STATE OF VERMONT
ORANGE COUNTY, SS

TOWN OF NEWBURY

ORANGE SUPERIOR COURT

v.

FRANCIS MACE and
ROBERT MACE

DOCKET NO. S 172-92 Oe C

FINDINGS, CONCLUSION AND ORDER

This matter came before the court for final hearing on October 27, 1993, December 27, 1993, December 29, 1993, and January 18, 1994. Judge Mary Miles Teachout presided and Assistant Judge Patricia Davis was present during the entire hearing. Plaintiff was represented by Gavin Reid, Esq. Defendants were both represented by Charles Calley, Esq.

Findings of Fact

Based on the credible evidence presented, the court finds as follows:

1. Plaintiff is a Vermont governmental body in Orange County, Vermont, with certain powers and authority as conferred by law.

2. Defendant Francis Mace is a resident of Newbury, Vermont. He is co-owner with his son Chester of a homeplace and 72 acres of land in Newbury [hereinafter `Mace property']. He acquired the property with his wife in 1930 and has lived on it since. A few years ago he added Chester's name to the deed. He is 86 years old.

3. Defendant Robert Mace is the son of Defendant Francis Mace. He lives in a trailer on property immediately adjacent to the property of Francis and Chester Mace.

4. The Mace property is located on Town Highway 16, also called Mace Road. This is a Class III road for a distance of one-quarter mile from where it leaves Town Highway 4, a Class I highway, called Scotch Hollow Road. The

homestead on the Mace property is located approximately 20 feet off the end of the Class III segment of Town Highway 16. The Town snowplow turns around in the Mace driveway. Beyond the Mace homestead, Town Highway 16 continues as a Class IV road for a distance of 0.19 mile. Other landowners access their property from Town Highway 16 beyond the Mace homestead.

5. There is a junkyard located on the Mace property. At some point well before 1968, Francis Mace began accumulating junk motor vehicles and storing them on the property with other kinds of junk. His son Robert Mace also began accumulating junk motor vehicles and storing them on the Mace property. By 1969, there were approximately 200 junk cars on the Mace property along with automotive parts and tires. Since 1969, the number of vehicles has fluctuated but there has been up to 200 junk vehicles on the property on a regular basis. Of the maximum number of 200 cars, approximately 60 are owned by Robert Mace and the balance are owned by Francis Mace.

6. The Mace junkyard is not now and never has been operated as an income-producing junkyard business, although the Maces sell automotive parts occasionally and periodically sell junk vehicles to crusher operations. They have also given away auto parts. They have never advertized as a junkyard, have never hired any employees, and have never derived any significant income from junkyard activities. Robert Mace enjoys collecting old cars and automotive parts as a hobby: "It's like a rose garden to me."

7. Some of the Mace property is located less than 1,000 feet from Scotch Hollow Road (Town Highway 4), and thus is in the area that has been zoned as a medium density residential district since 1972. Some of the Mace property is more than 1,000 feet from Scotch Hollow Road and thus is and has been in the area zoned as a conservation district under Newbury zoning.

8. The junk vehicles on the Mace property are visible from Town Highway 16, Mace Road, as it passes through the Mace property, which is located on both sides of Town Highway 16, and from a road on the opposite hillside located about a mile away, particularly during the seasons when there are no leaves on the trees.

9. In the late 1960's, zoning came to Vermont; Chapter 117 of Title 24, the zoning enabling statute, was enacted in 1967 and became effective on March 23, 1968.

10. Also in 1968, on March 1st, James Hanna began to work for the State of Vermont in connection with junkyards and abandoned vehicles. He has worked for the State Agency of Transportation on junkyards continuously since then except for 8 months and 21 days in 1992. He carries in his mind the most extensive "institutional memory" on junkyards in the State of Vermont. The Agency's junkyard files have been purged at least twice over the years due to relocation of office spaces and personnel changes. The Agency has no records concerning the Mace junkyard prior to 1989. Mr. Hanna has no recollection as to any Agency involvement with the Mace junkyard before 1989.

