own, didn't you?

14 A. Yes.

15 Q. You and Ann?

16 A. Yes.

17 Q. And that's because you wanted to preserve
18 this piece of property, this 500 acres or whatever it
19 is, always as woodland; is that correct?

20 A. Yes.

21 Q. Is it your understanding that that's what
22 the forestry management plan was all about?

23 A. Yes.

24 Q. After the State threw you out of the
25 program, you could have sold this land for commercial

1 purposes; isn't that true?

2 A. Yes.

3 Q. As a matter of fact, you had several offers
4 for this property?

5 A. Yes.

6 Q. As a commercial property, didn't you?

7 A. Yes.

8 Q. For significantly more than you sold it to
9 the City?

10 A. Yes.

11 THE COURT: Do you mean commercial,
12 you mean development or you mean housing?

13 MR. RYAN: Housing development, your
14 Honor.

15 THE COURT: Okay.

16 BY MR. RYAN:

17 Q. And you turned all of those down?

18 A. Yes.

19 Q. At any time did anyone make you aware that
20 there were any significant violations as a result of
21 the 1992 cutting prior to Mr. Fice in 1996 just after
22 you could have opted out of the program?

23 A. I was not aware of it at all. No.

24 Q. Did Mr. Dern, when you hired him as a
25 logger did, he assure you that he knew what he was

STATE OF VERMONT
RUTLAND COUNTY, SS.

JONES)
) Vermont Superior Court
 v.) Docket No. S0202-97 RcCa
)
VERMONT DEPARTMENT OF FORESTS,)
PARKS & RECREATION)

COURT TRIAL

BEFORE HON. WILLIAM D. COHEN

ON NOVEMBER 9, 2001

A P P E A R A N C E S:

HARRY R. RYAN, III, ESQ., Ryan Smith & Carbine,
Ltd., 98 Merchants Row, Rutland, Vermont;
on behalf of the Plaintiff.

REBECCA M. ELLIS, ESQ., Vermont Attorney General's
Office, 109 State Street, Montpelier, Vermont;
on behalf of the State of Vermont.

JEANNE ELIAS, ESQ., Zalinger, Cameron & Lambek,
P.C., 140 Main Street, Montpelier, Vermont;
on behalf of the State of Vermont.

TRANSCRIBED BY: Donna L. Gould

COURT REPORTERS ASSOCIATES
117 BANK STREET
BURLINGTON, VERMONT 05401
(802) 862-4593

1 have known their decision-making process and why they did
2 what they did and why they didn't amend it prior to
3 implementing it because the foresters are supposed to
4 know that they need to amend the plan before implementing
5 an action that's contrary to the plan.

6 THE COURT: All right. Thank you. Mr. Ryan?

7 MR. RYAN: Thank you, your Honor.

8 Q. You know, it's -- it's such an opportune
9 time. Let's start talking about discretion. You do have
10 discretion?

11 A. Yes.

12 Q. You have allowed people to amend plans where
13 there's been a violation where there was no log -- no
14 forestry manager involved at all; is that correct?

15 A. Where there was no forestry manager involved?

16 Q. Yeah. You want to do the deposition thing?

17 A. Yes.

18 THE COURT: Yes, you want to do the
19 deposition thing --

20 THE WITNESS: No. Excuse me.

21 THE COURT: -- or yes, you allowed people to
22 amend their plan?

23 THE WITNESS: Yes, I'm sure I have.

24 Q. Okay. And you've allowed people who have
25 been in violation who have had a forester and they

1 violated the plan, you've allowed them to amend the plan
2 and stay in the program; is that correct?

3 A. Yes.

4 Q. So -- okay. Just so we've got it. Both with
5 and without a forester for people who've gone in and cut
6 contrary to the plan, you've allowed them to stay in the
7 plan without throwing them out, correct?

8 A. Yes.

9 Q. All right. But you don't have any standards
10 for that discretion, do you?

11 A. There are no written standards.

12 Q. Well, it's totally arbitrary on your part,
13 isn't it?

14 A. Totally arbitrary?

15 Q. You want to go to your deposition?

16 A. I guess I would have to say it's my
17 discretion. It's my --

18 Q. It's totally arbitrary, isn't it? Your
19 discretion --

20 A. Yes.

21 Q. -- is totally arbitrary. Thank you. You want
22 to check it, that's on Page 114 and 122 of your
23 deposition. And the fact that there are no standards is
24 on Page 113 of your deposition if you'd like to check it.
25 Would you, sir, or do you degree -- you're agreeing you

1 have no standards and your discretion is totally
2 arbitrary?

3 A. There are no written standards and it's my
4 discretion.

5 Q. Okay. It also would have been Mr.
6 Philbrook's discretion, wouldn't it, back in 1992 --

7 A. He ha --

8 Q. -- if he thought there were violations to let
9 them go or not let them go?

10 A. Yes.

11 Q. And he had to deal one way or another -- if
12 this is an inspection report in 1992, he had to deal one
13 way or another with any violations, didn't he? He had to
14 either forgive them or cite Mr. Jones for violations;
15 isn't that true?

16 A. Yes.

17 Q. Thank you. That's really important.
18 Philbrook -- you can check your deposition. It's Page 11
19 if you want. Mr. Philbrook in 1992 when he went out and
20 inspected this property had to deal with any violations.
21 He either had to cite Mr. Jones or forgive him, correct?

22 A. He had to deal with any violations he was
23 aware of.

24 Q. One way or the other?

25 A. One way or the other.

1 A. Yep.

2 Q. -- 8?

3 A. That's correct.

4 Q. When you say it looked different, how
5 different?

6 A. Well, I said there were less trees and less
7 basal area.

8 Q. You know that this 15.8 acres is high up on
9 the hill, if you will?

10 A. Yes.

11 Q. You don't have -- you don't know -- you
12 didn't take any measurements before the 1992 cutting so
13 that you could determine what the basal area was before
14 the -- the '92 cutting?

