STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Washington Unit 2015 SEP -3 P 4:39 **Docket #755-10-10 Wncv**

BRUCE CHAPIN and SUSIE CHAPIN,
Plaintiffs

v.

ALLAN SPECTOR, MARCIA SPECTOR,
ALLAN SPECTOR RETIREMENT TRUST,
and TOWN OF FAYSTON,
Defendants

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SUPERIOR COURT **CIVIL DIVISION**
Washington Unit **Docket # 20-1-12 Wncv**

MICHAEL J. REGAN, DENISE REGAN
and ANDREE FALARDEAU,
Plaintiffs

v.

ALLAN SPECTOR, MARCIA SPECTOR,
ALLAN SPECTOR RETIREMENT TRUST,
and TOWN OF FAYSTON,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

These two cases were consolidated for trial. In both cases, Plaintiffs claim that Defendants diverted stormwater flow in a manner than affected Plaintiffs' properties. The parties, their attorneys, and the court made a site visit on November 7, 2014 prior to the beginning of the final hearing. Evidentiary hearings, status conferences, and motion hearings were held on February 2, 3, 4, 10 and 13; March 27; April 1, 2, 10, and 16; May 4, 18, and 20; June 30; and July 10, 2015.

Plaintiffs Bruce and Susan Chapin (hereinafter Chapin) were represented by Attorneys Robert O'Neill and Matthew W. Stern; Plaintiffs Michael and Denise Regan (hereinafter Regan) were represented by Attorneys Marc Heath and Michael Regan; Defendants Allan and Marcia Spector and the Spector Retirement Trust (hereinafter Spector) were represented by Thomas Aicher; and the Town of Fayston (hereinafter the Town) was represented by Attorney James Carroll. Plaintiff Andree Falardeau represented herself.

Post-trial amended proposed findings of fact and memoranda were filed.

The parties all own property on a developed hillside in the Town of Fayston.[1] Stagecoach Road crosses the hillside on the upper portion of the part of the hillside at issue in this case, and Farm Road curves across the hillside some distance downhill below it. Activities on the upper part of the Spector property, which lies between the two roads, affected the Falardeau and Chapin properties below, both of which have frontage on Farm Road, as well as part of the Regan property, which is adjacent to the Spector house lot and has a driveway and home on the lower side of Stagecoach Road. The Town is responsible for the roads and stormwater drainage on the hillside, as both roads are presently Town roads.

In these suits, Regan seeks an injunction based on claims of trespass and nuisance requiring Spector and the Town to relocate Town culvert #7 on Stagecoach Road from where it is now, after it was moved in 2008, back to the location and configuration it had prior to 2004.[2] Chapin has settled their claim for money damages contingent on culvert #7 remaining where it is and opposes Regan's requested injunctive relief. However Chapin also has a request for an injunction requiring the Town to install a culvert to carry stormwater from the ditch above the Chapin driveway across Farm Road. Falardeau no longer seeks any affirmative relief but has remained in the case in order to participate in any action that might affect her property. Both Spector and the Town oppose relocating culvert #7 and the Town objects to constructing a new culvert across Farm Road at the Chapin location.

Findings of Fact

Mike Quenneville worked for the Town on its roads from 1980 until his retirement in 2008, and was the Road Commissioner for the last several years. He became familiar over the years with the problems of stormwater drainage that this hillside in Fayston presented, particularly as it became more developed, and he was fully familiar with the roads, culverts, and drainage issues on the hillside.

In the 1980s, the land just below Stagecoach Road was a parcel of 2.5 acres that will be called in this decision Stagecoach Road Lot. (It is where both old and new culverts #7 have been located.) It was farmed by Willis Bragg. A farm lane bordered its downhill diagonal boundary: the farm lane left Stagecoach Road toward the eastern end of the Stagecoach Road Lot, and headed downhill toward the west across the hillside at an angle. In the evidence in the case, the farm lane has been called both Old Stagecoach Road and Pasture Road, but it will be called Old Stagecoach Road in this decision.

Farm Road did not exist until a 23-lot subdivision called Fayston Farms was developed down the hill below Stagecoach Road (and below Old Stagecoach Road) in the

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[1] See Attachment 1, which is a copy of Chapin Exhibit 4, which is a May 2012 Google Map of the hillside with added labels showing features described in these Findings.
[2] In a ruling made during the trial, Regan's claim for money damages was dismissed.

1980s. Farm Road was initially a private road that came off a different town road. It looped around to provide access to the lots in the subdivision. Lots 6 and 7 were laid out between the Stagecoach Road Lot and Farm Road, with frontage on Farm Road. (No Fayston Farms lot had frontage on Stagecoach Road.) Mr. Spector, whose primary business career had been in New York in management and real estate, bought Lot 6 in 1986 and became actively involved in Fayston Farms real estate. He owned half of the lots at one time or other, and was the president of the Fayston Farms Association for several years beginning in 1990. He did not develop Lot 6 after purchasing it.

At some point, Mr. Spector saw Mr. Bragg driving his tractor on Old Stagecoach Road, the southern boundary of the Stagecoach Road Lot, which was located directly above Lot 6 and had even more spectacular views of the distant mountains and ski area, and Mr. Spector approached him with interest in buying it. In 1992, Spector bought the Stagecoach Road Lot, and the Allan Spector Retirement Trust bought Lot 7 immediately adjacent to and west of Lot 6. As a result, Spector entities had acquired, and still own, all 3 adjacent lots, which encompass a total of approximately 8.3 acres that slope downhill between Stagecoach Road and Farm Road.

When Spector bought the Stagecoach Road Lot in 1992, culvert #7 was a 15" culvert that carried stormwater from a portion of the hillside above Stagecoach Road under Stagecoach Road, and deposited it on the hillside on the Stagecoach Road Lot, which was then mostly wooded. Culvert #8 was located to the west and uphill on Stagecoach Road, and the water that flowed through #8 undisputedly drained in a westerly direction toward a gully further to the west in the Fayston Farms development. Culverts #6 and #5 were located further to the east and downhill on Stagecoach Road, and the water that flowed through them undisputedly drained in an easterly direction down through woods and vegetation on land east of and adjacent to the Stagecoach Road Lot on a parcel now owned by Regan (not part of Fayston Farms). The central factual issue in this case is: prior to 2004, and from 2004 to 2008, in which direction did the stormwater that flowed through culvert #7 drain once it reached the Stagecoach Road Lot? This is addressed more fully below.