11. In 1969, Subchapter 10 of Chapter 61 of Title 24, regarding regulation and licensing of junkyards, was enacted and made effective as of April 1, 1971. There have been subsequent amendments. In general, this law establishes minimum regulatory requirements for the establishment, operation, and maintenance of junkyards. It permits towns to enact more stringent regulations under local zoning ordinances. 24 V.S.A. Sec 2246. It contains enforcement provisions, including penalties for violations and authorization for towns to enforce by seeking an injunction in superior court. 24 V.S.A. Sec 2281 & 2282. Applicants may become authorized to operate a junkyard by

obtaining a license from the state and a certificate of approval for the location of the junkyard from the designated local town officials. 24 V.S.A. §§ 2242, 2251 & 2261. In the late 1960's, after this law was enacted, it was relatively easy for owners of existing junkyards to obtain licenses from the state to continue operation of existing junkyards. Sometime in 1969 or 1970, one of the Maces, other than Francis, applied at the town level for approval of a junkyard. The application was denied. None of the Maces has ever obtained a junkyard license from the State.

12. On January 15, 1969, Newbury adopted an interim zoning ordinance to be effective for two years. It applied to the commencement of land development projects during the interim period.

13. On May 12, 1972, Newbury adopted its first complete zoning ordinance. It did not authorize a junkyard as a permitted or conditional use within any zoning district. Non-conforming uses at the time of the effective date of the ordinance were permitted to be continued indefinitely, except that non-conforming junkyards located in a residential district were required to be terminated within three years (Plaintiff's 2, sec. 2.7). The Mace property is located partly in the medium density residential district and partly in the conservation district. Some of the junk cars are in the medium density residential district and some of them may also be in the area zoned as a conservation district.

14. Neither the town nor the state attempted to enforce any zoning regulations or junkyard statutes against the Mace junkyard between 1970 and 1989, and the junkyard was in continuous use throughout that period.

15. In February 1989, James Hanna visited the Mace junkyard with Newbury Selectman William Ellithorpe. Francis Mace and Chester Mace were also present

for the visit. It was Mr. Hanna's first visit to the Mace junkyard. The State Agency of Transportation had never issued a license for the Mace junkyard. Mr. Hanna informed all those present that for the State to issue a license, application must be made to the State Agency of Transportation. He further informed them that if the Town of Newbury had zoning, the application must be accompanied by a Town certificate of approval of location or a certificate that the junkyard had been in existence before zoning and was permitted to continue in operation as a nonconforming use. Since that visit, no application has been submitted to the Agency of Transportation for a license for the Mace junkyard.

16. On March 6, 1989, following the visit, Mr. Hanna wrote to Mr. Ellithorpe and the Newbury Selectmen setting forth in detail the requirements that would have to be met for the Maces to maintain the junkyard legally. He suggested that it would be beneficial for the Selectmen, the Zoning Board of Adjustment, and the Planning Commission to meet together with Mr. Mace to discuss the matter, as the issue of whether the Mace junkyard was "grandfathered" as a nonconforming use could involve determinations by these other boards.

17. In the summer of 1989, the Maces were invited to a meeting with the Selectboard and the Planning Commission to address the junkyard issue. The meeting involved other junkyards in the town and was publicized in local media. The Town was attempting to bring all junkyards in the Town, which included several others as well as the Mace junkyard, into compliance with the law. Robert Mace attended this meeting. His interpretation of the information presented at the meeting was that the application of anyone who applied would be denied. He was upset and left the meeting. He felt it would not be

worthwhile to submit an application.

18. In July of 1990, the Selectmen posted a public notice that the Town intended to take steps to enforce laws regulating junkyards. The notice referenced the Junkyard Statute and the Newbury Zoning Ordinance. It directed people to the Town Clerk's office for applications and copies of laws, and stated that questions could be raised at the regular meetings of the Planning Commission. It further stated that persons not complying by October 1st, 1990 would be subject to applicable fines and court proceedings.

