

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

VERMONT SUPREME COURT
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VERMONT DEPARTMENT OF)
FORESTS, PARKS AND RECREATION,)

Appellant)

v.)

JOSEPH JONES and ANNE JONES,)

Appellee)

) Supreme Court
) Docket No. 2003-017
)
)
)

Appeal from Rutland Superior Court
Docket No. S0202-97-RcCa

BRIEF OF APPELLANT
STATE OF VERMONT

STATE OF VERMONT

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ISSUES PRESENTED

When the Vermont Department of Forests, Parks and Recreation inspected a ± 500- acre tract of land owned by the Joneses that was enrolled in the Use Value Appraisal Program (UVA) and they found 20.3 acres of the parcel out of compliance with the Jones' Forest Management Plan. The Department of Forests, Parks, and Recreation issued an adverse inspection report and, as a consequence, the Department of Taxes imposed a development tax imposed on the 20.3 acres in violation and removed the entire parcel from the program. The Joneses appealed to superior court, which ruled in their favor. On appeal to this Court, the State presents the following issues for review:

1. Did the trial court misunderstand the UVA program and thus grant a remedy to the Joneses that exceeded its authority under the statute and put them in a better position than they would have been if they had never been found in violation? Pp. 12-16.

2. Did the trial court err when it found that the State was estopped from asserting that the violations had happened? Pp. 16-22.

3. Did the trial court wrongly conclude that the two cited violations had not been proven? Pp. 22-30.

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STATEMENT OF THE CASE

This case involves a dispute between the State and property owners, the Joneses, who obtained a significant tax break by enrolling their forestland in the Use Value Appraisal Program. The Joneses had an obligation to comply with the terms of the Forest Management Plan for their property, or else risk having their land removed from the program. A 1996 inspection found significant violations of the plan. As a result of the adverse inspection report, the Department of Taxes removed the Jones' property from the program and imposed a land use change tax on the acreage in violation. The Joneses appealed the issuance of the adverse inspection report to Superior Court.

The Superior Court ruled in favor of the Joneses but as explained further below, the court committed a number of key errors. Among other things, the court made findings of fact that are unsupported by, and indeed contrary to, the evidence below; awarded a remedy that is inconsistent with the statute and disregarded substantial undisputed evidence of the Jones' violations of the plan. The State accordingly brought this appeal.

Statutory Background

The UVA program is a voluntary program that provides tax incentives to landowners who agree to maintain their property in agricultural or forest use. Managed forestland includes any land "which is at least 25 acres in size and which is under active long-term forest management for the purpose of growing and harvesting repeated forest crops in accordance with minimum acceptable standards for forest management." 32 V.S.A. § 3752(9). Forestland is eligible for the UVA program only if the land is subject to a forest management plan, the forest management plan is proposed and signed by the

owner of the land, and the plan is approved by the Department of Forests, Parks and Recreation. *Id.* § 3755(b)(1). The owner of eligible managed forestland may voluntarily apply to the Department of Taxes for inclusion in the UVA program. *Id.* § 3756(a). If the application is approved, the land is appraised at its use value. *Id.* § 3752(12) (definition of use value).

The Department of Forests, Parks and Recreation is required to inspect each tract of land, at intervals not to exceed five years, for conformance with the owners' forest management plan. *Id.* § 3755(c). If the Department finds that the "management of the tract is contrary to the . . . forest management plan, or contrary to the minimum acceptable standards for . . . forest management, it shall file . . . an adverse inspection report . . ." *Id.* Following an adverse inspection report, the entire tract becomes ineligible for tax benefits for a period of five years. 32 V.S.A. § 3756(d) & (i).

Upon enrollment in the UVA program, a lien attaches to the enrolled property in exchange for the tax benefit conferred by the program. 32 V.S.A. § 3757(f). The lien secures payment of a land-use change tax, which would be imposed in the event the land were subsequently developed. §§ 3757(f), § 3752(5) (definition of development). Following an adverse inspection report, a land-use change tax must be paid on the portion of the parcel that has been developed, 32 V.S.A. § 3757(a). The owner is not required to pay off the lien on the remaining property unless it is developed. *Id.* The lien remains indefinitely on the property and runs with the land.

A taxpayer may appeal an adverse inspection report to the Commissioner of the Department of Forests, Parks and Recreation. The Commissioner's decision may, in turn, be appealed to Superior Court. The statute provides that the appeal shall proceed "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 this title." 32 V.S.A. § 3758(d),

The Vermont legislature permitted landowners to terminate their participation in the UVA program while extinguishing their UVA liens at no cost during special opt-out periods created on an annual basis between 1992 and 1997. Each of these opt-out programs required that a landowner make an affirmative election in writing, that the landowner do so within the limited time period set by the legislature and that the landowner have a parcel enrolled in the UVA program at that time. See Vt. Act No. 178, H. 806 (1996 Adj. Sess.), § 292 "[T]he withdrawn land shall be relieved of any obligation under chapter 124 of Title 32, including the obligation for a land use change tax." "A property owner who elects to withdraw from use value appraisal shall notify the director in writing on or before September 1, 1996, on a form prescribed by the director." *Id.* § 292(d).

Factual Background

Enrollment Joseph and Anne Jones entered a 507-acre tract of land in the UVA Program in 1980. The Rutland County Forester, James Philbrook, approved the Jones' original forest management plan on October 3, 1980. PC 24 Ex A. The plan was revised in 1985 and 1991. PC 29,37 Ex C, Ex F

1985 and 1988 Inspections On August 6, 1985, Rutland County Forester James Philbrook issued an inspection report for the Jones' property. Mr. Philbrook noted that the treatments performed on the property had not been in conformance with the Jones' forest management plan. Mr. Philbrook further observed that: "Owner has not followed

management recommendations too closely. His forester has already revised his plan and has spoken with the Owner regarding his responsibility to the program. Another year will hopefully demonstrate a more active role by the Owner and field accomplishments."