Development was taking place both below Stagecoach Road in the Fayston Farms subdivision, and above Stagecoach Road. Managing the water runoff on the hillside presented challenges. The Olivio (now Falardeau) residence was built on Farm Road in Fayston Farms at some point, and the Chapin residence was built in 1989 on Farm Road. There were two road locations in Fayston Farms that routinely had problems from runoff from the hillside above, one of them being at the junction of the Falardeau driveway and Farm Road. Part of Mr. Quenneville's job as Road Commissioner was to manage the culvert and drainage system on the hillside as a whole to minimize such problems.

In 1992, the Town installed a culvert under Old Stagecoach Road and later a stone-lined ditch along the upper edge of Old Stagecoach Road to manage water that drained downhill toward Fayston Farms. The Town required Spector to participate in the cost of enlarging the culvert under Old Stagecoach Road in 1996 when Spector first sought a permit for a driveway at the location of culvert #7. In 1996, the Town took over

Farm Road as a Town road. In 1998, Falardeau moved to her residence, and in 2001, the Chapins purchased their property, which was initially, and is now, a second home, but which Susie Chapin occupied as a principal residence for several years beginning in 2002. The Spector lots were then undeveloped.

When Spector wanted to build a house on the Stagecoach Road Lot with a driveway at approximately the location of culvert #7, he sought to have the Town move culvert #7 to a different spot further uphill to the west, closer to culvert #8. Mr. Quenneville did not want to do that because he did not want to increase the amount of water that would drain in a westerly direction down through the gully toward a difficult area in Fayston Farms. He also did not want to move culvert #7 further downhill to the east, closer to culvert #6, because that would mean that a greater amount of water would be running down the ditch on the uphill side of Stagecoach Road for a longer distance and faster in a manner that would create a worse problem. His strategy was to divert the water under the road and downhill at the #7 location so it was dispersed before the volume and speed became a bigger problem further downhill. He declined several requests from Spector to change the location of culvert #7 either uphill or downhill. [3]

In 2004, Spector applied for a building permit to build a house on the Stagecoach Road Lot with a driveway access close to culvert #7.[4] At that time, Mr. Quenneville, on behalf of the Town, dug out a "box ditch" from the outlet of culvert #7 for several feet in an easterly direction on Spector land. It was a trench with squared-off sides. Its purpose was to avoid congestion and buildup of runoff and debris in culvert #7. It sent the flow from culvert #7 toward the east approximately 15 feet from which point the water was free to run downhill, which it did in sheets across the hillside.

When Spector then built a driveway close to culvert #7, Spector placed a culvert in the box ditch and then covered it over with gravel and material so that the driveway ran over it. The result was that water from above Stagecoach Road flowed through culvert #7 into the dug-out box ditch and then turned at almost a 90 degree angle to proceed through the culvert under the Spector driveway toward the east for a distance of some feet. The exact distance is unknown, but most likely the water was directed toward the east further than the 15 feet of the original box ditch, and perhaps as much as 30 feet. Some of the water continued toward the east and some of it ran downhill. Some of it, after emerging from the culvert, cut a channel on the Spector land and eroded land near

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[3] Many requests and actions described in these facts as made by Spector were made by contractors acting as agents for Spector. Such actions are attributable to Spector.

[4] Regan argues that natural drainage patterns were still intact in 2004 before Spector applied for a building permit, but the evidence shows that "natural" drainage patterns had already been affected by the construction of Stagecoach Road and related ditches and culverts, the ditches and culverts related to Old Stagecoach Road, and probably development that had occurred uphill from Stagecoach Road. The Town has immunity for its efforts to control stormwater drainage, whether such efforts changed a pre-human natural drainage pattern or not. *Graham v. Town of Duxbury*, 173 Vt. 498, 499 (2001).

the house site. A little further downhill, below the house site, the stone-lined ditch on the upper side of Old Stagecoach Road and the culvert under Old Stagecoach Road remained in place, previously installed to manage the dispersal of runoff. Below Old Stagecoach Road, the hillside was wooded with lots of vegetation.

Also in 2004, the Chapins, who had by this time restored distinctive flower gardens around their house and done extensive landscaping, constructed a pond at the lower part of their property, below their house. This pond was created in a Class III Wetland. Its location is in a level wet area at the base of the easterly portion of the hillside described above and is just above the spring-fed headwaters of a stream. Chapin obtained a necessary Army Corps of Engineers permit based on a design submitted with the application that showed a pond that barely fit within the southerly boundaries of the Chapin property, and had an overflow pipe that spilled overflow water into the swampy wetland below. Either at the same time or the following year, adjacent to the Chapin pond, a smaller "sediment pond" or "silt pond" was created by digging out a small pond next to the Chapin pond. Its water level was two feet higher than the Chapin pond. The purpose of a silt pond is to allow silt to settle and collect so that it does not go into the larger adjacent recreation pond; clean water flows through a pipe from the higher level of the silt pond into the lower recreation pond.[5] Since such a silt pond is designed to collect silt, it is also intended to be cleaned out periodically so it does not fill in and so that it will maintain its function of protecting and providing clean water to the recreation pond. Unmaintained, it will fill in with sediment and become swampy.

In 2005, Fred Viens was hired by Chapin to bring in his backhoe and make the area near the Chapin pond more attractive. His work included digging out and cleaning the sediment pond as well as bringing in fill and creating a lawn area around the Chapin pond. His bill does not reflect that he created the sediment pond and installed the pipe, but rather that he cleaned out the sediment pond and created and seeded lawn. Thus it is possible that the sediment pond was constructed at the time the Chapin pond was installed in 2004 (even though it is not part of the approved design) as its function was as a sediment pond related to the Chapin pond.