19. In November of 1990, the town took steps to begin enforcement proceedings against the Maces. Town Attorney Gavin Reid wrote to Francis and Chester Mace. In December of 1990, Francis and Chester Mace engaged the services of Attorney John Morale to represent them in connection with the enforcement issues raised by the town over the junkyard. Mr. Morale wrote to the town attorney on December 13, 1990.

20. At some point before April 1, 1991, Newbury revised its zoning regulations. The ordinance adopted, which remained in effect until August 25, 1992, continued the requirement that junkyards in a residential district be terminated within three years; otherwise, it permitted the continuation of non-conforming uses and established regulations affecting changes in non-conforming uses. (Plaintiff's 26, sec. 2.5)

21. On June 22, 1992, Bruce Allsop, Newbury Zoning Administrator, sent a letter to Francis Mace by certified mail, return receipt requested. A copy was sent to Robert Mace by certified mail, return receipt requested, although the letter was addressed to Francis Mace only and not to Robert Mace. Chester Mace acknowledged receipt of the letter to Francis Mace on June 24, 1992 and Francis Mace received the letter from Chester. Robert Mace acknowledged receipt of the

letter on June 26, 1992, and gave it to Francis Mace. The letter stated that its purpose was to give notice to Francis Mace that he was in violation of specified Newbury zoning ordinance provisions, that he was in violation of the state junkyard statute because he was operating a junkyard without a permit, and that he was in violation of an additional provision regulating the disposal of junked vehicles (24 V.S.A. Sec 2271). It stated that a copy was being provided to Robert Mace so that he would be informed since he may be involved in some of the activities on the property. The letter stated Francis Mace had seven days to correct or cure the violations or he may be subject to enforcement including injunction and fines. It also stated that "the only way to correct the violations will be by a discontinuance of operations and removal of the unregistered junk vehicles or by obtaining proper permits for the operation." It further stated that he would not be entitled to any additional warning or notice, and that the Selectboard was prepared to proceed with enforcement. It did not specifically state that Mr. Mace had a right to appeal the decision of the zoning administrator as to the violation of the zoning ordinance, and that if he did not do so within fifteen days, he would be foreclosed from asserting his defense that the junkyard operation was legal as a non-conforming use continued from before the existence of zoning. Similar letters were sent to a total of approximately eight junkyard operators in the Town of Newbury against whom the Town intended to proceed.

22. On August 25, 1992, the Newbury Zoning Regulations were revised again, and a new zoning ordinance came into effect. This ordinance was silent as to the continuation of prior non-conforming uses.

23. On September 17, 1992, this action for enforcement was filed. During the trial, the Town withdrew its claim for enforcement on the basis of

violation of the statute regulating disposal of junked vehicles. The suit proceeded as an enforcement action for violation of zoning ordinances, and for enforcement of the state statute regulating junkyards.

24. On November 30, 1993, after the trial in this case had begun, the Newbury Zoning Regulations were revised yet again, and another zoning ordinance came into effect.

25. The Defendants have continued to maintain their junkyard at the same level and on the same basis continuously since 1970. Between 1989 and 1993, the number of junk cars placed on the west side of Town Highway 16 (Mace Road) on the Mace property increased. There are now approximately 25 vehicles in that location. Previously, the junk cars had been located primarily on the east side of Town Highway 16, Mace Road. During the past two years, Robert Mace has disposed of approximately 30 vehicles. There is ongoing turnover of the specific vehicles located on the Mace property. The evidence does not establish that there has been an overall increase in the number of cars or the extent of the junkyard over the years.

Conclusions of Law

Plaintiff Town of Newbury seeks to prohibit further operation of the "Mace junkyard" on two grounds. First, it contends that the maintenance or operation of the junkyard constitutes a violation of the Newbury Zoning laws. Second, it asserts that the junkyard, being unlicensed, is in violation of the State junkyard statutes.