PC 59-60

On August 8, 1985, Philbrook wrote a letter to Joseph and Anne Jones in which he stated that "over the past five years very little has been accomplished that was outlined for activities to be completed in your forest land. You have a conformance report due prior to March 1, 1986. At that time I will expect documentation of sincere effort on your behalf to implement [your forester's] recommendations." PC 61.

On December 27, 1988, Nathan Fice, then a Forestry Technician, inspected the Jones' property and found that many of the treatments prescribed for the property had not been conducted. PC 62-63.

Although the inspectors observed instances of nonconformance during the 1985 and 1988 inspections, they recommended that the Joneses be permitted to remain in the program.

1992 Inspection On August 12, 1992, Rutland County Forester James Philbrook received oral notice from a forestry consultant for a neighboring landowner of muddy water in a brook coming from the Jones' property. On or around August 12, 1992, Mr. Philbrook called a forester employed by Mr. Jones, Randy Wilcox, about logging activity on the Jones' property but learned that the forester had not been hired to supervise the job. PC 64 (Ex L) PC 94 -96.

Russell Reay, a state lands forester for the Department of Forests, Parks and Recreation, took a telephone complaint from a neighboring landowner about the same

problem two days later. Upon investigation, Reay issued an inspection report on the Jones' property finding several violations of Vermont's Accepted Management Practices for Maintaining Water Quality on Logging Jobs in Vermont. PC 68-69 (Ex N).

Mr. Philbrook inspected the Jones' property on August 20, 1992. PC 64. Philbrook observed that stands 5 and 5a had been cleared or clear-cut. He further observed ongoing logging activity in the western portion of stand 1 and a logger told him which portion of the stand had already been cut. Mr. Philbrook marked on a map the logging activity that he was made aware of during the August 20, 1992 visit. The notes on the map indicate "done - as of Aug. 20, 1992" and "cleared area." PC 67 (Ex M) PC 98-111.

During his inspection, Philbrook did not visit the areas in stands 1 and 3 that were later cited for violations in 1996, nor was he made aware of cutting in stands 1 and 3 in the areas that later became the subject of violations. PC 109-110.

Mr. Philbrook told Joseph Jones during a phone call on or around September 3, 1992 that he needed to revise his forest management plan to reflect current logging activity and that he could lose UVA eligibility if the land was not in compliance with the forest management plan. Philbrook also advised Jones to hire his forester, Mark Riley, to supervise the log job. In another call that same week, Jones told Philbrook that Riley had agreed to become involved. PC 65 (Ex L) PC 112-119.

Mark Riley sent a memo to Philbrook on September 25, 1992, requesting to amend the Jones' 1991 Plan as follows: "Due to excessive [sic] rot in a plantation defined as Area #5, this stand will be liquidated." Philbrook approved this amendment on September 30, 1992. PC 44(Ex G).

1996 Inspection Rutland County Forester Nathan Fice and Assistant Forester Lisa Thornton conducted the next conformance inspection of the Jones' property on October 18, 1996. PC 70 (Ex O). Nathan Fice has extensive forestry experience and has been the Rutland County Forester since 1996. PC 281a-281c. As Rutland County Forester, Fice is the custodian of the Department of Forests, Parks and Recreation's files regarding the Jones' participation in the UVA Program. The Joneses' 1991 forest management plan divides the property into five stands of trees. PC 37-43 (Ex F).

Lack of Conformance in Stand 3

Fice and Thornton began their inspection on October 18, 1996 in stand 3. The Jones' plan describes stand 3 as 116 acres of spruce, fir and mixed woods, and identifies the stand as a deeryard. PC 37-43 (Ex F). In addition to "group selection cuts approximately 40 feet in diameter," the plan calls for the following management practices in stand 3:

1993	Complete the release of desirable Spruce/Fir regeneration by completing group selection cuts approximately 40 feet in diameter. To assure that winter cover is maintained for deer, area regulation will allow approximately 20 percent of the stand to be regenerated in this manner.
2006	Complete second series of group selection cuts. Long term management will produce Spruce and Fir sawlogs and pulpwood while maintaining winter cover for deer. The management guide for deer wintering areas will be followed.

PC 40 (Ex F).

During the October 18, 1996 inspection, Fice discovered three clear-cut areas that measured 1.0, 1.5 and 2.0 acres in size. PC 286. A 2-acre cut is nearly 70 times larger than the allowed group-selection cut of 40 feet in diameter. PC 287. The 1-acre, 1.5-acre

and 2-acre cuts in stand 3 were not in compliance with the Jones' 1991 forest management plan. PC 295, 104-107.

Lack of Conformance in Stand 1 Fice also inspected, on October 18, 1996, the area designated in the Jones' 1991 forest management plan as stand 1. The Jones' 1991 forest management plan describes stand 1 as 232.1 acres of northern hardwood. PC 37-43 (Ex F). The plan calls for the following management practices in stand 1:

1993	Complete limited single tree and group selection cut in overstocked areas. Maintain average BA of 80.
2001	Evaluate stand and schedule future treatments. Long-term management will maintain uneven aged stand structure while producing quality sawlogs. The Q objective is 1.6. (NE-603)

PC 40 (Ex F).

During the inspection, Fice noted that portions of stand 1 had been heavily logged, contrary to the prescription in Jones' forest management plan, which called for "limited single tree and group selection cut in overstocked areas." PC 296-297. Fice returned to the property on November 5 and, on the following day, November 6, 1996, completed and signed an inspection report, noting violations in stands 3 and 1. PC 70 (Ex O) PC 297-301. On November 13, 1996, Fice wrote to the Joneses to advise them of his findings of violations in stands 3 and 1. PC 71-72 (Ex P).