Whenever it was created,[6] the sediment pond was not located on Chapin land, but on adjacent land then owned by Stankiewicz (now Regan). The work was apparently done with permission from Stankiewicz. In order to continue to maintain the function of the sediment pond, Chapin would need to have ongoing periodic permission from the owner of the Regan lot. Similarly, because of the topography, Regan cannot maintain it without bringing equipment across Chapin land. The purpose of maintaining it as

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[5] Silt or sediment ponds can be used to protect other features in addition to recreation ponds, but in this case the feature to be protected was the Chapin pond.

[6] Whether the creation of the Regan pond was in 2004 or 2005 does not make a difference to the material facts or legal conclusions in this decision, nor does the descriptor used for it by various witnesses (silt pond, sediment pond, frog pond, forebay, detention pond).

constructed (higher than the Chapin pond and with a pipe carrying water to the Chapin pond) would be for the ongoing benefit of the Chapin pond. Alternatively, it would need to be dug out periodically using equipment brought across Chapin land simply to maintain its character as a pond, whether or not it was used to benefit the Chapin pond. In sum, unless the respective owners of the Chapin and Regan lands mutually agreed over time to the necessary permissions to enable regular cleaning out of the sediment pond, it was destined from the time of its construction to return to the swampy wetland condition that it was in before it was constructed, as it was also located in the Class III wetland.

In 2005, Spector built a 3-story 7,100 square foot house on the Stagecoach Road Lot to serve as the Spector primary residence. Clearing and grading around the house significantly changed the contours of the land at the house and driveway site. Following construction, Spector had erosion problems below the outlet of the culvert under the driveway, and measures had to be taken in response. The court finds that following these changes, there was still stormwater flow from culvert #7 in a variety of directions: some fanned out downhill; some went to the west down the stone-lined ditch above Old Stagecoach Road; and some went down the culvert under Old Stagecoach Road. Water drained in both the western and eastern drainages. There may have been some shift of water drainage from the west to the east toward Regan land, but it was not significant and apparently not noticed by anyone.

In that same year, 2005, runoff from the hillside damaged the culvert at the junction of the Falardeau driveway and Farm Road as well as part of Farm Road. The Town made repairs. Spector began clearing trees on Lot 7, below and to the west of the Spector house.

In the spring or summer of 2006, Mr. Spector talked with Stuart Hallstrom, who had worked on Town roads and culverts with Mike Quenneville for many years as of that time, about problems he was having with erosion at the outflow of culvert #7, near his driveway. Mr. Hallstrom also considered that culvert #7 was troublesome because the box ditch tended to fill up with leaves, and it was hard to clean out because of the tight area between the outlet of culvert #7 on the lower side of Stagecoach Road and the inlet to the culvert under the Spector driveway.

In 2007, Regan purchased the property adjacent to and easterly of the Spector Stagecoach Road Lot. The house and driveway are on Stagecoach Road, and the land slopes downhill and is wooded between the top of the property, where the house and a cleared area near it is located, and the wetlands area at bottom of the parcel where the small sediment pond is, next to the larger Chapin pond. Before the purchase, Regan had not been downhill to the pond area or seen it. There were no paths leading from the house area through the woods down to the wetland and pond area at the bottom of the property. The Regans did not know there was a pond there when they purchased. They discovered it, though, and in 2007 and 2008 the family, including two young children, enjoyed going down through the woods to the pond and catching frogs. They did not know that it had any relationship to the nearby Chapin pond. The pipe was not visible, and they did not know it had, or had once had, a function as a sediment pond. In 2005

when Mr. Viens had dug out the Regan pond, he had spread the fill material around in the area near the pond. They were able to walk around the pond on dry ground.

The Regan land includes part of a drainage area called throughout the trial the "eastern drainage." Water from a portion of the hillside above Stagecoach Road gathers in the ditch at the upper edge of Stagecoach Road and flows through culverts #6 and #5 onto the highest part of the Regan land. It disperses into the ground in a wooded and vegetated area between Stagecoach Road and the Regan house, and travels underground down the hillside and into the relatively level Class III wetlands at the bottom of the property to the east of the Regan pond. This Class III wetland is a classic "seepage wetland," created by water that seeps downhill underground and may or may not emerge above ground when it reaches the level area at the bottom. At the time Regan bought, there was no visible channel of flowing water above ground either on Regan land or on the adjacent Spector land in the eastern drainage, although there was occasionally a trickle of water from just above the Regan pond into it. Both the Regan and Chapin ponds are located at the northern edge of the Class III wetland. There is also a "western drainage," described below, that drains into this same Class III wetland at a location west of the Chapin pond.

In 2008, Regan cleared approximately one-third of an acre below the house and planted a vineyard. In conjunction with this project a dirt pathway ran partway downhill away from the house and vineyard. There were trees and vegetation downhill from this construction pathway, and the evidence does not establish that runoff and/or sediment traveled from this location all the way downhill and into the Regan pond. Some runoff may have drained to the east of the Regan pond.

In the summer of 2008, Spector did extensive clearcutting of trees on the hillside below the Spector house down to Farm Road. Spector needed a permit to clear that much forested land (approximately three acres) but did not know it and did not have a permit. Part of the cleared area was formerly a gravel pit, and was shaped like a bowl. This bowl was immediately next to and above the Falardeau driveway.

By late summer or fall of 2008, Mr. Quenneville had retired and Stuart Hallstrom had become Road Commissioner. Spector's contractor, Louis Hallstrom, proprietor of Hallstrom Excavating and brother of Stuart Hallstrom, renewed Spector's request for the Town to move culvert #7 downhill to the east. Stuart Hallstrom, the Road Commissioner, who had had his own problems with culvert #7 and was concerned with the risk that stormwater from culvert #7 might flow toward an identified well site, agreed to the proposal as long as Spector paid for the excavating work the project would entail.