Defendants vigorously oppose the Town's requested relief. The general thrust of their position is that their usage of the property as a junkyard pre-dates the existence of any zoning ordinance or state law which would prohibit a junkyard on the site. Specific legal grounds for opposition are

addressed herein.

I. ENFORCEMENT OF TOWN ZONING

As noted in the findings, defendant Francis Mace received formal notice from the Newbury Zoning Administrator that the use of the property as a junkyard was a violation of the Town Zoning Ordinance. Francis Mace is an owner of the relevant property. Robert Mace received a copy of the notice of violation which was sent to Francis Mace, although the notice was not addressed to him. Robert Mace does not have an ownership interest in the real estate on which the junkyard is located.

An action to enforce a zoning ordinance against a purported violator may not be brought unless and until that person has received seven day's notice via certified mail. 24 V.S.A. §4444(a). That notice must state that the violation exists and that the person has seven days to cure the violation. The letter to Francis Mace contained this information. Id. Each day that a violation is continued constitutes a separate offense. Id. A person who violates a zoning ordinance, and who has received the appropriate notice detailed above, may be fined up to fifty dollars for each offense. Id.

A person who is aggrieved by an action taken by the zoning administrator, including a notice that they are in violation of an ordinance, may appeal to the town zoning board of adjustment. 24 V.S.A. §4464(a); Town of Charlotte v. Richmond, 158 Vt. 354, 356 (1992). An appeal from a decision or action by the zoning administrator must be filed within fifteen days of the administrator's decision or action. 24 V.S.A. §4464(a).

In the realm of zoning law, parties are strictly bound by their actions or failures to act. Town of Sandgate v. Colehammer, 156 Vt. 77, 84 (1990). The zoning appeal statute, 24 V.S.A. §4472, provides, in relevant part:

> [T]he exclusive remedy of an interested person with respect to any decision or act taken, or any failure to act, under this chapter or with respect to any one or more of the provisions of any plan or bylaw shall be the appeal to the board of adjustment under section 4464 of this title, and the appeal to a superior court from an adverse decision upon such appeal under section 4471 of this title.

24 V.S.A. §4472(a). That section continues:

> Upon the failure of any interested person to appeal to a board of adjustment under section 4464 of this title, or to appeal to a superior court under section 4471 of this title, all interested persons affected shall be bound by such decision or act of such officer... and shall not thereafter contest, either directly or indirectly, such decision or act... in any proceeding, including, without limitation, any proceeding brought to enforce this chapter.

24 V.S.A. §4472(d). The preference for finality is so strong that this limitation applies even where the action, upon later examination, turns out to have been utterly incorrect or lacking in legal support. Levy v. Town of St. Albans, 152 Vt. 139, 142 (1989)

In the case of Town of Charlotte v. Richmond, the Town zoning administrator gave the defendants a notice "that their used car business violated the Charlotte zoning ordinance and ordered them to cease its operation." 158 Vt. 354, 355 (1992). The defendants did not appeal to the zoning board of adjustment from this notice. 158 Vt. at 357. When they failed to cease operation, the Town brought an enforcement action against them in superior court. 158 Vt. at 355. In that court action, the defendants sought to offer the defense that their car business had existed since before the Town's zoning ordinance, such that it was 'grandfathered' as a "nonconforming use." 158 Vt. at 356. The Vermont Supreme Court, referring to the provisions of 24 V.S.A. §4472, held that the defendants' failure to appeal from the zoning administrator's notice of violation deprived the trial court of jurisdiction to consider the defense of a pre-existing nonconforming use. 158 Vt. at 356-57.

The Vermont Supreme Court has continued to apply this principle, and has

recently applied it to facts which are extraordinarily similar to those in the case at hand:

> [D]efendants argue that the junkyard was a preexisting nonconforming use and therefore not in violation of the zoning laws. We do not rule on this issue because we consider that the trial court did not have subject matter jurisdiction to consider the defense of a nonconforming use. .... To contest the administrator's determination that the junkyard is in violation of town zoning regulations, defendants were required to appeal [from] the original notice [of violation].... Having failed to appeal that notice, their affirmative defense [of existing nonconforming use] is barred.