On November 21, 1996, Fice and the Assistant Forester for Windsor County, Tim Morton, visited the property to take basal area measurements to see if stand 1 was out of compliance with the Jones' plan, which specified that the basal area of the stand be maintained at a certain level. PC 37-43 (Ex F).

Simply put, basal area is a measure of the density of a forest. It is a two dimensional area measurement of the square footage of trees per acre. A forest that is

dense, with numerous trees or trees with large diameters or both, has a high basal area. A sparse forest, with few trees or small diameter trees or both has a low basal area. The basal area of a forest increases with growth and decreases when timber is harvested. If, through growth, the density of a forest exceeds a certain optimal basal area, further growth is hindered and that forest is considered overstocked. The basal area of a stand is the area of a cross-section of all trees in the stand at a height of four-and-one-half feet above the ground. Basal area measurements are an accepted standard in forestry management used in determining both the health of a forest and as a gauge for determining the optimal conditions for growth of a forest. PC 281-282.

In order to measure basal area, Fice employed a technique called prism sampling. Prism sampling is a widely accepted method within the forestry profession to determine the basal area of stand. PC 300a-300j. Using a prism, Fice and Morton took measurements from 17 points in order to measure the basal area in a 15.8-acre area. The Jones' forest management plan called for a total basal area of 80 and an acceptable growing stock basal area of 50 square feet. Fice and Morton measured a total basal area of 45 square feet and an acceptable growing stock basal area of 12 square feet. PC 311-317. The heavy logging in stand 1, and the resulting basal areas, were not in compliance with the Jones' 1991 forest management plan.

2000 Sale of Jones Property The Joneses conveyed their property to the City of Rutland on or around August 28, 2000. At the same time, the Joneses voluntarily entered into an agreement with the City of Rutland to pay off the UVA lien that remained on the property. The lien pay-off was not, in any way, associated with the property's discontinuance in the UVA program. The lien would remain on the property regardless

of whether the Joneses stayed in the UVA program, left the program voluntarily or left involuntarily. The property may be sold or transferred without paying off the lien. No demand for the release of the lien was made by the Vermont Department of Taxes or the Vermont Department of Forests, Parks and Recreation. The Jones' purpose in voluntarily paying off the lien was, apparently, to facilitate the property's transfer to the U.S. Forest Service. PC 373-375.

Procedural Background

Adverse Inspection Report On November 6, 1996, following his inspection, Rutland Forester Nate Fice completed a Conformance Inspection Report for the Jones property in which he recommended that the Joneses not be continued in the UVA program based on non-conformance with the Jones' Forest Management plan. PC 70 (Ex O). This adverse inspection report was then forwarded to the Department of Taxes.

Notice of Discontinuance on Entire Parcel and Imposition of LUCT on 20.3 Acres Following receipt of the Adverse Inspection report, the Department of Taxes, on January 15, 1997, issued the Joneses a "Notice of Development or Discontinuance from Land Use Value Appraisal Programs". PC 80 (Ex T) This notice withdrew the entire 478.03-acre parcel owned by the Joneses from the program based on the adverse inspection report and imposed a Land Use Change Tax of \$1547.00 (which represented 10% of the fair market value of the land) on the 20.3 acres that had been harvested contrary to the management plan. A "Notice of Adverse Inspection Report" also dated 1/15/97, informed the Joneses of their right to appeal the filing of the adverse inspection report to the Commissioner of Forests & Parks. PC 81-82 (Ex T)

Appeal to Commissioner and Decision of Commissioner The Joneses sent a letter to the Commissioner of Forests and Parks on January 18, 1997 contesting the issuance of the Adverse Inspection Report. A hearing was held on February 11, 1997. Upon review of the record, the Commissioner determined that there was not sufficient evidence to warrant changing the original finding of non-compliance and on March 24, 1997 he denied the appeal. PC 379, 380

Appeal to Superior Court The Joneses filed a timely notice of appeal in the Rutland superior court. In a pre-trial ruling the superior court determined that it would conduct a de novo review of the evidence on whether the Joneses had violated their Forest Management Plan. The Court, Judge Cohen presiding, conducted a five-day bench trial. The court heard from six witnesses and also conducted a site visit to the areas of Jones' property that the State alleged had been cut contrary to the plan nine years before. At trial, the State presented extensive testimony documenting the violations. No proof was offered to rebut the assertions that the violations had occurred, and that they were committed by the Joneses or their agents.

Superior Court Decision Approximately one year after the conclusion of the trial, the Superior Court rendered its decision. PC 1-14 The court did not decide whether the Joneses had violated their forest management plan. Instead, the court held that the State was estopped from asserting that any violations had occurred. The judgment cited no extraordinary circumstance or justification for the imposition of an estoppel against the government. The court voided "ab initio" any lien on the property that was filed "as a result of the alleged violations." The court did not acknowledge that the UVA lien was placed on the property because of the Jones' participation in the program, not because of

the adverse inspection report. As an additional remedy the Court deemed the Joneses to have retroactively withdrawn their property from the UVA program effective August 30, 1996 (during one of the limited legislative opt out periods), despite the fact that the Joneses had never exercised their withdrawal options during the relevant time periods. The court went on to rule that any tax imposed for development (violations) on the Jones' property should be calculated at the percentage in effect at the time of development. It is not clear why the court reached this last conclusion, since its other relief eliminated the Jones' obligation to pay the tax.

SUMMARY OF ARGUMENT

The trial court's decision in this case should be reversed because it is premised on both an incorrect understanding of the statute and on several findings of fact that are contrary to or unsupported by the evidence. At a minimum, even assuming the Department erred in issuing the adverse inspection report, the trial court granted a remedy that exceeded its authority under the UVA statute and gave the Joneses a \$70,000 financial windfall. Setting the remedy aside, however, the trial court's findings and conclusions regarding the inspection report are also gravely flawed. The court's judgment should be set aside and judgment entered in favor of the State based on the undisputed evidence in the record.

