

**FILED**

MAR 23 1994

ESSEX SUPERIOR COURT

BY: \_\_\_\_\_  
CLERK/DEPUTY CLERK

STATE OF VERMONT  
ESSEX COUNTY, SS.

ROBERT S. DECKER, \*  
 ARTHUR F. MCGRATH, JR., and \*  
 ALLISON W. ROGERS, \*  
     Selectmen of Guildhall \*  
 v. \*  
 \*  
 LESTER BREault, EXECUTOR of \*  
     the Estate of Florence \*  
     Breault, and \*  
 LAWRENCE SANGRAVCO, INC. \*

ESSEX SUPERIOR COURT  
 Civil Action  
 Docket No. S7-89 Ec

**DECISION AND ORDER**

Plaintiffs seek to enjoin Defendants from committing waste on Town land leased to Defendant Estate's deceased. Plaintiffs further seek damages resulting from past waste committed by Defendants in their operation of a sand and gravel excavation pit. This action came before the undersigned for final hearing on December 7, 8, and 9, 1993. Plaintiffs were represented by Robert Bent, Esq. Defendant Executor Breault was represented by Deborah Bucknam, Esq. Defendant Lawrence Sangravco, Inc. was represented by Charles D. Hickey, Esq.

**FINDINGS OF FACT**

Based on the evidence presented, the Court finds as follows:

1. Plaintiffs are Selectmen and residents of the Town of Guildhall, County of Essex and State of Vermont. Individual persons have been substituted during the pendency of this action for the original complaining plaintiffs. At all times, plaintiffs have been the Selectmen of the Town of Guildhall, and are collectively referred to herein as "Town".

2. Florence Breault, whose estate is a defendant, was a longtime resident of the Town of Guildhall, County of Essex and State of Vermont. She lived on the family homestead in Guildhall with her husband Felix Breault from about 1939 until her recent death during the pendency of this action.

3. Florence Breault deceased on April 27, 1991 and Lester Breault, Executor of the Estate of Florence Breault, was substituted as a defendant (hereinafter "Estate").

4. Defendant Lawrence Sangravco, Inc. ("Lawrence") is a Vermont corporation having a place of business in the Town of Guildhall, Vermont.

5. Prior to December of 1982, defendant Lawrence was owned by Frank Ray Lawrence and others. In December of 1982, the shares of the corporation were sold to Calkins Sand and Gravel, Inc. Paul Calkins is the primary shareholder of Calkins Sand and Gravel, Inc.

6. Plaintiffs seek compensation from defendants for waste as the result of the removal of sand and gravel from a certain "school lot" located within the Town.

7. The lot in question consists of 50 acres of the land which was granted "for the benefit of the school" under the terms of the Town Charter.

8. The part of the lease land for which the Town seeks damages for waste is composed of approximately 19 acres.

9. Florence Breault held a 999-year lease on the land in question (the Breault school lot) with an annual rent of \$6.75, which rent is paid to date.

10. Mrs. Breault also owned an adjacent 50 acres which was not "school land."

11. New Hampshire Governor Benning Wentworth created the Town of Guildhall by executing a grant on October 10, 1761. The original document included a provision for:

A Tract of Land to contain Five Hundred acres as marked B-W in the plan which is to be accounted two of the within shares, one Share for the Incorporated Society for the Propagation of the gospel in foreign Parts one share for a Glebe for the church of England as by Law established, one Share for the first settled Minister of the Gospel and one share for the benefit of a School in said Town.

12. In March of 1788, the original proprietors of the Town of Guildhall designated Lot 5 of Range 6 as a "school lot."

13. In 1799, the Town Leased Lot 5 of Range 6 to William Hewes for a term of 999 years.

14. The Town re-leased the school lot to Lemuel Cook on March 31, 1820 for a 999 year period, after William Hewes defaulted on his lease. The lease, which specified that the lot had been given to the Town "for the benefit of Schools therein," contained, inter alia, the following operative language:

To have and to hold the said demised and granted premises with all the privileges and appurtenances thereof to him the said Lemuel Cook, his heirs, executors, administrators and assigns from the day of the date hereof for the full term of nine hundred and ninety-nine years next come; his yielding and paying therefor yearly and every year from and after the date hereof during the term aforesaid unto the said Isaac Cushman, Simon Howe and Rueben W. Freeman, Selectmen as aforesaid or their successors in office to wit the selectmen of Guildhall for the time being the yearly rent of Six Dollars and seventy-five cents current money of the United States of America . . .