Reid v. Town of Charlotte, Docket No. 91-605, slip op. at 3 (Feb. 12, 1993). Thus, in the present case, Francis Mace, having failed to appeal from the notice of violation which was sent to him, is now bound by his failure to appeal. He cannot now defend this enforcement action with a claim that his junkyard was an existing nonconforming use. The time to raise that issue was by a timely appeal of the notice of violation. The effect of the failure to appeal the notice of violation was to establish, as a matter of law, that the Mace junkyard is a violation of the Newbury Zoning Ordinance, at least as to Francis Mace. Since co-owner Chester Mace is not a defendant in this case, it is not necessary to consider whether such determination also applies to him.

The defendants assert that various constitutional infirmities require that the court allow them to present their affirmative defenses. First, they argue that the notice of violation issued by the zoning administrator violated due process by not warning that any affirmative defenses would be barred upon a failure to appeal. Second, they argue that the zoning statutes violate due process by not mandating that such a warning be given. Third, they argue that these infirmities in the particular notice and the general statues have resulted in an unconstitutional taking of property without due process of law. They also argue that one of the revisions to the Newbury Zoning ordinance, by

eliminating a provision allowing for existing nonconforming uses, operates as an unconstitutional taking of property without due process.

The court first turns to the claim that the notice of violation, by not warning that a failure to appeal would prevent defendants from later offering any affirmative defenses, amounts to a deprivation of due process. Defendants correctly state the general proposition that the fundamental cornerstones of procedural due process are notice and the opportunity to be heard. Vermont Real Estate Commission v. Martin, 132 Vt. 309, 311 (1974). Defendants did receive notice that the Town considered them to be in violation of the zoning ordinance. Notice is sufficient, for purposes of due process analysis, if it adequately informs the parties of the matters at issue. In re Vermont Health Service, 115 Vt. 457, 460 (1990). The only question, then, is whether defendants were provided with an adequate opportunity to be heard.

The defendants did have a right to appeal the decision of the zoning administrator. 24 V.S.A. §4464. On such an appeal, they were automatically entitled to a hearing as a matter of right. 24 V.S.A. 4467 (mandating hearing upon appeal). Such a hearing was the proper occasion to raise their affirmative defense. Since they did not appeal, they did not have such a hearing. Defendants have not advanced any authority supporting the idea that the defendants were deprived of due process because in order to receive a full hearing they had to respond to the notice of violation.

Procedural due process in the administrative context is a matter of balancing competing state and private interests; in assessing a claim of a violation of procedural due process,

> [The] court must identify the private interest implicated, the risk of harm posed by an erroneous decision, "the probable value of additional procedural safeguards," and the governmental interest, including any financial or administrative burden presented by such

alternatives.

In re G.K., 147 Vt. 174, 179 (1986), quoting Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). "The requirements of due process do not demand an ideal system of justice-- with provision against every hardship that may befall." Vermont Electric Power Co. v. Anderson, 121 Vt. 72, 85 (1958).

The evidence establishes that as of June 1992, Francis Mace had been engaged in addressing all issues as to the legality of his junkyard with town and state officials for over three years. He had been represented by an attorney for a year and a half. The form of notice clearly specified that it constituted formal action. The notice specified the provisions of the state zoning statute that Francis Mace was charged with violating. That statute itself contains the provisions that require an appeal within 15 days from action by the zoning administrator and establish the right to a hearing. All Francis Mace or his attorney had to do was refer to the statute cited to be able to determine that he needed to respond within 15 days in order to get a hearing.

Every presumption is to be indulged in favor of the constitutionality of a statute; a statute will not be declared unconstitutional "without clear and irrefragable evidence that it infringes the paramount law." In re Neglected Child, 129 Vt. 234, 240-41 (1971). Here, there is not a sufficient basis to conclude that the effect of the statute was to deprive defendants of an opportunity to exercise their opportunity to be heard. Defendants have not shown that due process mandates a more elaborate form of notice and warning.