The trial court misconstrued the statute governing the Use Value Appraisal program and thus incorrectly concluded that the UVA lien on the Jones' property was connected with the violations discovered in 1996. Though the primary consequences of the violations were a \$1500 tax and the removal of the Jones' property from the UVA program, the court's order entitled the Joneses to retroactively dissolve the \$70,000 UVA

lien on the property that had nothing to do with the violations. This remedy is far in excess of what is permissible under the statute.

The court erroneously ruled against the State on the grounds of estoppel, on the theory that the State should have told the Joneses about the violations in 1992, so that the Joneses could have opted out of the UVA program or submitted an after-the-fact amendment to cure the violations. This finding ignored the fact that the State did not know of the violations in 1992, and that, in any event, once the violations were cited, the Joneses would not have been eligible to opt out of the program. Nor did any evidence show that an after the fact amendment would have been approved.

Finally, the undisputed evidence at trial demonstrated that logging had occurred on the Jones' property contrary to the Jones' Forest Management Plan, and that the State had sufficient grounds for issuing the adverse inspection report. Based on this evidence, this Court should enter judgment in favor of the State.

I. The trial court's remedy exceeds its authority under the UVA statute and grants a windfall to the Joneses.

The trial court fundamentally misunderstood how liens are created and extinguished in the Use Value Appraisal program and, as a result, the trial court awarded relief to which no participant in the UVA program is entitled. The court's ruling and remedy should be reversed for the following reasons: (1) the trial court mistakenly reasoned that the lien on the Jones' property was imposed as a result of the 1992 violations; (2) the court gave the Joneses a windfall benefit by deeming them to have withdrawn their property during a past opt out period even though the opt out period expired and the Joneses never attempted to opt out when that option was available and (3) the court apparently confused the \$1547.00 Land Use Change Tax (LUCT) imposed for

the violations with the LUCT voluntarily paid by the Joneses to discharge the lien on the rest of their property.

A. *The UVA lien on the Jones' property was created when they first enrolled in the program and is unrelated to the violations.*

Contrary to the trial court's ruling, the lien on the Jones' entire parcel was created by operation of law when the Joneses first enrolled their land in the program in 1980. The lien is a consequence of the Joneses accepting the tax reduction benefits of the UVA program. The creation of the lien was not related in any way to the Jones' later violation of their forest management plan. The UVA statute provides that: "The application for use value appraisal of agricultural and forest land, once approved by the state, shall be recorded in the land records of the municipality *and shall constitute a lien to secure payment of the land use change tax to the municipality upon development.*" 32 V.S.A. §3757(f). (emphasis added) The trial court disregarded this statute and instead concluded that the lien was created "as a result of alleged violations" PC 1. The lower court's ruling is contrary to the UVA statute and must be reversed.

B. *The trial court had no authority to allow the Joneses to take advantage, retroactively, of an expired "opt-out" program.*

The Joneses appealed an adverse inspection report that resulted in their property being removed from the program and the Joneses being assessed a \$1547 LUCT. If the court ruled in the Jones' favor, their remedy was to have the inspection report vacated, their property reinstated in the program and the assessment reversed. The court, however, after disregarding the evidence that supported the inspection report, created a new remedy for the Joneses that put them in a better position than they would have been in had the adverse inspection report never been issued in the first place. The court

ordered that the Joneses were deemed to have removed their property from the program during an opt-out period (that had since expired) and thus the Joneses could avoid paying off the entire UVA lien on their property. This was error for at least three reasons.

First, the court inexplicably gave the Joneses a benefit no other landowner in the UVA program was given: a chance to opt out after the opt-out period expired. The Joneses, like all landowners in the program, had notice of the opt out and could have opted out if they wanted to during any of the opt-out periods. They did not; and the fact that they were later found to be in violation provides no basis for letting them opt out at a later date.

Second, the Jones' waiver and estoppel defenses in no way support the court's creation of a remedy. In essence, the court ruled that the State should have provided earlier notice to the Joneses of the violations and if the State had done so, the Joneses could have opted out. This reasoning suffers from a fatal flaw however – once the State issued an adverse inspection report, the Joneses would be removed from the program and could not opt out. A violator could not take advantage of an opt-out program.

Third, the court's ruling places the Joneses in a better position than if no adverse inspection report had ever issued. If no report issued, the Joneses would have remained in the program until they voluntarily paid off the lien after they sold their property. Since they never took advantage of the opt-out periods available to them, they would not have extinguished the lien.

C. The court failed to distinguish between the development tax imposed as a result of the violations and the Jones' voluntary decision to pay off their UVA lien.

The remedy fashioned by the court is further flawed because it fails to distinguish between the LUCT that was imposed as a result of violations and the *voluntary* LUCT payment by the Joneses to extinguish the UVA lien on their entire parcel. By conflating the two, the court improperly gave the Joneses a “remedy” for their voluntary decision, unrelated to the violations, to extinguish the UVA lien on their entire parcel.

The only financial consequence to the Joneses, other than their removal from the program, of the adverse inspection report was a \$1547 tax. The Department of Taxes imposed this tax, or LUCT, on the Joneses for cutting on 20.3 acres that was not in conformance with their Forest Management Plan. Cutting contrary to the plan is included in the definition of development under the UVA statute and is grounds for the imposition of the LUCT. Payment of that amount by the Joneses entitled them to a release of the UVA lien on those 20.3 acres. The UVA lien on the balance of the Jones' parcel was unaffected by either the violation or the assessment of the tax, and the Joneses had no obligation to extinguish the remaining lien by paying the LUCT for that property.