15. On April 16, 1927, Felix Breault acquired 100 acres of land from Charles and Jessie Richardson, who were successors in interest to Lemuel Cook of 50 acres of the original 100 acre school lot. The conveyance included 50 acres which the Richardsons had owned in fee, and 50 acres of the "school land" in Lot 5 of Range 6. The latter 50 acres (herein referred to as the Breault school lot) was described in the conveying document as:

all my right, title and interest in and to the westerly half of Lot No. 5 in the Sixth Range, said lot being a Public Right and subject to an annual rent to the Town of Guildhall of \$6.75.

16. In 1939 Felix Breault's wife Florence took up residence with him on the property, which became the marital homestead and dairy farm. It supported their family of eleven children.

17. On the school lot portion of the Breault property, the land consisted of pasture and scrub trees. The top soil was so thin that Mr. Breault could not plow sections of the property.

18. The location of the boundary between the fifty acre school lot leased by the Breaults and the fifty acre lot which they owned in fee was not marked on the ground.

19. Small quantities of sand and gravel were first taken from Breault land in the 1930's. They were taken from the school lot portion in an area around the Breault house. Selectman Bert Peaslee remembers that the State of Vermont took sand and gravel off the Breault property in the 1940's.

20. Before 1964, the Town purchased small quantities of sand and gravel directly from Felix Breault.

21. In 1964, the Breaults granted a license to Lawrence Sangravco, Inc. to remove sand and gravel from the Breault property. At that time, F. Ray Lawrence held the primary responsibility for the operation of Lawrence Sangravco, Inc.

22. Current Selectman Bert Peaslee first held the position of selectman from 1954 until 1974. He has also acted from time to time as the road commissioner for the Town of Guildhall. As road commissioner, he hauled sand and gravel bought from Lawrence for the Town out of the Breault pit. He also bought gravel to haul as part of his personal trucking business. Over the

years, he has also served the Town as lister, constable, and planning board member as well as Selectman and road commissioner.

23. From the time Lawrence opened the pit, the Town bought sand and gravel from Lawrence because it did not have another good source.

24. Available records show that the Town purchased substantial amounts of sand and gravel from Lawrence from 1978 through 1989.

25. Charles Lawrence, one of the founders of Lawrence Sangravco, Inc., was told by Felix Breault that a portion of the Breault land was lease land; Felix Breault told Charles Lawrence not to dig in a certain area "because lease land was over there somewhere" implying that Lawrence should not excavate on the school lease land. Mr. Breault indicated the location of the school land in a general way, but did not clearly designate the boundary between school and non-school land.

26. The location of the boundary between school and nonschool land was believed by Bert Peaslee to be marked by a fence substantially further to the southeast than the place the boundary turned out to be when a survey was eventually done. The fence was near the mouth of a small valley where the slopes were low and there was very little excavation.

27. The primary access to the 50 acre non-school portion of the Breault property is through the school lease lot.

28. The sand and gravel operation of the defendant Lawrence Sangravco, Inc. began in 1964 on what later was discovered to be the school lot, and moved westward over time into the non-school lot.

29. During the 1960's and the 1970's, there was extensive excavation on the lease land or school lot, as well as the non-school portion of the Breault land.

30. Since about 1964, Lawrence has been paying the Breaults for sand and gravel which it has removed irrespective of whether the minerals came from the school lot or from the non-school lot.

31. Most of the removal of sand and gravel from the school lot portion of the Breault property took place prior to 1979. Extensive removal continued after 1979 on the non-school portion of the Breault property.

32. On November 19, 1987, Felix Breault conveyed his property, including the leasehold interest in the school lot, to himself and to his wife, Florence Breault, as tenants by the entirety. Following Mr. Breault's subsequent death, Mrs. Breault held the property by herself.

33. Over the years, Mr. and Mrs. Breault renewed the license to Lawrence Sangravco for the removal of sand and gravel. The first written lease was signed in 1969; the most recent lease agreement is dated November 5, 1981. Both leases describe the subject premises as only the non-school lot. Both Mr. and Mrs. Breault signed these leases.

34. Charles Lawrence, the son of F. Ray Lawrence, ran the sand and gravel operation for the defendant Lawrence Sangravco, Inc. in Guildhall from about 1964 until 1975.

35. During that period of time, Charles Lawrence was never told by Town Officials to stop digging on the school lot.

36. Bert Peaslee spoke to F. Ray Lawrence in the late 1970's about "looking into" the matter of the removal of sand and gravel from the school lot. At that time, Bert Peaslee did not tell F. Ray Lawrence not to remove sand and gravel from the school lot.

37. The Town, through its officials, was aware that sand and gravel were

being removed from land now identified as the school lot in the 1960's and 1970's.

38. It was beneficial for the Town to purchase sand and gravel from the defendant Lawrence Sangravco, Inc. because the site was in the Town and convenient and economical. Town employees had a key to the pit area so that they could take sand and gravel at will if the pit was not open. The Town always paid for the gravel it took. At one point Lawrence donated gravel to the Town to improve the Town road leading to the Breault property.