Defendants' next claim is that the statute itself has resulted, in this particular case, in a taking of property without due process of law. A constitutional challenge may only surmount the limitations of 24 V.S.A. §4472

(barring any challenge not brought via timely appeal) if that constitutional challenge is a challenge to the zoning law as generally applied, and not if the challenge is a "constitutional attack on the application of the [law] to... particular facts." Town of Charlotte v. Richmond, supra, 158 Vt. at 357. In other words, an assertion that a statute or ordinance results in a "taking" in a particular instance is not sufficient; the law must be constitutionally infirm in its general application. Defendants' argument is apparently that, because the statute does not require that a notice of violation include a warning that a person must appeal the notice within 15 days to receive a hearing or the person will be bound by the zoning administrator's determination and lose any rights to further contest the finding of violation, the statute permits a "taking" without due process. Defendants have not advanced any authority to support this general proposition, nor have they demonstrated that the general application of this law produces such a constitutional infirmity. As a practical matter, the notice gave defendant Francis Mace all the information that he needed to obtain a hearing to protect his property interest. He failed to take advantage of the opportunity.

Defendants' final constitutional argument is that the omission of a "nonconforming use" provision in one of the more recent Newbury zoning ordinances amounts to a taking of property without due process. As defendants are barred from raising their affirmative defenses on account of their failure to file a timely appeal from the notice of violation, this issue is not before the court. As previously noted, defendants' failure to file a timely appeal conclusively establishes, as a matter of law for purposes of this action, that their junkyard is in violation of the Newbury zoning ordinance. Town of Charlotte v. Richmond, supra, 158 Vt. at 357 ("Having failed to appeal [from

the notice of violation issued by the zoning administrator] defendants were bound by his decision."). Nonetheless, it should be noted that, at the time of the zoning administrator's action in June 1992, the applicable zoning ordinance did include a provision permitting non-conforming uses in conservation districts and providing for three-year phaseout in residential districts. It was during the period from August 25, 1992 to August 26, 1993, that the Newbury zoning ordinance in effect had no such provision.

For all of the foregoing reasons, the court concludes that defendant Francis Mace is in violation of the Town of Newbury Zoning Ordinance. Robert Mace does not hold an ownership interest in the Mace property, and as an occupant/user he was not properly served with a notice of violation explicitly addressed to him; therefore, the court concludes that he is not liable for the zoning violation.

The Town is entitled to receive a fine for each day of the zoning violation. 24 V.S.A. §4444(a); Town of Sherburne v. Carpenter, 155 Vt. 126, 133 (1990). That fine may not exceed $50.00 per day of violation, but there is no minimum daily amount. 24 V.S.A. §4444(a). Francis Mace received notice of the violation from the town zoning administrator on June 24, 1992. He had fifteen days to appeal that decision. 24 V.S.A. §4464(a). His failure to take that appeal rendered it uncontestable that he was and is in violation of the zoning ordinance. 44 V.S.A. §4472 (a); Reid v. Town of Charlotte, Docket No. 91-605, slip op. at 3 (Feb. 12, 1993). Accordingly, as of July 9, 1992, it was established that the Mace junkyard was in violation of the zoning ordinance. The court considers one dollar per day of violation to be an appropriate sum for the fine. Accordingly, Francis Mace is liable to the Town of Newbury for one dollar per day for each day between July 9, 1992 and whatever day he

complies with the provisions of this order which require him to cease operation or maintenance of the junkyard.

II. ENFORCEMENT OF STATE JUNKYARD STATUTES

The plaintiff Town's second basis for action against the defendants lies in its assertion that defendants are in violation of those portions of the Vermont statutes which require licensing of junkyards. Specifically, 24 V.S.A. §2242 provides[1]:

> A person shall not operate, establish or maintain a junkyard unless he:
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> (1) Holds a certificate of approval for the location of the junkyard; and
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> (2) Holds a license to operate, establish or maintain a junkyard.

