

Note from the Professor: This case is about private nuisance and the aesthetics of property. As you review the case, look for what the court says about whether interference with aesthetics and potential diminution in property value as a result, is a substantial interference with the use and enjoyment of property.

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2017 WL 129041

Supreme Court of Vermont.

Nancy Myrick

v.

Peck Electric Company, d/b/a Peck Solar, Encore Middlebury Solar I, LLC and Encore Redevelopment, LLC

Dale Hastings and Jess Whitney

v.

Solarcommunities, Inc., d/b/a Suncommon, Sun CSA 6, LLC and Helios Solar, LLC

Nos. 2016–167 & 2016–169

1/13/2017

For 120 years, Vermont has recognized that the unsightliness of a thing, without more, does not render it a nuisance under the law. See *Woodstock Burial Ground Ass’n v. Hager*, 68 Vt. 488, 35 A. 431 (1896). These consolidated cases require us to revisit whether Vermont law recognizes a cause of action for private nuisance based solely on **aesthetic considerations**. Appellants, a group of landowners from New Haven, appeal from the trial court’s grant of summary judgment to defendants, two solar energy companies. The landowners filed suit after their neighbors leased property to the solar companies for the purpose of constructing commercial solar arrays. According to the landowners, the solar arrays constitute a private nuisance because they have negatively affected the surrounding area’s rural aesthetic, causing properties in their vicinity to lose value. ... We uphold Vermont’s long-standing rule barring private nuisance actions based upon aesthetic disapproval alone. Accordingly, we affirm.

We review a trial court's decision to grant summary judgment under a de novo standard of review. Summary judgment is appropriate when there are no disputed material facts and the moving party is entitled to judgment as a matter of law. *Id.* There are no disputed material facts here. The sole question on appeal is whether Vermont law recognizes a private nuisance cause of action for alleged interference with property resting solely upon aesthetic considerations. Landowners argue the superior court erred in granting summary judgment for two reasons.

Landowners' primary argument is that "[t]he ordinary comfort of human existence, as conceived in today's society, requires application of well-established nuisance law to claims based on aesthetics." ... Additionally, landowners argue that aesthetic "injury to the sensibilities and ordinary comfort" of the average person is cognizable as nuisance and compensable by reference to diminution in property value. We address each argument in turn.

"The law of private nuisance springs from the general principle that it is the duty of every person to make a reasonable use of his own property so as to occasion no unnecessary damage or annoyance to his neighbor." In **Vermont, a private nuisance is defined** as an "interference with the use and enjoyment of another's property" that is both "unreasonable and substantial." Whether a particular interference is unreasonable is a question for the factfinder, and "[t]he standard for determining whether a particular type of interference is substantial is that of 'definite offensiveness, inconvenience or annoyance to the normal person in the community.' " A claim for nuisance that cannot establish that a complained-of interference is either unreasonable or substantial must fail as a matter of law.

An unattractive sight—without more—is not a substantial interference as a matter of law because the mere appearance of the property of another does not affect a citizen's ability to use and enjoy his or her neighboring land. A substantial interference requires some showing that a plaintiff has suffered harm to "the actual present use of land" or to "interests in having the present use of the land unimpaired by changes in its physical condition." Restatement (Second) Torts § 821D cmt. b. A landowner's interest "in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress. The latter is purely an interest of personality and receives limited legal protection," since emotional distress is not an interference with the use or enjoyment of land. For example, there is a difference between, on the one hand, a complaint that solar panels are casting reflections and thereby interfering with a neighbor's ability to sleep or watch television and, on the other hand, the landowners' complaint in this case—that the solar panels are unattractive. The former involves a potential interference with the use or enjoyment of property, while the latter involves emotional distress.

Additionally, a complaint based solely on aesthetic disapproval cannot be measured using the unreasonableness standard that underpins nuisance law. This is because unlike traditional bases for nuisance claims—noise, light, vibration, odor—which can be quantified, the propriety of one neighbor's aesthetic preferences cannot be quantified because those preferences are **inherently subjective**. The appellants find the solar panels unsightly, but other equally reasonable people

may find them attractive. And while the landowners may be frustrated by the appearance of solar arrays adjacent to their property, “they surely can see the converse mischief (and infringement) on a homeowner’s property rights if homeowners could prevent their neighbors from construction deemed unattractive.”

Likewise, recognizing aesthetic nuisance would transform nuisance law “into a license to the courts to set neighborhood aesthetic standards.” “In our populous society, the courts cannot be available to enjoin an activity solely because it causes some aesthetic discomfort or annoyance. Given our myriad and disparate tastes, life styles, mores, and attitudes, the availability of a judicial remedy for such complaints would cause inexorable confusion.” The judicial branch is ill-suited to be an arbiter of style or taste, and given the subjectivity of aesthetic preferences, they must remain the province of legislative decision-making in the form of zoning laws and, in specific instances, restrictive covenants that the courts are competent to interpret and apply. ...

Landowners’ second argument is that they should be entitled to recover because the solar panels have allegedly caused their property value to fall. At the outset, landowners conceded at oral argument that they were not pursuing a claim that diminution in value in itself was sufficient to constitute a nuisance, but rather that the diminution in value should be considered only as a measure of damages for a nuisance otherwise proven. A concession at oral argument is binding, and the Court will treat a conceded argument as having been waived. Nevertheless, we briefly address the issue of **diminution in property value alone** as constituting nuisance to clarify the scope of private nuisance in Vermont in light of our decisions in ... *Allen v. Uni-First Corp.*, 151 Vt. 229, 558 A.2d 961 (1988).

In *Uni-First*, a group of homeowners in Williamstown sought damages after state inspectors discovered that a chemical solvent from a drycleaner had entered the town’s drinking water and fear of contamination caused a decline in property values. On appeal, this Court held that homeowners could sustain a private nuisance cause of action based on “a public perception of widespread contamination” that resulted in diminished property values. Specifically, we concluded that even though not all the plaintiffs whose property value fell could prove that their property was contaminated, there was sufficient evidence of generalized contamination that was causally linked to lowered property values.

Landowners urge us to interpret *Uni-First* as permitting recovery in nuisance “based on diminished property values caused by an adverse public perception, regardless of [the] accuracy” of that perception. That reading of *Uni-First*, however, is too broad. *Uni-First* represents a narrow category of private nuisance claims involving chemical contamination that threatens to or in fact causes an unreasonable interference. In *Uni-First*, the harm was not diminished property value but the “actual and substantial” threat of contamination, and the proper measure for damages was the diminution in value. In other words, a decrease in property value does not mean there has been an interference with that property’s use, a requisite for a nuisance claim.

Additionally, a claim of nuisance based solely upon diminution in property value invites speculation, as “[p]roperty values are affected by many factors; a decrease in market value does not mean there is a nuisance, any more than an increase means there is not.” And such a rule of law would be one-sided: a plaintiff alleging diminished property value because of activities on a neighbor’s land—such as construction of an oddly-shaped house—would have a claim for damages, but a neighbor whose activities resulted in an increase in the property owner’s value—such as construction of a palatial estate—would have no claim for contribution for the activity that increased property value. As with aesthetic concerns, allowing a cause of action in nuisance any time an activity on a neighbor’s land has a negative impact on another’s property value would likely lead to neighborly discord in the form of claims for damages by neighbors alleging neighboring activities have made their property less valuable.

For the foregoing reasons, we reaffirm the rule from *Hager* that private nuisance law in Vermont does not encompass a cause of action for aesthetic harm alone, and the trial court therefore did not err as a matter of law when it granted the solar companies’ motions for summary judgment.

Affirmed.