39. The Town never made any claim for compensation until 1987, nor did it attempt to stop the Breaults from excavating on school land.

40. Historical Town records including maps, diagrams and deeds were available at all relevant times from which the Town, the Breaults, and/or Lawrence could have determined the exact boundaries of the school lease land. Town diagrams showed that one-half of the Breault land was Town lease land.

41. There is no evidence that town officials ever communicated with the Breaults about excavating on the school lot until September 29, 1987.

42. When Calkins Sand and Gravel, Inc. purchased the stock of Lawrence Sangravco, Inc. in 1982, Paul Calkins examined the written leases granting sand and gravel removal rights on the Breault land. The leases were recorded in the Guildhall Land Records. The leases describe the premises as being a portion only of the Breault property and contain legal description specifying the non school 50 acres on the subject land. No agent of Lawrence told Paul Calkins which portions of the Breault land were subject to the school lease and which were not. Neither Calkins nor any agent of Calkins Sand and Gravel Inc. made inquiry to determine the extent of the area available for excavation within the boundaries of the Breault land.

43. The first official action taken by the Town of Guildhall with regard to the lease land was in 1981 when the Selectmen requested an opinion from the Town Attorney about their rights. Contemporaneously with receiving advice from the Town Attorney, a Town official advised an officer of Lawrence not to dig on lease land. However, this advice was vague and the official did not clearly disclose what portion of the excavation site the Town considered to be lease land. At that point, the Selectman did not know the extent of the past excavation on lease land, and did not know the boundaries of the lease land on the ground.

44. There was discussion of the Breault lease land at a meeting of the Guildhall Board of Selectmen on August 24, 1981. The minutes contain the following summary of that discussion:

There was discussion of land leased by the Town to Felix Breault which may be being used by Lawrence Sangravco, and whether Lawrence Sangravco could legally take materials from this land. A letter from the town Attorney stating his opinion of this situation, was read.

45. In the summer of 1987, three Selectmen went to the Breault property with information from Town records and measured the boundaries of the school lot. Following that visit, the Town made a claim for compensation from the defendants by way of letters dated September 29, 1987. Plaintiffs told defendants to stop removing sand and gravel from the Breault school lot, which they did at that time. Plaintiffs arranged for a professional survey to be done by Truline, a firm doing licensed survey work.

46. Once the Selectmen's survey of the boundary of the school lot portion of the Breault property was completed in January 1988, the Selectmen learned of the full extent of the damage to the school lease land and promptly made demand on the Breaults and on Lawrence.

47. The excavation on the Breault land, both on the school lot and the

non-school lot, is extensive. On the school lot some 19 acres of land have been altered by the removal of thousands of cubic yards of sand, gravel and other material. The excavation depth in many places in the school lot is in excess of 50 feet. The site looks as if a huge amount of material has been scooped out of the ground. The excavation on the 19 acres is continuous with a vast degree of excavation on the adjacent 50 acre non-school portion of the Breault land. Between 1964 and 1988, 299,000 cubic yards of material were removed, based on calculations derived from comparing contour maps prepared as of those years and applying mathematical calculations. In total, there is a 69-acre hole in the ground, with extreme variation in terrain within that area.

48. The site remains an open active gravel pit, as gravel is still being removed from the adjacent 50 acre non-school lot. A crusher, weighing station, equipment, and settling ponds are also located in the area, partly on and partly off the school parcel.

49. The material removed from the land was deposited by the glaciers during the last ice age. Gravel as a resource is non-renewable.

50. The excavation and sale of such large quantities of gravel has substantially diminished the land mass of the property which will be returned to the Town of Guildhall at the termination of the 999 year lease in the year 2819. It has also resulted in the removal of large amounts of topsoil.

51. From 1969 to 1981 the agreed price between Lawrence and Breault for materials removed was 10 cents per cubic yard. Beginning in 1981, the price was 20 cents per cubic yard. In 1982, the market price for gravel in the Northeast Kingdom was .35 - .40 per cubic yard. Since the fall of 1992, the Estate has been receiving 40 cents per cubic yard from Lawrence.

52. After this suit for injunctive relief and damages was started,

Lawrence stopped removal of any material from the school portion at issue for a time. In 1993, Lawrence resumed removing gravel from the school lot despite the pending suit. It removed up to 4,000 cubic yards of material before stopping again. The present market price in the Northeast Kingdom is .75 - \$1.00 per cubic yard.

53. All commercially usable sand and gravel on the school lot has not yet been removed. There remains an unexcavated hill of sand on the school lot. The sand is not top grade itself but is used for mixing with other grades of gravel to produce desired products.