No advance notice of this proposed action was given to Regan or apparently to any other downhill owner, and it was not discussed in advance at a Selectboard meeting. It was standard practice for Mr. Hallstrom to discuss road and culvert issues with Selectboard member Mr. Vasseur, but this was apparently a matter of maintaining communication. While Selectboard authority was needed for capital expenditures, there is no evidence that Selectboard authority was needed for decisions made in the course of

ongoing maintenance of Town roads, culverts, and ditches.

At the time, the Town had no plan of its own to relocate culvert #7 for its own benefit, although the project would eliminate the troublesome maintenance called for at its location at the Spector driveway near the box ditch. The Town would not have proceeded with this had Spector not requested it and been willing to pay for the work to be done. Stuart Hallstrom, on behalf of the Town, chose the new location for culvert #7 at a spot that was free from obstructions and relatively accessible for maintenance purposes.

In October of 2008, culvert #7 was moved approximately 100-150 feet downhill (to the east) on Stagecoach Road, closer to the Regan land and closer to culverts #6 and #5. The Town provided a new 24" culvert and Spector paid Hallstrom Excavating for the excavation and equipment work. The Town provided supplemental "shovel work" in coordination with the work done by Spector's contractor. Spector was billed and paid $3,200 for the work.

The Regans saw the result, which was that the outlet pipe of culvert #7 in the new location appeared to direct water toward their land. Mr. Regan contacted a Selectboard member and went to a Selectboard meeting to protest. A Selectboard member on behalf of the Town attempted to mediate a solution and required Spector to install a stone-lined channel (called in this decision the New Channel) from the end of the outlet to carry the water from the outlet of the new culvert #7 downhill so it would stay on Spector land. This was done within a matter of days. The New Channel ran straight downhill near the boundary between the properties. Spector's contractor, at the direction of the Town, also installed a new large (24") culvert under Old Stagecoach Road about 30' east of the previous one to coordinate with the new location of culvert #7. These actions were not satisfactory to Regan, as Regan feared the result would still be more water diverted into Regan land.

In May of 2009, the first spring following the Spector land clearing and culvert relocation, a huge rainstorm occurred with devastating consequences for all parties. A culvert on a private driveway on Solomon property uphill from Stagecoach Road became plugged and overflowed and the water skipped over culvert #8, which would have carried it in a westerly direction down the large gully to the west, and instead the water rushed down the ditch on the uphill side of Stagecoach Road, resulting in overflow over Stagecoach Road. The volume of water from the storm itself, plus the effect of the failed Solomon culvert, sent large amounts of water down and over Stagecoach Road and into the ditch alongside Stagecoach Road and running through culvert #7 and plugging up the culvert under Old Stagecoach Road. Water gushed down the New Channel with such force and in such quantities that it threw the stones in the New Channel aside, dug into the soil causing severe erosion and exposing tree roots, and created a deep gash. The water continued downhill on Spector land, carrying stones and eroding soil as it moved

through woods in the eastern drainage on a path that crossed Falardeau and Chapin lands[7] before entering Regan land several feet above the Regan pond and dumping quantities of sediment and silty water into the Regan pond.

At the same time, water draining off the hillside across the breadth of Spector land rushed downhill across the now-cleared (previously wooded) portion of Spector land. The hillside was unstable from the previous year's clearing. Vegetation had not yet taken hold and the tree roots and other vegetation that had previously been there to slow and spread downhill drainage when the hillside was wooded was no longer there. The water went through the bowl like a funnel and rushed onto the Falardeau driveway, washing out the Falardeau driveway and the culvert at the junction of Farm Road. It was moving with such force and volume that it carried gravel and stones from Stagecoach Road and the Spector driveway and mud and dirt that it dislodged along the way. It overwhelmed the ditch along the side of Farm Road below the Falardeau driveway and moved in a wide sheet across the Chapin yard and driveway, taking out flower gardens and a stone wall. It continued down to the Chapin pond, leaving a sheet of mud and debris across the Chapin driveway and gardens and taking out plantings or killing them later as a result of the debris, and depositing mud and silty water into the Chapin pond at the bottom.

The water that ran down through the New Channel to the Regan pond was in the eastern drainage. The water that ran down through the cleared-out bowl through the Falardeau and Chapin properties down to the Chapin pond generally followed a course that has been described in this lawsuit as the western drainage.

Following this event, Spector reinstalled a new stonelined channel along the route of the New Channel at least twice, including installing fiber matting, but both such efforts failed, and in subsequent storms the water continued to overwhelm these erosion control devices, taking out the stones and matting, and it continued to cause erosion that brought sediment downhill with the flow that was deposited in the Regan pond. Spector also installed erosion control devices such as hay bales and stone check dams in the cleared-out bowl in the western drainage to try to slow the flow of runoff affecting Falardeau, Chapin, and Farm Road, but these devices also failed to control the runoff effectively, and water continued to run down through the bowl into the Falardeau property and driveway before proceeding down Farm Road and entering the Class III wetland near the Chapin pond. This pattern of flooding occurred in 2010 and 2011 as well as 2009.

The 2011 flooding in both the eastern and western drainages was not as severe as 2009, but still powerful enough to wash stones downhill in both drainages, causing damage, and taking out some of the installations that had been put in to try to handle the flow. Regan took a tractor down the Regan property in 2011 and cleared a path that disturbed the soil. There was some erosion such that some mud and sediment traveled downhill, and the water may have gone as far as the Regan pond but due to intervening

[7] There is some possibility that the deluge entered and exited Regan land also on its way downhill through the woods, but the evidence on this point is not conclusive.

hills and flats, it is unlikely that any sediment went as far as the Regan pond.

Flooding in the western drainage occurred again in 2012 and 2013, but not in 2014, nor in 2015 so far.

If the volume and speed of water in the western drainage is sufficient to overwhelm the ditch on the uphill side of Farm Road, it represents a risk of running over the Chapin property again as it did during the May 2009 storm. It is for that reason that Chapin seeks equitable relief in the form of a requirement on the part of the Town to run a new culvert across Farm Road to send the water downhill at an angle away from the Chapin land. The Town declines to do so. It is not clear whether that is due to cost or possible consequences of such action on other properties further downhill.