15 A. No, I did not.

16 Q. That was a horrible question. I apologize
17 for it. So you had -- in this particular area, the 15.8
18 acre section, you didn't know what the general basal area
19 was before?

20 A. No, I did not.

21 Q. Did you take any readings -- basal area
22 readings outside that anywhere, even up on the U.S.
23 Forest Service land, so you could get a comparison of
24 what it might have been like before any cutting?

25 A. I did not take any samples before it was cut.

1 Q. And you didn't count any stumps at that time
2 to determine the number of trees cut in that section?

3 A. I did not.

4 Q. And in fact you -- you didn't take any
5 measurements of any stumps?

6 A. None that were recorded.

7 Q. Okay. You want to do the deposition thing or
8 do you want to --

9 A. No.

10 Q. -- do you want to just admit you didn't take
11 any readings of any stumps? You didn't even measure one
12 stump, did you?

13 A. Not -- I mean, visually you look at it and
14 you say it's about this.

15 Q. You didn't measure any stumps, did you?

16 A. No.

17 Q. Thank you. And in fact, when the trees
18 started to get thick, you even shortened the chain by 18
19 and a half feet or you shortened the track by 18 and a
20 half feet so you wouldn't have to measure -- get the
21 basal diameter of any trees outside that section; isn't
22 that true?

23 A. We stopped 18 and a half feet short so that
24 we wouldn't measure trees outside the area in violation.

25 Q. Yeah, you know, but the area in violation

1 isn't in violation until you take the readings; isn't
2 that true?

3 A. My opinion was it was in violation and I took
4 the data to confirm it.

5 Q. Well, you know, I listened to your testimony
6 yesterday. You're going two chains in a -- I guess it
7 would be a westerly direction; is that correct?

8 A. Yes.

9 Q. And you didn't stop because you came to
10 Stand 2 because that's not marked on the ground anywhere,
11 is it? You don't know where it is?

12 A. We know roughly where it is.

13 Q. All right. You didn't stop because you came
14 to -- to Stand 2, did you?

15 A. We stopped because we came to the edge of the
16 violation.

17 Q. And just outside what you identify as the
18 area of violation, there were thicker trees, correct?
19 It looked thicker and so you didn't include that; isn't
20 that right?

21 A. It looked denser, so we didn't include it.

22 Q. Sure. So if you'd gone 18 more feet, you
23 would have had more dense trees to include in -- in
24 samples, correct?

25 A. We would have --

1 Q. Yes, please?

2 A. Yes.

3 Q. Thank you. So it's just like a row of trees
4 on the other side of that wall that we were talking about
5 yesterday. If you decided to include those, the basal
6 area would be significantly larger; isn't that true, sir?

7 A. Significantly?

8 Q. If -- okay. Let's just go with larger. If
9 you'd gone -- if you'd let the area -- if you hadn't
10 shortened the chain -- your area by 18 and a half feet,
11 the basal area would have been greater, correct?

12 A. Yes.

13 Q. Thank you. You knew that Mr. Philbrook was
14 out in Stand 1 in 1992, didn't you?

15 A. Yes.

16 Q. You knew that Mr. Philbrook thought that
17 Stand 1 had been cut in -- contrary to the plan or in
18 violation of the plan, didn't you?

19 A. From his notes.

20 Q. Yes? The answer is yes?

21 A. Yes.

22 Q. Okay. And that's something Philbrook should
23 have dealt with one way or another in 1992 to recap your
24 testimony?

25 A. Yes.

1 STATE OF VERMONT
2 RUTLAND COUNTY, SS.

3
4 JONES)

) Rutland Superior Court

5 -V-)

) Docket No. S0202-97 RcCa

6 STATE OF VERMONT)
7 DEPT OF FORESTS, PARKS &)
REC.)

8
9
10 Hearing Held On

11 November 8, 2001

12 Before Honorable William D. Cohen
13
14
15

16 APPEARANCES:

17 HARRY R. RYAN, III, ESQUIRE, of the firm of RYAN SMITH
18 & CARBINE, LTD., on behalf of the PLAINTIFF;

19 REBECCA M. ELLIS, ESQUIRE, of the firm of the VERMONT
20 ATTORNEY GENERAL'S OFFICE, on behalf of the DEFENDANT;

21 J. ELIAS, ESQUIRE, of the firm of the VERMONT ATTORNEY
GENERAL'S OFFICE, on behalf of the DEFENDANT.
22
23
24
25

COURT REPORTERS ASSOCIATES
117 Bank Street
Burlington, Vermont 05402
(802) 862-4593

000013

1 A. Can I answer that?

2 THE COURT: Let him rephrase it for
3 you.

4 Q. Can you give me your best recollection of when
5 you finished the log job on the Jones' property with
6 respect to cutting?

7 A. I did not complete everything that was designated
8 or that was spoken to in the plan. But I believe it
9 was quite sure it probably was August of '92 that I
10 finished and was going to return to do some things,
11 which I never did.

12 Q. And the hatch cuts you did in area 3, you did
13 those before August of 1992?

14 A. You're pointing to number 4.

15 Q. I'm sorry, 3 up here.

16 A. I did some of the ones in number 3. I don't
17 believe all of them in number 3 got completed.

18 Q. Right. But you did -- the ones you did in area
19 3, stand 3, were done prior to August of '92, before
20 August of '92?

21 A. Yes.

22 Q. Thank you.

23 MR. RYAN: That's all I have.

24 THE COURT: Mr. Dern, you can step
25 down.