54. Leaving the land in its present state would create a very odd long term terrain, as there is a steep bank between the remaining hill of unexcavated sand and the fully excavated hole where materials have been removed.

55. Lawrence has reclaimed a small area of two acres on the school land by adding silt from settling ponds, smoothing it over, and planting vegetation. Lawrence had previously used this land in its gravel operation. The remainder of the school lot would be very unsightly and unusable if not reclaimed. Lawrence proposes to finish excavation of the remaining sand and then reclaim the land at a reasonably continuous terrain level.

56. The Town has always appraised the Breault school lot at its full fair market value for property tax purposes. The Town has not recognized any limitation on the use of the lease land for property tax purposes.

57. About 15 acres of the leased school lot is used by Bert Peaslee for his potato crop and for hay.

58. Conventional practices in the construction and gravel industry require that open mine areas such as exist on the school lot be stabilized by

cutting down the sharpness of embankments, by sloping and grading the land, by covering the land with top soil, by adding fertilizer and lime, and by seeding and mulching so that vegetation will grow, thus preventing erosion by water and wind.

59. The cost for completing such reclamation at this time on the school lot, assuming no further excavations, to the current standards in effect would be \$50,200.00, if done by independent contractors. The cost could be less if done by Lawrence.

60. Without the process of reclamation, the land is worth substantially less per acre.

61. The volume of material extracted from the mining operation included sand, gravel, and top soil in varying quantities. No reliable records exist of the quantities removed specifically from school land. The operation was commercially viable. The predominant volume of material removed would have been saleable material.

62. The Estate's expert economist used an economic forecasting methodology that indicated that the current market value of the Town's reversionary interest, which will ripen in 2819, is zero. The economic forecasting methodology is usually used to predict the value of assets up to approximately 40 years in the future. The longer the period of forecasting, the greater the difficulty of forecasting.

63. The Town recently conveyed to Mrs. Silver, whose property abutted the Breault land and who held the lease interest in the other 50 acres of the 100 acre school lot, its reversionary interest in the 50 acre school lot on Silver's land in exchange for water rights with an assigned value of \$1,500.00. There was no gravel on the Silver land, which is all wetlands.

## CONCLUSIONS OF LAW

The lease agreement entered into between the Selectmen of the Town of Guildhall and the Defendant Estate's predecessor in title, Lemuel Cook, in 1820 is silent about the right of the lessee to extract minerals or remove natural resources from the property. In a prior ruling in this case, the court ruled that the Plaintiffs were not entitled to relief on their original claim for conversion, because the Town had not reserved rights to the minerals on the premises. Decision and Order, Decker v. Breault, No S7-89 Ec (Vt. Essex Sup.Ct. Nov. 15, 1991), J. Morris.

The Defendants have characterized this decision as a declaration that the Defendant Estate holds an absolute right to ownership and disposition of the sand and gravel on the premises. That was not the impact of the decision on Defendant's motion for summary judgment. The decision was a ruling of law that the Plaintiffs were not entitled to recover based on a theory of conversion; it was not a ruling that the Plaintiffs were barred from relief on the other ground asserted, namely waste. The case proceeded to trial based on the Plaintiffs' claim for relief on the grounds of waste. Plaintiffs are seeking recovery of money damages and an injunction against future removal of sand and gravel.

There is no evidence that in 1820, when the current lease was created, there were any mines or quarries on the premises. The parties have agreed that while small quantities of sand and gravel were removed from the premises in the 1930's and 1940's by manual means, the significant gravel pit operation that precipitated this litigation did not start until 1964 when the Breaults granted removal rights for gravel pit extraction purposes on their non-school land to

Lawrence Sangravco, Inc.

The common law as received from England at the time of the Wentworth grant, and which was adopted as the law of this state to the extent appropriate by 1 V.S.A. §271, forbids waste by a tenant for years. "A tenant for life or years has no right to take clay, gravel, soil, etc. unless such material was one of the recognized profits of the land before commencement of tenancy." Tiffany on Real Property, Section 437. The initial inquiry is whether the lease in this case is a lease for a term of years. If not, Plaintiffs have no grounds for recovery.

A lease for 999 years is a lease for a term of years. A lease for a term of years indicates exactly when the lease will end. 51C C.J.S. Landlord and Tenant §29. This is different from a perpetual lease, where the lease is without limitation as to time. Black's Law Dictionary 801 (5th ed. 1979). Where the parties agreed to a lease for "as long as grass grows and water runs," the lease was deemed perpetual. White v. Fuller, 38 Vt. 193, 200 (1865). This is not the case here. Thus, despite the unusual length of time of this lease, which extends beyond the ability of most of us to envision to the extent that it seems analogous to "forever," one can calculate when it will come to an end. It is therefore a lease for a term of years for purposes of analyzing the relations between the lessor and the lessee.