Susie Chapin ceased living in the Chapin house as a primary residence and Chapin hired a civil engineer to investigate the cause of the damage to the Chapin property and filed suit in October of 2010. In the spring of 2011, the Town hired its stormwater hydrologist and Spector hired an engineer to obtain a permit in conjunction with the unpermitted clearcutting and to design a plan for mitigating the stormwater runoff problem. In the fall, Regan hired a hydrologist to analyze the drainage flow on the hillside. Regan moved to a primary residence in South Burlington in 2011, but continues ownership and use of the property on a part-time basis. The Regan suit was filed in January of 2012. No maintenance work was done on the Regan pond after 2005. During the course of this lawsuit, the pipe that had been installed between the Regan and Chapin ponds was, upon investigation, found to be buried in the ground between the two ponds and was nonfunctional.

Spector's engineer Richard DeWolfe designed several stormwater mitigation devices for various parts of the property. Some were installed immediately on a temporary basis, some have been installed for permanent use, and some have been designed but not yet installed, pending the outcome of this lawsuit. These include:

- Stabilization of the soil in the area on Lot 6 that was clearcut and disturbed, including the bowl, by seeding and planting to create turf (completed)
- Installation of a stone-lined ditch along the upper edge of Old Stagecoach Road (completed) to carry water toward the west onto Lot 7
- Installation of a second culvert under Old Stagecoach Road at the end of the stone-lined ditch along the upper edge of Old Stagecoach Road, at approximately the westerly boundary of Lot 6 (completed)
- Planned installation of a level spreader (not yet installed) on Lot 7 to alter the flow from the ditch alongside Old Stagecoach Road so that it becomes a shallow sheet flow across and down Lot 7

The court has heard extensive testimony from experts with a variety of types of specialized training and experience. There is a fundamental disagreement between the experts about an essential fact, specifically: whether the water that flowed through old culvert #7 prior to 2004, and again between 2004 and the fall of 2008, drained toward the

west or to the east. The court heard highly detailed and extensive testimony from a number of witnesses on this subject. The court has not found any one individual's testimony to be relied on as the sole source of findings. Rather, the undersigned has worked to reconcile the testimony of all witnesses, consisting of a large volume of information and opinions, as much as possible and integrate testimony with other evidence such as photos and maps to try to understand where water flowed at different points in time, before and after various land development activities.

The only two people who actually observed the old culvert #7 closely and saw it functioning with water running through it before and after the addition of the box ditch in 2004 are Mike Quenneville and Stuart Hallstrom. The court finds credible Mr. Hallstrom's testimony about the exact location of old culvert #7 and its placement across the road at an angle rather than perpendicular. He was able to show it clearly to Mr. Heindel on the ground, and he was the most recent person to struggle with the problems of the culvert and box ditch at that location and the one who made the critical decision to move it based on familiarity and experience. The court finds credible Mr. Quenneville's testimony that before he installed the box ditch, the water from old culvert #7 sheeted out as it went downhill and dispersed in the vegetation for the most part although it was also directed to the west to some degree by the ditch and culvert on Old Stagecoach Road. The court also finds it credible that when Spector proposed to locate a house and driveway right at the location of old culvert #7, it was necessary for Mr. Quenneville, on behalf of the Town, to try to do something to assure that the outflow would not have a negative effect on either the Spector development or on the Fayston Farm properties below. While the alternatives were not ideal, his decision to direct the flow toward the east even further from the Spector driveway prior to it spreading out down the hill was a reasonable one, as was his decision to decline to move culvert #7 either uphill or downhill on Stagecoach Road.

The court further finds that Mr. Stuart Hallstrom's decision to move culvert #7 had a reasonable basis because of the ongoing problems he was having with it plugging up and overflowing as well as requiring tricky digging out in a tight spot with a 90-degree angle. The problem of what to do about culvert #7 was a highly challenging one for both Mr. Quenneville and Mr. Hallstrom, given the terrain, amount of runoff, configuration of developed parcels on the hillside, Spector's desire to build a large residence at the exact location of a difficult culvert, and the difficulty of predicting what the downhill effect of any change would be.

Regan's expert, Andres Torizzo, is a stormwater hydrologist whose opinion is that water that flowed through old culvert #7 before 2004 drained to the west, and that the Town's construction of the box ditch in 2004 significantly changed stormwater flow by sending water from the drainage area for culvert #7 (uphill of Stagecoach Road) into the eastern drainage rather than to the west. His opinion is that this effect was a significant change that was further exacerbated in 2008 to a lesser degree by the relocation of culvert #7, which not only sent the water further into the eastern drainage, but increased the amount of water because of the enlarged drainage area uphill from Stagecoach Road, although the 2008 change was not as significant as the 2004 change. In his opinion, the

only way to return to the natural drainage pattern is to relocate culvert #7 back to its location and configuration prior to the addition of the 2004 box ditch so that water from the drainage area above culvert #7 will drain to the west and proceed downhill to the large gully west of any of the parties as, in his opinion, it did before.

Chapin's expert, Donald Marsh, is a consulting civil engineer specializing in erosion control and stormwater. He testified credibly that the clearcutting on the Spector land significantly increased both the volume and rate of the water that came down the western drainage in 2009 and was the cause of the damage to downhill owners. He also testified credibly that grass has a mitigating effect on stormwater runoff but not as much as woods, which is a significant factor in controlling runoff and had significantly moderated the downhill drainage on Spector land prior to the clearcutting. As of the date of his testimony in February of 2015, the hillside was not yet fully stabilized following the clearcutting that was completed in 2008. He did not do a drainage analysis.