Unless or until there is development of a parcel carrying a UVA lien, no LUCT is due and the lien remains and runs with the land. This is true whether a parcel is in the UVA program, or has been withdrawn from it. Even upon the sale of a parcel, no LUCT is due. If the property is never developed, the UVA lien can exist forever.

The Joneses however, sold their property in the year 2000 and as part of an agreement with the buyer, the Joneses agreed to voluntarily extinguish the UVA lien through payment of a LUCT of nearly \$70,000. They paid off the lien not because the

pay off was required by the State or was in any way connected with the violations. They did so to ensure that the property would end up being owned by the US Forest Service, which apparently would not accept the property with the lien. PC 374. The relief granted by the trial court would permit the Joneses to avoid the tax legally imposed on them as a consequence of their voluntary decision to extinguish the UVA lien on the portion of their land unrelated to the violations.

The trial court's discussion of the proper tax rate for the LUCT is similarly flawed. Act 60, enacted in June 1997, increased the LUCT from 10% to 20%. Vt. Act No. 60, H. 527 (1997), § 61(a). The lower court ruled that the proper LUCT to be imposed upon the Joneses for any development was 10% and not 20%. PC 2. In fact the LUCT imposed on the Joneses for the development of the 20.3 acres was at the 10% level. When the Joneses voluntarily paid off the UVA lien on the remaining acreage after the sale of the property in 2000, the proper LUCT rate was 20% and that is the rate they paid. This portion of the court's ruling is superfluous since the court's order allowing the Joneses to retroactively opt out means they would pay no LUCT at all. However, to the extent that this ruling was intended to or would allow the Joneses to pay only a 10% LUCT rate to release the UVA lien on the 457-acre parcel in 2000, the ruling violates the statute and should be reversed.

II. The evidence does not support any of the elements of estoppel.

The trial court's conclusion that the State should be "estopped from asserting that any such violations or 'Development' occurred" should be reversed. PC 1. The court based its estoppel holdings on findings of fact about events surrounding the 1992 logging operation on the Jones' property. The court's findings regarding the knowledge and

actions of Rutland County Forester James Philbrook during and after his 1992 inspection, and the intentions and actions of the Joneses at that time are devoid of evidentiary support. The court also failed to consider whether the circumstances justified estoppel against the government. The court found that estoppel should prevent any claim by the State that violations occurred because the State was aware of the violations in 1992 and yet chose not to file an adverse inspection report and the Joneses relied to their detriment on the State's inaction by choosing to remain in the UVA program.

The party seeking to invoke estoppel must establish all four of the following elements: (1) the party to be estopped must know the facts; (2) the party being estopped must intend that his conduct shall be acted upon or the acts must be such that the party asserting the estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely on the conduct of the party to be estopped to his detriment." *Wesco v. City of Montpelier*, 169 Vt. 520, 524, 739 A.2d 1241, 1243 (1999). A party seeking to invoke estoppel against the government must also show injustice or extraordinary circumstances. The evidence does not support any of these elements.

A. *The State did not know of the violations during its 1992 inspection.*

The court held that the knowledge element of estoppel was satisfied because Rutland County Forester James Philbrook "was aware of the cuttings that took place in stand 1 and stand 3 in 1992" (Philbrook PC -11). This is untrue. Philbrook did not know of the violations during his inspection. He did not see the cuttings and more importantly, the evidence shows that the cuttings had not yet happened. Philbrook testified that during his August 1992 inspection he was not in the eastern portion of stand 1 (the area later

determined to be in violation) and that he did not see any evidence of non-conformance when he walked through stand 3 on that day. PC 109-111. Another witness, Randy Wilcox, testified the cuttings had not yet occurred at this point. Wilcox, who was employed by VFF, Jones' Forestry Consultant, visited the Jones property more than a week after the Philbrook inspection. Wilcox testified that on September 4, 1992 the only logging activity he saw happening on the property was in stands 5 and 5A and that it was not until a later visit that he observed logging occurring in the eastern portion of stand 1, where one of the areas of violation was located. He also testified that he saw no evidence of logging in stand 3 and was fairly certain that no logging activity had taken place in stand 3 at that point in time. PC 207-209

The court's findings on this critical issue are themselves inconsistent. The court found that Philbrook knew of the violations during his 1992 inspection. But it also found that at the time of Philbrook's inspection it was "unknown if the area of alleged violation ... had already been cut." PC 6 (FOF ##34, 35) In the State's view, the evidence clearly shows that the cuttings had not taken place. But even if the trial court is correct and the timing of the cuts is "unknown" Philbrook cannot be charged with knowledge of them. No evidence contradicted either Philbrook's or Wilcox's testimony on this point.

B. The State warned the Joneses that their logging might jeopardize their program participation but never led them to believe that after-the-fact amendments could cure the violations.

The court found that Philbrook's failure to issue an adverse inspection report in 1992 was conduct through which Philbrook intended to communicate to the Joneses that their property was in conformance with their Forest Management Plan. PC 12. Philbrook, in fact, warned the Joneses that their eligibility could be in jeopardy. The court

also specifically found that "Philbrook would have approved any amendment of the 1991 Forest Management Plan that reflected the actual cutting on the property performed by Dern in 1992 that took place in stands 1 and 3, if an amended 1991 Forest Management Plan had been submitted to him at that time for approval. (FOF #36 PC - 6) These findings are contrary to the evidence and thus, clearly erroneous.