The Defendants urge us to construe the lease as perpetual and offer Weyerhaeuser Company v. Town of Hancock, 151 Vt. 279 (1989), in support of their contention. However, that case is clearly distinguishable. In Weyerhaeuser, the court was construing a 999-year lease in relation to a statute imposing a burden of taxation on real property. The purpose there was to determine whether the lessee in sole possession should contribute to annual

costs of community protection through property taxation under the terms of the applicable taxation statute. The statute defined a "perpetual lease" as

every leasehold interest in land located in Vermont, and every estate in Vermont land other than fee simple absolute, arising out of or created by an instrument of lease which conveys to a person designated as lessee ... the right to possess, enjoy and use the land in perpetuity or substantially in perpetuity.

Id. (emphasis in original). The court concluded that the Legislature intended to create a more flexible interpretation of perpetual leases for taxation purposes. Otherwise, such property might be wholly exempt from taxation. In this case, annual property taxes as well as a lease rental are paid by Defendant Breault. The purpose of interpreting the lease is to determine when, if ever, the lessor will get the property back, and in what form it will be returned. There is no statutory exception to the accepted definition of a lease for a term of years in this case. The lease term is 999 years, so it is clear when the lease ends and that the Town will get the property back. Thus, Weyerhaeuser is inapposite, and the Court concludes that the lease is a lease for a term of years.

The history of this property substantiates this conclusion that the Town intended to retain a reversionary interest. The property was first leased for a term of 999 years to William Hewes in 1799. When he defaulted on his lease, the Town took the property back and released it for a term of 999 years to Lemuel Cook in 1820. Clearly William Hewes did not take the property under a perpetual lease, and neither did Breault's predecessor, Lemuel Cook.

Therefore, the relationship between the Town/Plaintiffs and Estate/Defendant is that of lessor and lessee. As such, the Breaults were, and the Estate is, prohibited from committing waste of the premises, since to do so would injure the Plaintiffs' reversionary interest in the property. See Dobbs, Remedies,

Chapter 5.1, p. 319 ("Tenant for life or years has the right to use and enjoy the land but also has a duty to the reversioner who will have the land later to avoid substantial impairment of it.").

Defendants have committed waste. Generally, waste is anything causing "permanent injury to the inheritance" value of the property. Keeler v. Eastman, 11 Vt. 293, 294 (1839). It is waste for a tenant to open a new mine or quarry and remove "rock, oil, minerals, etc.," unless the lease agreement expressly or impliedly grants the lessee the right to do so. 93 C.J.S. Waste § 8. The lease agreement did not grant the lessee the right to open a new quarry, and the quarry in question had not been opened before the lease was created.

The Estate would like to remove the remaining hill of sand that is situated on the school lot portion of the Estate property, and Lawrence would also like to be able to do this in conjunction with its sand and gravel operations on the abutting nonschool portion of the Breault land. From the foregoing analysis, the court concludes that the Estate has no right to do so, and that such activity would constitute waste of the property and damage to the Plaintiffs' reversionary interest. The history of the property shows that in the past, the Breaults were not sufficiently mindful of the need to protect the Town's reversionary interest, and permitted waste to occur. In addition, the Estate, as late as 1993 during the pendency of this action, also permitted further removal of sand and gravel, thus allowing further waste of the property and further damage to the Town's reversionary interest. These actions lead the court to conclude that a remedy at law is inadequate, and that an injunction is a necessary form of relief in order to ensure the protection of the Plaintiffs' reversion interest. Campbell Inns, Inc. v. Banholzer, Turnure & Co., 148 Vt. 1

(1987). Therefore, an injunction shall issue enjoining both Defendants from removing any sand, gravel, or topsoil from the portion of the Estate premises that is school lease land as shown on the survey done by Truline in January 1988.

Of course, the injunction would not prevent the Plaintiffs and the Defendants from reaching an agreement among themselves for removal of sand and gravel from the property. In that event, the Plaintiffs would be able to protect or dispose of the Town's reversion interest in the property in accordance with their obligations and duties with respect to Town property. The Town would presumably receive some consideration in exchange for its property interest. Disposal of sand and gravel pursuant to such an agreement would not constitute a violation of the injunction as long as the Selectboard acted properly in entering into such an agreement. Without the participation and consent of the Plaintiffs, however, the Defendants shall be enjoined from removal of sand and gravel and topsoil.

The next question is whether the Plaintiffs are entitled to recover money damages from Defendants for past removal of sand and gravel. The Town argues that it is entitled to recover for damage to its reversion, and argues that the measure of damages should be the value of the resources severed from the property. Both Defendants argue that the Plaintiffs are barred from any money recovery by the doctrines of laches and estoppel.