Spector's expert, professional engineer Richard DeWolfe, ran models that indicated that neither the addition of the box ditch in 2004 nor the construction of the Spector house nor the relocation of culvert #7 in 2008 have made a significant difference to the volume of water in the eastern drainage or to the amount of water that flows into the wetlands in the vicinity of the Regan pond. His opinion is that the move of culvert #7 increased the drainage land area to culvert #7 by 3.9 acres and correspondingly decreased the drainage land area to culvert #6 (which also drains onto the Regan land), resulting in an overall increase of 3.2% of water flow into the eastern drainage in a manner that does not have a significant effect on the Regan parcel. His opinion also is that all water from both the western and eastern drainages flows to the same large wet area at the base of the slope within which the Regan and Chapin ponds are located, meaning that in his opinion, none of the relevant water drained to the west before 2004, as Mr. Torizzo believes. Mr. DeWolfe's opinion is that all effects from the Spector clearing and 2008 relocation of culvert #7 can be managed effectively with the mitigation devices he has designed.

The Town's expert, Craig Heindel, a hydrologist (surface water) and hydrogeologist (subsurface water) is of the opinion that it cannot be determined exactly where water flowed from the old culvert #7 before the box ditch, as old culvert #7 was located in the extreme northwest corner of the eastern drainage and at least some of the water probably drained to the east, but in any event, the relocation of culvert #7 did not significantly change the amount of water affecting the Regan pond as the eastern drainage water ends up at a spot to the east of the Regan pond and the western drainage water ends up in a spot west of the Chapin pond and both of them contribute to the overall wetland area within which the Regan and Chapin ponds are both sited. He is also of the opinion that relocating new culvert #7 to its pre-2004 location would increase problems in the western drainage, particularly affecting the trouble spots where the Falardeau and Chapin driveways intersect with Farm Road.[8]

[8] Mr. DeWolfe testified that if culvert #7 were moved back to the pre-2004 location, necessary mitigation devices could not be installed on Spector land only, but would need

The court has considered the testimony of all parties and experts on this key issue of whether water that entered Spector land in 2004 at culvert #7 from a drainage area uphill from Stagecoach Road then drained to the west or to the east.

There are several factors that make deciding how stormwater (rainwater and snowmelt) once (or rather periodically) flowed down a steep hillside—one that has been developed over time resulting in periodic topographical changes—a complicated determination. To start with, there is a factual dispute about the exact location of culvert #7 before 2004 and about the angle at which it lay under Stagecoach Road and hence the angle of water flowing from its outlet, and where that water went. Expert witnesses derived their information from different sources, which showed different locations and configurations: different site plans showed culvert #7 as either perpendicular to Stagecoach Road or set at an angle under Stagecoach Road, and the water from culvert #7 could drain differently depending on the angle at which it entered the Stagecoach Road Lot. Most of the experts had not had the opportunity to observe culvert #7 before 2004, and testimony from those who had seen it was conflicting about where the culvert was in relation to both Stagecoach Road and the Stagecoach Road Lot and the location and length of the box ditch dug in 2004 and any changes that occurred when the Spector driveway was put in and a culvert put under it in the box ditch.

Another factor is that to determine the flow of water draining from uphill once it entered the Stagecoach Road Lot and the flow of water draining off Spector lands, most experts relied on topographical maps and/or site plans created for different purposes. Contour lines on such maps, some of which come from a State grid and some of which are interpolated from such grid lines, are likely to be accurate in a generalized direction, but they are not fine-tuned based on actual on-the-ground conditions derived from field work, and exact conditions on the ground can have an impact on which way water goes as it moves downhill. Hardly any witnesses had the opportunity to observe field conditions and water flow before 2004; by the time the issues in this case developed, the land in the vicinity of old culvert #7 had been significantly bulldozed and reshaped in connection with the development of the Spector residence on the Stagecoach Road Lot, so pre-2004 conditions, including land contours on the Stagecoach Road Lot, had disappeared.

Mr. Quenneville is the person who had the best opportunity for observation of pre-2004 conditions on the ground, as he personally worked with hillside drainage and culvert #7 for a period of years, and he is the one who made the decision to construct the box ditch once Spector had applied for a building permit. His testimony was that the water that came out of old culvert #7 went downhill and fanned out, and that the vegetation on Spector lands eased the absorption and flow of the water as it proceeded downhill. The facts also show that prior to the box ditch, Old Stagecoach Road angled to the west downhill with a ditch on the uphill side, which had the effect of directing some

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to be partially on land owned by others for which no legal authority exists. Because the decision rests on other grounds, this testimony has not been evaluated.

of the draining water to the west, some of which probably wound up in the western drainage and some of which may have traveled even further to the west.

Once the box ditch was installed, the water from old culvert #7 was directed more deliberately to the east, but even so a portion of it was shifted to the west along Old Stagecoach Road, whereas a portion of it went downhill through the culvert under Old Stagecoach Road and then dispersed in the vegetation. In short, both before and after the box ditch in 2004, the most credible evidence supports the conclusion that there was not a single linear path of drainage from the outlet of old culvert #7. Rather, from the outlet, some went directly downhill and was absorbed into the ground where it joined with stormwater on Spector lands and drained to both east and west; some went to the east, especially after the 2004 box ditch, where it fanned out and seeped downhill underground in the eastern drainage; and some was diverted on its downhill travel by Old Stagecoach Road and was shifted to the west and probably fanned out and either drained down the Spector land in the western drainage or drained further to the west toward the gully. The court cannot find that the installation of the box ditch resulted in an all-or-nothing shift of water drainage from west to east, or that there was a linear pattern of drainage exclusively to the west prior to the construction of the box ditch.

The evidence shows that from 2004 to 2008 there was dispersal of stormwater from above Stagecoach Road and from the Stagecoach Road Lot toward both the east (a combination of natural flow and the water directed by culvert #7 through the box ditch and under the Spector driveway as well as water directed through the culvert on Old Stagecoach Road) and west (water directed by the ditch on the uphill side of Old Stagecoach Road as well as possibly some flow off the western side of the Spector housesite). The water that flowed to the east went down a hillside with forestation and vegetation that was able to check the flow and prevent concentration of it into a channel for the most part. In the western drainage there were occasional events when surface water flow eroded portions of the Falardeau driveway and Farm Road.