First, although Philbrook did not know of the specific cuttings that later gave rise to the violations, he did provide notice to the Joneses of problems with their logging activities. He told a logger conducting work in the western area of stand 1 that the cutting was not in conformance with the plan. PC 106. Though Philbrook had no legal duty to do so, he also notified the Joneses through telephone calls that they were in jeopardy of losing their eligibility for the UVA program and suggested that they work more closely with their forestry consultant, Mark Riley, to insure compliance with their plan. Jones had not hired Mark Riley to supervise the logging job because he wanted to save money. (PC -266) During calls with Philbrook, Jones assured Philbrook he would bring in Mark Riley. (PC 115-119) At trial, Philbrook testified to the details of this conversation after refreshing his recollection with his contemporaneous notes. The court's finding that Philbrook had "no clear memory of going over any issue of nonconformance with the 1991 Forestry management plan with Jones" is unsupported by the testimony PC 6 (FOF #32). And the court's conclusion, based on these incorrect findings, that after the Philbrook inspection "the Joneses had no reason to believe that their property was in violation of the Plan," is error. PC 12. While the violations themselves had not yet happened, Philbrook's conduct in notifying the Joneses of possible future problems rebuts rather than supports a finding that Philbrook intended the

Joneses to believe that their logging job was being conducted in conformance with their Forest Management Plan.

Second, the court was absolutely wrong when it found that Philbrook “stated that he would have approved an amendment to the plan that reflected the actual cutting on the property performed by Mr. Dern if such a request had been submitted to him at the time.” PC 12, PC 6 (FOF# 36) No proof was offered at trial by any witness to suggest that Philbrook ever made such a statement. Furthermore, during cross examination, Philbrook was asked “If Jones had amended his plan to include the cutting that was actually done in stand 1 and stand 3 you would have accepted it wouldn’t you?” Philbrook’s reply was “No.” PC 164.

Contrary to the court’s findings, the evidence does not show that the Joneses could have relied on any conduct of Philbrook as the basis for believing that their property was in full compliance with their plan.

C. The Joneses, and not the State, knew of logging operation.

The third element of estoppel requires that the party asserting the estoppel be ignorant of the true facts. Here, the Joneses knew they had conducted logging activity on their property in 1992, as acknowledged in the Annual UVA Conformance Report for 1992 submitted by the Joneses to the Department. PC 54. While the Joneses may have hired loggers to conduct the logging operation on their land, the Joneses are charged with the knowledge of their agents who did the cuttings in stands 1 and 3 and are liable for their actions. The Joneses even had reason to believe that the loggers were not following their Forest Management Plan because Philbrook told them so. PC 115-119. There was no testimony, however, that Philbrook ever returned to the property after the August 1992

inspection, or that anyone told him about the cuttings in stands 1 and 3 that were later cited as violations. The evidence shows that only the Joneses, and not the State, knew that the logging on their property continued after the Philbrook inspection in August.

D. The Joneses ignored advice from the State about losing their UVA eligibility and did not elect to opt out of the program.

The court's finding of detrimental reliance turns extensively on its mistaken conclusion that "had the Joneses known that they were in violation of the plan they could have availed themselves at the time of the legislature's 1992 or 1995 advantageous tax benefit program by withdrawing their property from the Plan." PC 13. As explained above, if the State had issued an adverse inspection report in 1992, the Joneses could not have taken advantage of the opt-out period.

It is not clear whether the court is suggesting that the forester should have given the Joneses an advance warning – that the Joneses should opt out or else the forester would issue an adverse inspection report. But certainly the forester had no legal duty to provide this kind of assistance to the Joneses to avoid the consequences of the violations.

In any event, the record shows that the Joneses ignored, rather than relied upon, Philbrook's advice to get their forester involved or risk losing their UVA eligibility. After the 1992 warning from Philbrook that they might be in jeopardy of losing their UVA eligibility, the Joneses continued to allow logging of their property and did not engage their professional forester to supervise the logging, even though they had done so during previous logging operations on their land. Nor did the Joneses respond to the warning by opting out, as they could have done in any year between 1992 and 1996. Mr. Jones testified that he was aware of the special legislative withdrawal options and made an affirmative decision not to exercise them. PC 375-378.

Because the Joneses seek estoppel against the government, the Joneses must also establish an element of injustice to offset the estoppel's effect on public interest or policy. *Larkin v. City of Burlington*, 172 Vt. 566, 569, 772 A.2d 553, 558 (2001) (rejecting plaintiff's estoppel argument as a matter of law for failure to establish injustice). There are no extraordinary circumstances or injustice that entitle the Joneses to raise estoppel against the Department of Forests, Parks and Recreation. Even if the court were correct, which it is not, and the State could have issued the adverse inspection report after the August 1992 inspection, the Joneses were not harmed by the delay. They paid the same tax and suffered the same consequence as if their property had been removed from the program in 1992. Estoppel is inappropriate under these circumstances.

III. The evidence supports the violations cited in the report.

The State produced ample uncontroverted evidence at trial that portions of stand 1 and stand 3 of the Jones parcel had been cut contrary to their Forest Management Plan and that the issuance of the adverse inspection report by Rutland County Forester Nate Fice in 1996 was justified. The court's findings to the contrary are clearly erroneous and should be reversed. As argued below, the undisputed evidence shows that the Joneses violated their forest management plan in stands 1 and 3 of their property. Based on this evidence, the court should reverse the lower court and enter judgment in favor of the State.

A. The logging in Stand 1 violated the plan.

While the Jones' Forest Management Plan allowed some logging to take place in stand 1, the plan required that the basal area, (which is a measure of forest density) after logging could not fall below a certain level. The evidence at trial showed that it was far

below this level, and thus a violation of the plan had occurred. Despite extensive testimony at trial about the meaning of the forestry term, basal area, and uncontradicted documentation by the Department that the basal area in part of stand 1 was below the level required by the plan, the court made clearly erroneous findings of fact on this issue. As shown below, the trial court made four critical errors in its findings on this issue.