The Defendant Estate also argues that Florence Breault had no legal interest in the property until the tenancy by the entirety was created on November 19, 1987, which was after the gravel extraction was stopped as a result of the Town's notice; therefore, the Estate argues, it has no obligation to compensate the Town for waste that occurred prior to her

obtaining a legal interest. The Estate also argues that the proper measure of damages, if any are payable, is the present value of the Town's reversionary interest, and the Estate presented evidence that the present value of the reversion is zero.

Defendant Lawrence argues that the proper measure of damages, if any are payable, is the injury to the surface of the land only. Lawrence argues that prior to any gravel extraction, the topsoil on the property was thin and not tillable, and that once it finishes the reclamation it will perform upon completion of extraction, the land surfaces will actually be superior to the original surface quality.

The defenses of estoppel and laches will be addressed first. The elements of estoppel are: 1) the party to be estopped must know the facts; 2) the party must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has the right to believe that it is so intended; 3) the latter must be ignorant of the true facts; and 4) the latter must rely on the former's conduct to his injury. My Sister's Place v. City of Burlington and Lt. John Vincent, 139 Vt. 602 (1981).

Defendant Lawrence argues that the Town knew for a number of years that the school lot was a school lot. The evidence shows that the Town maps and records indicated that one-half of the Breault premises was in lot 5, range 6 and was a school lot. There is no evidence, however, that any Town official had any specific knowledge of exactly where the boundary was between school and non-school land until the Town had a survey prepared in January 1988. On the contrary, Bert Peaslee, who was a town Selectman during many of the years between 1954 and 1974, and was road commissioner and hauled sand and gravel out of the pit for the Town, actually had an incorrect understanding of where the

boundary was between the school and non-school portions of the Breault premises. The evidence does not support a conclusion that the first element of estoppel exists in this case, i.e., that any Town official had actual knowledge that it was school lease land from which gravel was being extracted. Therefore, the doctrine of estoppel does not bar Plaintiffs' claim for damages. See In re Barlow, 4Vt. L.W. 199, 202-3 (1993).

Laches is the failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right. Comings v. Powell, 97 Vt. 286 (1923). "Laches does not arise from delay alone, but from delay that works disadvantage to another." Stamato v. Quazzo, 139 Vt. 155, 157 (1980). From 1964 through 1979, Lawrence was engaged in significant extraction of gravel on the school portion of the Breault property. The Town was a frequent purchaser of gravel from the pit. Bert Peaslee as road commissioner hauled gravel directly from the pit for Town use. Town officials had a key to the pit so that they could have access to sand and gravel for Town needs after hours. Although the Breault gravel pit is somewhat secluded from public view, anyone going to it to pick up gravel would be able to see that the pit operation was extensive. Town records showed at all times that Breault land was half school lease land and half nonschool land. The annual lease payment of \$6.75 was actually paid. Gravel operations continued at the pit, although at a lesser level of intensity, from 1979 until 1987. In 1981, the issue of possible damage to the Town's reversionary interest was discussed at a Selectmen's meeting. Aside from the brief and vague meeting between a Town official and an agent of Lawrence in 1981 which we conclude was not adequate as an assertion of the Town's rights, there was no followup until 1987.

The Town's failure to take steps to determine the boundaries of the school lease land and halt extraction operations on the school portion of the Breault land is both unexplained and unreasonable. The Town had at its fingertips all the information needed to establish whether or not its interest was being damaged, and it failed to act. There is no reason in evidence why it could not have done in 1964, or any other year, what it eventually did in 1987, which was to measure roughly the boundaries of the lease land, hire a surveyor and determine the exact boundaries, and notify Defendants that their activities were causing injury to its property interest. The fact that the Town had a source of sand and gravel by doing nothing is not sufficient reason or explanation, because the Town paid fully for the sand and gravel it used. It would have made more sense for the Town to establish that the pit was on school land and use that as a basis for receiving compensation in the form of revenue or a sand and gravel supply. By doing nothing, it created a delay in protecting its property interest that is both unreasonable and unexplained.

The next question is whether such delay was prejudicial to the adverse party, which in this case is the Estate and Lawrence. The court concludes that there was such prejudicial delay until September of 1987. The Estate of Florence Breault is prejudiced by the Town's delay in asserting its rights to prevent the continued excavation of sand and gravel from the school lot. The Estate must answer to all causes of action which survived the deceased Mrs. Breault. University of Vermont and State Agr. College v. Baxter's Estate, 43 Vt. 645 (1871). Had the Town asserted its rights against Felix or Florence Breault before any extensive sand and gravel excavation occurred, the claimed substantial damage to the land might not have occurred. Thus, the Estate would not now be potentially liable for the damage. Further, the Estate may assert

rights which the deceased could have asserted in her lifetime. Gilfillam's Adm'r v. Bixby, 100 Vt. 468 (1927). Thus, if Mrs. Breault could have claimed that she was prejudiced by the Town's failure to seek to enjoin the operation of the sand and gravel pit, the Estate may as well.