The court finds that the extensive tree clearing on Spector land up to and in 2008 increased significantly the amount of runoff in the western drainage and was the cause of the extreme water damage to the Falardeau and Chapin properties.

The relocation of culvert #7 to a new location in 2008 increased the amount of water flowing from above Stagecoach Road through culvert #7 to some degree but not to the degree of being a major shift in direction. In May of 2009 a portion of the flow through culvert #7 at its new location was directed into the eastern drainage where it became concentrated and flowed above ground in a flow that became a channel and eroded Spector land and caused overflow damage to the Regan pond. (Previously that extra water had flowed through culvert #6 and onto Regan land where it was absorbed into the vegetated ground and drained downhill underground. It wound up in the wetlands at the base of the Regan land.)

The court further finds that the mitigation measures that have since been installed on Spector land in the eastern drainage have slowed and dispersed the water in the

eastern drainage to a very significant degree. There is a small residual effect that very occasionally there can be surface flow that ends up in the Regan pond and causes some headcutting near the pond but it is very minor, and not much more, if any more, than the trickle that was occasionally visible prior to 2008. While there has been a marginal increase in the amount of water flowing through culvert #7 in the eastern drainage as a result of the 2008 relocation, much of such flow enters the wetland further to the east of the Regan pond and the amount is not significant.

Regan claims that increased flow in the eastern drainage creates ongoing damage to the Regan pond and the land near the pond. Regan claims ongoing damage from Spector/Town-induced increased flow in the eastern drainage in two ways. One is in the course of the eastern drainage from where it enters Regan land to the pond, which is a distance of about 20 feet. During the heavy flow in 2009, the effect of the running water in this area was some "headcutting," in which running water eroded the underlying soil, cutting into the earth backwards up the stream and carrying the eroded sediment downstream. The evidence shows that this did occur in 2009 and probably to some degree afterward. Evidence in the form of photos introduced by Regan show that there has been some additional ongoing headcutting in the eastern drainage path just above the Regan pond, resulting in a depression near the pond that has become enlarged since 2008 and is now filling in with vegetation. However, any above-surface flow in that area is now only an occasional trickle. It may be sufficient to cause some occasional minor headcutting, but not to a significant degree.

In addition, the area of the headcutting is the same area that was built up and seeded as a firm lawn area by Viens in 2005. Given the path of the natural drainage into the "seepage wetlands" where the Regan pond is located, it is unknown whether the earth would have remained intact over time in any event, without any changes to culvert #7 in either 2004 or 2008. It might have, but it is also a reasonable inference from the evidence that it would have become naturally saturated from natural drainage forces, such as that occasionally the subsurface flow at the base of the eastern drainage would emerge from underground and cause a similar effect.

The evidence does not show, by a preponderance of the evidence, that the substantial cause of the current minor erosion of Regan land near the Regan pond was caused by the Spector/Town changes to culvert #7. The Regan pond was not a natural feature of the land, but a human-created structure; its creation disturbed the wetland in which it was dug in 2004–2005, and in order to preserve it in the condition in which the Regans discovered it in 2007, it would have required ongoing cleaning out and regular maintenance, much as lawns or gardens do.

The second form of claimed damage by Regan is that there has been increased flow of water into the area of the Regan pond that has caused the whole area to be constantly wet and has caused a significant number of mature tall trees in the vicinity to fall over, with the root ball holes filling in with standing water. The evidence supports Regan's observations that the area is wetter than it was in 2008 and that there have been many more "tip-ups" (fallen trees) than in 2008. The question is whether these effects

were caused by the Spector/Town changes to culvert #7.

The court finds credible the testimony of the Town's expert wetland ecologist Dori Barton about the normal processes that occur over time in a seepage wetland such as the one that exists surrounding both the Regan and Chapin ponds at the base of the Fayston hillside. The seepage from the hillside naturally causes the area to be wet and soils are typically shallow. The trees that grow have shallow root systems and, over time, it is common for trees to fall over and for new trees to establish themselves in the rotting trunks of the fallen trees, leaving the holes to fill in with water and creating a "pit and mound" environment. This is the predictable pattern in a seepage wetland such as the one where the Regan and Chapin ponds were developed in 2004–2005. The shallow-rooted trees in such a wetland are susceptible to ground shifts caused by disturbances such as the excavation of the Regan and Chapin ponds and related tree-clearing as the shallow root systems may become compromised; thus there is a likelihood that the construction of these ponds in 2004–2005 was a contributing factor to the increase in the number of tip-ups.

The fact that the ground is wet and an increased number of trees have fallen over from 2008 to 2015 is just as consistent with the normal pattern of wetlands evolution, particularly where there has been excavation disturbance, as it is with any claim that Spector and the Town have caused a substantial increase in the amount of water in the wetlands. The credible evidence is that these effects would be happening over time in any event as a result of natural forces and the creation of the two ponds. The evidence does not show, by a preponderance of the evidence, that any ongoing effect of the Spector/Town change in flow pattern in the eastern drainage has had a substantial effect on the wetland area located on the Regan land. With the passage of time into the future, the wetland on the Regan land will "heal" from the effects of the pond dig-out and return to swampy wetland, and the pattern of tip-ups and the pit-and-mound phenomenon will continue.

Conclusions of Law

Chapin has settled with Spector as to any money claim for past property damage to the Chapin property. Chapin opposes moving culvert #7 from its current location, and is satisfied that the engineering solution that has yet to be completed will sufficiently address water flow in the future if culvert #7 remains where it is now located. Since Chapin's claims for non-monetary relief are dependent on the outcome of Regan's claim for injunctive relief, Regan's claims will be addressed first.

REGAN CLAIMS

Regan seeks equitable relief requiring the Town and Spector to relocate culvert #7 back to the location and configuration it had prior to the installation of the box ditch in 2004. Regan also claims that the movement of culvert #7 to its current location amounts to a taking without compensation by the Town, as Regan's property allegedly is being used as a receptable for an injurious amount of water that it previously did not hold (this

is the inverse condemnation claim).