The "certificate of approval" must be obtained from the legislative body of the town where the junkyard is to be located, or, if that town has zoning, the zoning board of adjustment of the town. 24 V.S.A. §2251. The "license" for the junkyard must be obtained from the State Transportation Board. 24 V.S.A. §§2261-62; 2241(2). A person who violates the state junkyard statutes "shall be fined not less than $5.00 nor more than $50.00 for each day of the violation." 24 V.S.A. §2282.

For purposes of the state statutes regulating junkyards, a "junkyard"

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[1]. A town may pass specific regulations, including but not limited to zoning ordinances, which regulate junkyards more strictly than the state statutes. 24 V.S.A. §2246. In the event that a Town does pass such stricter regulations, the specifics of those regulations control over the general provisions of the state statutes. Id. In the present situation, the relevant Newbury zoning ordinances, while not making particular provisions for junkyards, also do not set forth specific controls on junkyards. Accordingly, the state regulations are not superseded by the ordinances of Newbury; the two regulatory schemes co-exist and address related but distinct aspects of junkyards.

includes:

> any place of outdoor storage or deposit, not in connection with a business, which is maintained or used for storing or keeping four or more junk motor vehicles which are visible from any portion of a public highway.

24 V.S.A. §2241(7). In turn, a "junk motor vehicle" is:

> a discarded, dismantled, wrecked, scrapped, or ruined motor vehicle or parts thereof, or one other than an on-premise utility vehicle which is allowed to remain unregistered for a period of ninety days from the date of discovery.

24 V.S.A. §2241(6).

The junkyard statutes also provide:

> Notwithstanding that this subchapter is established under the police power for the general welfare and public good, just compensation shall be paid to an owner affected for his reasonable and necessary costs incurred for the landscaping or other adequate screening, or the removal, relocation, or disposal of the following junkyards affected by this subchapter:
>
> (1) Those lawfully in existence on July 1, 1969.
>
> ....

24 V.S.A. §2264.

In the present case, the evidence indicates that the Mace property contains, and has contained, at all relevant times, well in excess of four discarded, dismantled, wrecked, scrapped, or ruined motor vehicles, and/ or parts therof. The evidence also indicates that this storage operation is visible from Town Highway 16 ("Mace Road"). During seasons when the trees lose their leaves, the junk vehicles on the Mace property are also visible from a public road which crosses a hill some distance from the Mace property. Accordingly, the Mace junkyard fits the definition of a junkyard for purposes of the state statutes regulating such operations. As both Francis and Robert Mace are the owners of vehicles that are a part of this junkyard, the court considers Francis and Robert to each be "operators" of the Mace junkyard, even

though only Francis owns the land on which the operation is situated. Neither Francis nor Robert Mace possesses a current license for the junkyard, and neither has possessed a license at any time since 1989.

Francis and Robert Mace each seek exemption from the State licensing requirements, on the grounds that the existence of their junkyard pre-dates the current state regulatory scheme. Their apparent position is that the existence of their junkyard prior to the passage of the regulatory statutes exempts them from any need to comply with those portions of the statutes which require a license for the operation of a junkyard. They base this argument on their general assertion that the state junkyard statutes should be viewed as applying only to junkyards created after the passage of the statutes, but not to any junkyards already in existence prior to the statutes. They refer the court to no particular authority for this contention, save for an attempt to rely, by analogy, upon 24 V.S.A. §4408, the portion of the zoning enabling statutes which defines a preexisting nonconforming use in the zoning context. 24 V.S.A. §4408 applies to zoning matters, and does not apply to the state statutes regarding licensing of junkyards. As such, it offers no support for defendants' arguments.