The Estate argues that Mrs. Breault did not even have title to the property until November 1987, and that she should not be considered responsible for any acts of waste committed prior to that time. In this case, Felix Breault leased his interest in the school lot to Lawrence for the purpose of sand and gravel extraction. A wife may not be held liable for contracts entered into by her husband alone merely because of the husband and wife relationship, R. & E. Builders, Inc. v. Chandler, 144 Vt. 302 (1984); In re Estate of Elliot, 149 Vt. 248, 251 (1988); 15 V.S.A. §66. Nonetheless, when a wife is a party to a contract, she assumes responsibility. Mrs. Breault joined in both of the written leases conveying extraction rights to Lawrence. She therefore could be held liable for waste which may have occurred as a result of actions arising out of the leases to Lawrence. She also had a homestead interest in the school lot leasehold. In addition, she or her estate would certainly be responsible for waste occurring after November 1987 when she became an owner. By failing to assert its rights, the Town led Florence Breault and her husband to a situation in which they had a reasonable expectation that they were doing no harm to the Town's interest in the property.<sup>1</sup>

Whether or not the Breaults had a right to allow gravel extraction on the school land is an issue that has consumed four years of litigation and a considerable amount of legal talent and judicial attention. The Breaults were

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<sup>1</sup> Whether they actually had this understanding or not is not in evidence and is not necessary, since it was the reasonable consequence of the Town's behavior.

a farm family with eleven children living on land with poor soil. For the Town to buy sand and gravel from them, never telling them that they were wrongfully selling off the Town's reversion, and then later seek to recoup damages from the Breault Estate appears to this court to constitute prejudice to Florence Breault and to her Estate. Had she been notified sooner of the Town's assertion of its interest, she could have altered her behavior and avoided committing waste on the school land, or entered into an agreement with the Town, or knowingly done what actually happened, but at least she would have had a choice. It is doubtful that she would have arranged matters as they turned out, expecting that her estate would then pay monetary damages to the Town. Therefore, the Town's delay created prejudice for her and subsequently to her Estate.

Lawrence Sangravco, Inc. is in a similar position. The extent of prejudice is weaker. Lawrence took its grant of rights to remove gravel from the Breault property by written instrument that referred specifically only to a portion of the Breault property. Both F. Ray Lawrence and Charles Lawrence, and later Paul Calkins when his solely owned corporation bought the shares of Lawrence, had a clear opportunity to research the boundaries of the school lot portion of the Breault property and take care not to damage the Town's reversion interest. They did not do so. Nonetheless, the Town's unexplained and unreasonable delay in asserting its rights also put Lawrence in the position of having been lulled into an expectation that no injury was being done to the Town's interest in the Breault premises.

This prejudicial delay continued until September 1987 when the Town officially notified both the Breaults and Lawrence of the existence and location of its legal interest and the fact that it was asserting its rights

under that interest. Thereafter, the defense of laches is not available to either Defendant, since at that point Plaintiffs effectively asserted their rights and thus there could be no prejudice to Defendants. If the Defendants proceeded to extract, they did so at their peril.

Therefore, the court concludes that Plaintiffs are barred by the doctrine of laches from recovering from Defendants any damages for sand and gravel extraction that occurred prior to September 1987. As to the removal that occurred after that date, Plaintiffs are entitled to recover damages, and the measure of damages is discussed below.

The Town argues that laches is not available as a defense against the Town because an act of one Selectman cannot bind the Town unless that act is affirmed by the balance of the Selectmen, and that governments should not be estopped from doing their public duties. The reasoning of such arguments is not applicable to the facts of this case. Bert Peaslee was not binding the Town when he failed to initiate action on behalf of the Town against the Breaults after seeing gravel removed from Breault land; nor did he bind the Town when, together with the other listers, he as lister appraised the school lot at full fair market value for property tax purposes. It was the delay on the part of the Selectboard as a collective unit that is the basis for laches in this case. Bert Peaslee's personal knowledge does not bind the Selectboard; rather it is evidence that the Selectboard had available to it information that it could have acted upon in investigating and asserting its rights. It failed as a collective body to exercise appropriate stewardship of a Town asset when it could have, and its delay had the effect of prejudicing the Breaults and Lawrence. The same thing happened in 1981 when the Board as a whole addressed the issue and failed to take any meaningful action to identify and assert its

rights. The Selectmen, as representatives of the Town and in that capacity, created the conditions that make the defense of laches appropriate to bar their right to recover money damages.