There is no disagreement among the parties as to the basic water law applicable to this case. As noted in the course of summary judgment proceedings, the law is as follows:

> The law regarding the natural drainage of surface waters may be summarized briefly. Upper and lower property owners have reciprocal rights and duties as to surface water drainage. The upper owner has the right to have the surface water pass to lower lands in its natural condition. The lower owner must accept the natural flow of such waters upon his land. As a general proposition, an upper property owner cannot artificially increase the natural flow of water to a lower property owner or change its manner of flow by discharging it onto the lower land at a different place from its natural discharge. But, in cases involving only increased flowage and not a change in the place of discharge, an upper owner may increase the flow as long as it causes no injury to the lower property. The burden is on the plaintiff to show that the defendant increased the natural flow and this increase resulted in injury to the plaintiff. "If this is established, the mere fact that flood conditions existed, or that the water was unusually high, will not protect the defendants." Of course the defendant will be liable only for that portion of the damage attributable to its increased flowage.
>
> In cases where the damage is repetitive or continuous in nature, injunctive relief is entirely appropriate to protect the lower landowner. In certain cases, however, an award of future damage might be appropriate in lieu of an injunction. A proper resort to equity does not always invoke the application of extraordinary or severe relief by way of a mandatory injunction. It is the duty of the court to consider and weigh the relative convenience or inconvenience, the relative injury sought to be cured as compared with the hardship of injunctive relief, and to consider whether injunctive relief can cure the problem. Such consideration may dictate instead substitution of future or anticipatory damages.

Swanson v. Bishop Farm, Inc., 140 Vt. 606, 610–11 (1982) (citations omitted), overruled on other grounds, *Soucy v. Soucy Motors, Inc.*, 143 Vt. 615, 619 (1983). An actionable injury must be "substantial"; the lower property owner has no freestanding right to fix the conditions on upper property at any particular point in time. *Kasuba v. Graves*, 109 Vt. 191, 207 (1937) (quarry may be pumped to the extent that it "can be done without substantial injury to the plaintiffs").

The facts are clear that at this time, the conditions on the ground of which Regan complains are due almost entirely to the natural evolution of a seepage wetland that was disturbed by and is incorporating over time the installation of two unnatural and unmaintained ponds. The box ditch and the precise location of the culverts on

Stagecoach Road have little, if any, effect on current conditions. Because the only Regan claim for relief at this time is for prospective injunctive relief, it is the current and prospective conditions that are under consideration.

Water that flows periodically through culvert #7 at its current location may be responsible for an occasional trickle into Regan's sediment pond at the tail end of a channel that was not there before. It causes a tiny bit of headcutting that may be depositing a small amount of additional sediment in the pond. Regan's sediment pond is, however, doing what it is supposed to: collecting sediment. Any increase in the rate at which sediment is collecting is far too minor to warrant an injunction. The area where the ponds are located is returning to swamp, and trees have tipped over, all in the natural course of things.

Regan has simply not proven any substantial, ongoing injury attributable to Spector or the Town. To the extent that any historical harm might have warranted damages, Regan no longer has any damages claims. Even if there were substantial ongoing harm, the evidence does not support the relief that Regan seeks: returning culvert #7 to its original location and configuration. It is not fully clear what the original location and configuration were. Given the development that has occurred over time, it is not fully clear what the consequences would be. It could well have significant negative effects on others as well as to parties to this case. What seems clear is that it would be highly unlikely to have positive impact on the Regan pond of any consequence, whereas there is a risk of substantial negative effects on others. There is not a basis for equitable relief in this case.

With no substantial injury potentially warranting equitable relief proven, it is unnecessary to address the Town's privilege defense and Regan's claim for inverse condemnation. Briefly, however, it is worth noting that the Town has the duty to maintain town highways, and siting culverts is within that duty. See 19 V.S.A. § 304(a). As against Regan's tort claim, any conduct by the Town was privileged and thus not actionable. *Ondovchik Family Ltd. Partnership v. Agency of Transp.*, 2010 VT 35, ¶ 11, 187 Vt. 556 (adopting Restatement (Second) of Torts § 211)); see also *Graham v. Town of Duxbury*, 173 Vt. 498, 499 (2001) (noting that "[b]uilding and maintaining streets, and the accompanying drainage system, are generally government functions, and no liability for injuries suffered as a result of such activities may attach"). The Town's decision to move culvert #7 to its current location was carried out as part of this function. Similarly, there is no "permanent physical occupation" or temporary incursions amounting to an easement of Regan's land. There has been no taking. *Ondovchik Family Ltd. Partnership v. Agency of Transp.*, 2010 VT 35, ¶¶ 17–18. Regan's argument that the Town had no privilege or immunity because the decision to move the culvert was made without express full selectboard approval is not persuasive. Neither the facts nor any law cited by Regan support the proposition that Quenneville or Hallstrom lacked authority to make the decisions they did absent express selectboard approval.

CHAPIN CLAIMS

Chapin and Spector settled Chapin's claim against Spector so long as the court declines to require culvert #7 to be moved from its current location. Because the court is not ordering any such equitable relief, there is no remaining claim against Spector.

Chapin also sought an order requiring the Town to put a new culvert under Farm Road. The facts are not sufficient to show the effect on downhill land and roads of such a relocation. Even if Chapin is correct that a new culvert would improve drainage as to the Chapin property, the claim fails because Chapin has come forward with no law to the effect that the Town can be compelled to install such a culvert in the circumstances of this case. Again, the Town generally has immunity with regard to how it handles stormwater in relation to its town highways. The decision not to install the culvert is within its discretion. There is no basis for injunctive relief against the Town.

ORDER

Plaintiffs are not entitled to relief. Defendants' attorneys shall prepare forms of judgment.

Dated at Montpelier, Vermont this 3rd day of September 2015.

Mary Miles Teachout

Mary Miles Teachout
Superior Judge

EXHIBIT
Chapin 4

5/19/12

Attachment 1