24 V.S.A. §2242 explicitly states that a person "shall not operate, establish, or maintain a junkyard" without a certificate of approval and a license for that junkyard. Even though the existence of the junkyard may have pre-dated the state licensing laws, the operation and maintenance of the junkyard are ongoing activities which have continued since the passage of the junkyard statutes. It is clear from the evidence presented by the defendants themselves that the condition of the junkyard has not been static since 1969: new cars have been added while others have been disposed of. Accordingly, the

court concludes that Francis and Robert Mace have indeed "operated" and "maintained" a junkyard, and that they have done so without a license at least since February of 1989, the date when the property was visited by James Hanna and William Ellithorpe.[2]

The Town of Newbury is entitled to receive fines for each day that Robert and Francis Mace operated an illegal unlicensed junkyard; these fines may not be less than $5.00 nor more than $50.00 per day of violation. 24 V.S.A. §2282. The evidence is clear that the Mace junkyard has not been licensed since at least late February of 1989, when the Mace property was visited by James Hanna and William Ellithorpe. As the exact date of the February 1989 visit is not clear from the evidence, the court shall treat the unlicensed operation of the junkyard as running from March 1, 1989. The court establishes the minimum of five dollars per day as the appropriate fine. Francis Mace and Robert Mace were each involved in the operation and maintenance of the Mace junkyard during these periods. Accordingly, Francis and Robert Mace are jointly and severally

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[2] The defendants' pleadings and memoranda insist that they are entitled to compensation in return for the Town's plans to force removal of their junkyard. Though this issue was not explored by the parties at trial, it is raised in pleadings. A party is only entitled to compensation if their junkyard was in compliance with the law as of July 1, 1969, the date that the present statutes came into effect. 24 V.S.A. §2264(1). Defendants appear to claim that no junkyard laws or regulations existed prior to the present law, and, from this, they assert that their use must have been "per se" lawful in the absence of any regulations to the contrary. The court notes, however, that there apparently were other regulatory provisions in existence prior to the passage of the statutes which took effect in 1969. See Reid v. Town of Charlotte, supra, slip op. at footnote on p. 1, (noting that prior to 1969, the requirement that a junkyard have a certificate of approval was codified at 24 V.S.A. §2069); see also Historical Notes to repealed sections 24 V.S.A. §§2061-2066 and 2067-2081 (noting that earlier statutes regulating junkyards date back to the Vermont Statutes of 1947, and that at least some prior junkyard laws derive from public laws passed during the 1930s). The court concludes that a party seeking compensation under 24 V.S.A. §2264(1) bears the burden of showing that their junkyard was in legal existence as of 1969. The defendants have not done so in the present matter. Accordingly, they are not entitled to compensation for any impacts of the regulatory scheme.

obligated to the Town of Newbury in an amount equivalent to five dollars per day for each day between March 1, 1989 and whatever day they cease operation or maintenance of the Mace junkyard.

Order

1.) Both Francis and Robert Mace are hereby ORDERED and ENJOINED from continuing to keep on the property of Francis Mace any "junk motor vehicles" constituting a "junkyard", as each term is defined by 24 V.S.A. §2241. Francis and Robert Mace have thirty days from the date of this decision to remove from the Francis Mace property all "junk motor vehicles" constituting a "junkyard" under 24 V.S.A. §2241. Failure to do so shall be treated as contempt of court, subjecting defendants to the remedies available therefor.

2.) Francis Mace is hereby also ENJOINED from operating or maintaining a junkyard on the property he owns in Newbury, either directly or indirectly through any other person.

3.) Francis and Robert Mace are jointly and severally liable to the Town of Newbury in an amount equal to five dollars per day for each day between March 1, 1989 and whatever day they remove from the Francis Mace property any and all "junk motor vehicles" constituting a "junkyard" for purposes of 24 V.S.A. §2241.

4.) Francis Mace is liable to the Town of Newbury in an amount equal to one dollar for each day between July 9, 1992 and whatever day he ceases to operate or maintain a junkyard on his property.

Dated this 9th day of May, 1994, at Chelsea, Vermont.

Mary Miles Teachout

Mary Miles Teachout, Presiding Judge

Patricia R Davis

Patricia R. Davis, Assistant Judge