The Town further asserts that the defense of laches should not be allowed against them as a governmental body asserting its interest in public land. The Town cites 27 AmJur2d Equity §156 for the proposition that when the government has a direct pecuniary interest in the subject matter of the litigation, the defense of laches may not be set up as a bar. However, further along in that very same paragraph, the authors state: "the defense of laches seems to be available in a suit which is brought by the government in its private or proprietary capacity." Id. We conclude from the facts in this case that the Town is acting in its proprietary capacity with regard to the school lot. As is apparent from the series of 999 year leases of this lot, the Town has not sought to use this land for school purposes. The land is an asset leased by the Town which collects revenue from the lease as well as property taxation. As noted hereunder, the public interest would be best served by encouraging the Town to be diligent in protecting public land as opposed to acquiescing in its destruction.

Application of laches here has no effect of prohibiting the Town from exercising municipal functions. On the contrary, the result here should serve as a stimulus for Town officials to identify, care for, and protect Town assets lest the Town be barred from collecting compensation for damage. The interests of the Town must be balanced with those of the persons asserting the defense of laches. In this case, the Town's behavior, through its elected officials, created substantial prejudice to the Breaults and Lawrence, who had no reason to think that they needed to alter their behavior in order to avoid

a substantial money judgment.

Since 1987, the Estate and Lawrence have removed 4,000 cubic yards of sand. They did so with complete knowledge of the Town's asserted interest and position and after commencement of this action, which includes a claim for money damages for waste. The court concludes that under these circumstances, the appropriate measure of damages is the strictest one, which is the value of the severed materials. Such a measure of damages is necessary to prevent Defendants from profiting from prohibited behavior. The evidence shows that the current market value of the material removed is up to \$1.00 per cubic yard. Therefore, Plaintiff shall have judgment against Defendants, jointly and severally, for \$4,000.00.

The last issue is the Plaintiff's claim for the value of the reclamation costs to restore the surface of the property to a decent condition. The court has already determined that the lease of the property is a lease for a term of years. Thus, the point in time at which the costs of reclamation become relevant is the point of termination of the lease. Certainly it is going to be necessary for Defendants to return the property to Plaintiffs in a reclaimed condition, but it is premature to award the Plaintiffs an amount of money representing the current costs of doing so when it is not clear that the time is ripe. It is quite possible that now or at some point in the future, the Town as lessor and the Estate as lessee may enter into an agreement about what to do with the remaining hill of sand, so as to minimize the variation in terrain level resulting from the excavation on the school land having been stopped in mid-hill, so to speak.

If so, the reclamation to be done thereafter would be a different reclamation project than the one that needs to be done if there is no more

removal of resources between now and the end of the lease in 2819, and awarding monetary damages at this point would be premature. If not, the Defendant Estate remains responsible not only for reclamation, but for making sure that there is no further waste of the Town's reversion through erosion at the site of the steep banks created by the past excavation. The Defendant should have the opportunity to fulfill this responsibility while in possession of the property, and perhaps at less cost than the Plaintiffs would incur in the project.

The Plaintiffs have a protectable interest, but the court will protect that interest by including in the injunction the requirement that the Defendants reclaim the property according to the currently applicable standards for gravel pit reclamation within a reasonable time of cessation of all gravel pit excavation upon the school lot portion of the Breault property. Because of the nature and timing of the lease term and gravel pit operations, this will be more effective than a remedy at law and is therefore appropriate. Campbell Inns, Inc. v. Banholzer & Co., supra.

ORDER

Based on the foregoing Findings and Conclusions, it is hereby ordered:

1. Defendants are permanently enjoined from removing any sand, gravel, or topsoil from the school lease lot portion of the premises of the Defendant Estate, as such lot is shown on a survey plan prepared by Truline dated January 1988.

2. The Defendants are jointly and severally liable for judgment for the Plaintiff in the amount of \$4,000.00.

3. Defendant Estate shall reclaim the school lease portion of its premises according to currently applicable standards for reclamation for gravel pits within a reasonable period of time of cessation of excavation.

Dated at Guildhall, Vermont this 17th day of March, 1994.

Mary Miles Teachout

Hon. Mary Miles Teachout

Presiding Judge

Virginia Carr

Virginia Carr

Assistant Judge

I CERTIFY THIS DOCUMENT TO BE A TRUE COPY OF THE ORIGINAL ON FILE IN THE OFFICE OF THE CLERK OF THE ESSEX COUNTY SUPERIOR COURT THIS

23rd DAY OF March, 19 94

Ellen B. Ransdell

Clerk/Deputy Clerk