First, the court erroneously found “That no one had ever measure (sic) the basal diameter of the trees in Stand 1” PC 9, and that “Fice did not know what the basal area of the trees in Stand 1 was prior to it being thinned in 1992.” PC 8 (FOF #49) In fact, the basal area of stand 1 was measured and documented in the 1991 Jones Forest Management Plan. The plan set forth that the basal area of stand 1 was in the 60-80 range and that the total basal area was 65 square feet per acre. PC 37-43. Randy Wilcox, on behalf of the Joneses, did the field research and basal area measurements for this plan in 1991. Wilcox testified that he spent the better part of a day walking stand 1 and did spot checks of basal area in the stand. PC 183-184. It is of no consequence that Fice, who conducted the 1996 inspection, did not personally measure the basal area of stand 1 prior to the 1992 cutting. Fice knew, based on the plan, what the basal area of stand 1 was before the cutting. His purpose in doing the inspection was to determine conformance by comparing what he saw on the property to the goals specified by the plan. “[A]t intervals not to exceed five years, the department shall inspect each tract to verify that the terms of the management plan have been carried out in a timely fashion.” See 32 V.S.A. §3755(c). Fice testified that he was aware of the basal area data contained in the plan for stand 1, and utilized that information in determining that the cutting in stand 1 was not in

conformance with the plan. PC 318-320. No evidence contradicted this testimony and the court's findings should be reversed.

Second, the court mistakenly concluded that Fice needed specific knowledge of the basal area of the "dogleg"¹ portion of stand 1 before finding a violation there and also found, contrary to all the evidence at trial, that the 15.8-acre dogleg was not below the basal area requirement of the plan as a result of Dern's thinning" PC 8 (FOF #50, #53).

Fice knew from the plan that all of stand 1 had a basal area between 60 and 80. He also knew that if the dogleg, or any portion over ten acres, had been of a significantly different basal area, it would have been designated as a separate stand. PC 361. The plan also allowed cutting only in overstocked portions of the stand. No cutting was allowed in the vast majority of the stand that was not overstocked. PC 37-43 (Ex. F) During his 1996 inspection, Fice saw that the dogleg had been heavily logged. PC 320. While Fice did not testify that the dogleg area was overstocked, it can be inferred that he knew this based on the large number of stumps he saw and his decision to violate the Joneses for cutting too much in an overstocked area. That this area was overstocked was proven through Wilcox who testified that he had been in the dogleg area in 1991 when he worked on the plan revision, that the area was overstocked, and that it had not been logged. PC 186-187. Fice testified that it did not matter whether he knew the precise basal area of the dogleg before the violation. PC 361-363. This is because the logging in the dogleg would have been a violation of the plan under any circumstances. If the area

¹ At trial counsel for the Joneses began calling the 15.8-acre area of violation in stand 1 the "dogleg" area because the shape of the area had a sharp angle in it. The court and counsel for the State adopted this convention.

was not overstocked, any logging was a violation, and if, as was the case here, it was overstocked, then leaving a basal area of below 80 was a violation of the plan.

After observing that the dogleg had been heavily logged, Fice and Morton determined through a technique known as prism point sampling that the total basal area of the dogleg in 1996 was 45. PC 106-116, 301-317. Furthermore, the State established at trial the scientific reliability of the prism sampling method used by Fice to calculate the basal area. There was no contrary testimony. In fact no other witness had even been to the dogleg since Fice's 1996 inspection. The court's finding that the basal area was "not below the basal area requirement of the plan as a result of Dern's thinning" (PC 8) is not supported by the evidence and should be reversed.

B. The logging in Stand 3 violated the plan.

While the Jones' Forest Management Plan allowed patch cutting to take place in Stand 3, the plan required that the cuts should be "approximately 40 feet in diameter." The plan further specified that the objective of the patch cuts was the release and regeneration of softwoods, specifically spruce and fir, and that the Deer Wintering Guides for Vermont be followed. PC 38,40. Despite undisputed testimony at trial that the cuts exceeded plan specifications in size and did not achieve the goals of the plan, the court failed to find that a violation of the plan had occurred.

A patch cut is the clear cutting of an area of specified size. Fice testified that the purpose of the small sized cuts specified by the Jones' plan was to "allow sunlight to come in and hit the forest floor and if you allow a little bit of sunlight to come in, spruce and fir are tolerant of some amount of shade and so because that area is small, it allows the spruce and fir to regenerate and keeps out intolerant or shade intolerant hardwoods

and other tree species.” Fice also explained the relationship between the 40 foot cut and the plan goal of creating and maintaining deer wintering areas: “It’s important in a deer yard to keep the areas small so that you maintain that overstory canopy, because the softwood canopy reduces the snow depths underneath the softwood, keeps the wind out, temperatures are more constant so deer can survive underneath that softwood stand during the wintertime.” He concluded by saying that the Vermont Deer Wintering Guide referenced in the plan contained a recommendation “to keep the patches small, to make sure that you get the spruce and fir regeneration and not other hardwoods...” PC 283-284. Here the undisputed testimony showed that the patch cuts did not conform to the size specified in the plan or to the plan objectives.

The undisputed evidence at trial demonstrated that during his October 1996 inspection of the Jones property, Fice observed three patch cuts in stand 3 that far exceeded the 40-foot diameter size specified in the Joneses Forest Management plan. Fice testified that these cuts were 1, 1.5 and 2 acres in size and that the largest of these was 70 times greater in area than the size specified in the plan. PC 286-287. In fact, Randy Wilcox, who had marked the patches, admitted that they were much larger than what was specified in the plan. PC 176. Wilcox and Mark Riley, who had observed the patches after they had been cut, both agreed that the size of the patches did not conform to that specified in the Jones’ Forest Management Plan. PC 179,270-271. No one testified otherwise.

The trial court nonetheless found that the patch cuts in stand 3 did not violate the 1991 Forest Management plan because they “accomplished the regeneration requirement set forth in the 1991 Forest Management Plan” and because “The purpose of the patch

cuts in Stand 3 as set forth in the 1991 Forest Management Plan has been met by the cutting that actually took place in 1992.” PC 9 (FOF #58, #59). These findings are contrary to the evidence. Fice testified that during his 1996 inspection he observed more hardwood than softwood regeneration in stand 3 and concluded that the larger cuts did not achieve the plan goal of exclusively softwood regeneration. PC 347-348. Fice also testified, following his observation of the area during a site visit at trial, that the long-term consequences of the larger patch cuts were contrary to the objective set forth in the plan. “Hardwoods had predominated in the patch cut areas and were competing with softwoods.” PC 364-366.

The testimony of other foresters does not undermine Fice’s observations. Wilcox testified that the patches “had been opened up to the full sunlight and were growing very well.” PC 178. While he agreed that the cuts were doing what he intended them to do, Wilcox did not testify that they were achieving the specific goal of softwood regeneration set forth in the plan. Mark Riley stated that the patch cuts were doing exactly what the plan intended them to do, but he also and inconsistently testified that both softwoods and hardwoods were growing in those areas. “It appears that the area, the patch cut areas have or are regenerating approximately the same percentages of softwoods and hardwood as previously in the deer yard.” PC 271-272. Neither Wilcox nor Riley contradicted Fice’s testimony that the patch cuts resulted in more hardwood than softwood regeneration, contrary to the goals of the plan. The court’s findings should therefore be reversed.

The court’s finding that Rutland County Forester Nate Fice would not have cited the patch cut violations if he had known that Wilcox had marked them is unsupported by

the record and must be set aside, PC 9 (FOF #60, #61). Neither the testimony of Fice nor Wilcox supports these findings.

While Fice did have a conversation with Wilcox, wherein he was surprised to learn that Wilcox had marked the cuts, his testimony was that had he known of Wilcox's involvement with the marking, he would have sought more information from him. Fice was asked "And you told Wilcox if I'd known that, I wouldn't have cited Jones, didn't you?" Fice replied, "No, I did not." He explained that what he did say was "I wished I had known that" because "I would have asked them to come out, look at it and explain their reasoning." PC 338-344.

Wilcox was sure that he had a conversation about the patch cuts with Fice, but not certain about the details. "Well, in fact, Mr. Fice told you if he knew you had marked those patches then he wouldn't have violated Jones?" "I'm not sure if he said that. He might have said that he wouldn't have written up that stand as a violation. I don't know. I don't think he said that." PC 183. When asked again about this conversation during cross examination, Wilcox said: "I don't recollect that he said if he knew I, myself, was involved, but I think he indicated that if he realized that the patches, you know, the reason for them, that he might not have issued the violation on that Stand Three area." PC 219-221. Wilcox's testimony thus corroborates Fice's statement that if he had known of the involvement of Vermont Forest and Field with the markings, he would have sought more information from them. The court's finding that Fice would not have found the patch cuts to be in violation, and that he said as much to Wilcox, is unsupported by the evidence.

C. The Department properly exercised its discretion in issuing the adverse inspection report.

The court mistakenly concluded that there were no standards for “establishing basal area violations of stands of varying sizes” nor for “evaluating basal area violations by the percentage of a stand that may have a basal area less than required by a Forest Management Plan.” PC 8 (FOF #47, #48) These findings are incorrect. Fice was entitled to exercise his discretion in determining what constituted a violation of the Jones’ plan and did so properly.

The UVA statute gives the Department the authority to approve a Forest Management Plan prior to a parcel’s acceptance into the program as well as the duty to inspect a parcel to determine whether “the management of the tract is contrary to the forest management plan.” 32 V.S.A. § 3755(c). Department employees, who are trained forestry professionals, also use discretion during the plan approval and conformance inspections processes. The exercise of this discretion is based upon their expertise and is to be afforded deference by any court reviewing agency action and should be presumed correct, valid and reasonable absent a clear and convincing showing to the contrary. *In re UNUM Life Ins. Co.*, 162 Vt.201, 206 647 A.2d 708, 712 (1994) *In re Professional Nurses Service, Inc.*, 164 Vt. 529, 532 671 A.2d 1289,191 (1996).

Fice testified that he used his discretion in concluding that the nonconformance on the Jones’ property warranted the issuance of an adverse inspection report. Citing the factors he used in making his decision on the Jones’ property, he stated: “I have to go out there and review the violation, look at the significance of the violation, what’s occurred, why it occurred, is it silviculturally sound, what was the purpose of the treatment, what was it meant to do, does it meet the standards of the program. There’s a variety of things

that you evaluate. What has been the past performance of the property, what has the previous management been like, that sort of thing.” PC 356-357

The evidence from Philbrook and Fice demonstrated that for 16 years the Jones’ conformance with their plan was found lacking at every inspection. The Joneses chose not to have the 1992 logging job supervised by a professional forester in order to save money. The Joneses had been warned before the violations happened that their UVA eligibility could be jeopardized and ignored this warning. Upon evaluating the cuttings he observed on the parcel in 1996, Fice used his discretion to conclude, based on all the factors he enumerated, that the violations were significant enough, both in nature and in size, to warrant the issuance of an adverse inspection report and the recommendation that the parcel be withdrawn from the program. Given his forestry education, training and experience, this exercise of discretion is to be presumed correct, valid and reasonable. There was no evidence at trial to rebut this presumption.

CONCLUSION

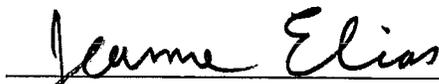
The State asks the court to reverse the judgment of the superior court in all respects and remand with direction to enter judgment in favor of the State. In the alternative, the State asks the court to reverse the lower court's remedy, vacate its judgment, findings of fact, conclusions of law, and order, and remand with directions that the lower court reconsider solely whether the violations cited in the Department's adverse inspection report are supported by the evidence.

Dated: April 7, 2003

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