STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: August 31, 2021]

QUIDNESSETT MEMORIAL CEMETERY,	:	
Plaintiff,	:	
	:	
V.	:	**C.A. No. WC-2015-0190**
	:	
STATE OF RHODE ISLAND; RHODE ISLAND DEPARTMENT OF TRANSPORTATION; and, MICHAEL P. LEWIS,[1] as Director of RHODE ISLAND DEPARTMENT OF TRASNPORTATION,	:	
***Defendants*.**		

DECISION

MCGUIRL, J. Before this Court is an action brought by Quidnessett Memorial Cemetery (Plaintiff or QMC) against the State of Rhode Island (State), the Rhode Island Department of Transportation (RIDOT), and Michael P. Lewis, as Director of RIDOT (collectively the Defendants) for several property-related claims. QMC contends that two temporary easements, executed in 1984 and 1990, allowing RIDOT to divert water from Post Road in North Kingstown onto its property, have since resulted in significant water problems. QMC asserts claims for inverse condemnation, continuous trespass, and due process. Conversely, the Defendants aver that Plaintiff's claims for inverse condemnation and due process fall outside the applicable statute of

[1] Pursuant to Rule 25(d)(1) of the Superior Court Rules of Civil Procedure, Peter Alviti, Jr., the current Director of the Rhode Island Department of Transportation, is substituted for Michael P. Lewis, a past director.

limitations and that all claims are further unsupported by sufficient evidence produced at trial. Furthermore, the Defendants contend that the State cannot be held liable for surface water flowing onto Plaintiff's property in the natural course. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

I

Facts and Travel

This matter proceeded to a thirteen-day trial beginning in January 2019 on QMC's claims for inverse condemnation, continuous trespass, and due process asserted in its Third Amended Complaint.[2] The Court heard testimony from fifteen witnesses and considered dozens of exhibits.[3] The Court also viewed the subject property twice during trial. *See* Trial Tr. 1:14-5:15, Jan. 14, 2019; 740:20-742:7, Jan. 24, 2019. At the close of trial, Defendants filed a renewed motion for judgment as a matter of law pursuant to Rule 52(c) of the Superior Court Rules of Civil Procedure. After review of the testimony and exhibits at trial, the Court finds the following facts.

A

Background

QMC is located on approximately 125 acres of land in North Kingstown, Rhode Island. (Trial Tr. 96:11-24, Jan. 15, 2019.) QMC was founded more than a century ago in 1902 and is run by a nine-member Board of Directors. *Id.* at 7:8-25, Jan. 14, 2019; 96:19-22, Jan. 15, 2019. The cemetery also employs five permanent staff members, including a general manager. *Id.* at 6:23; 8:19-20, Jan. 14, 2019. At the time of trial, Susan Haddad (Haddad) served as manager, succeeding Paul Hartley (Hartley), who had been employed by QMC for more than fifty years. *Id.* at 7:1-7.

[2] The Court permitted QMC to amend its complaint during trial, over Defendants' objection. The Third Amended Complaint asserts the same three claims as the prior complaint.

[3] Defendants presented deposition testimony from two witnesses—Terry Moone and Emile Ziadeh.

Robert Kalander (Kalander), a member of the Board of Directors since 1989 and former seasonal employee of QMC in the 1960s and 1970s, served as the resident of the Board. *Id.* at 573:16-574:8; 622:2-5, Jan. 23, 2019.

Since its founding, QMC has expanded its property by acquiring additional parcels of land, including Assessor's Plat 156, Lot 9 in 1931, and Assessor's Plat 156, Lot 7, in 1969. *See* Exs. D, E; Tr. 98:21-99:6, Jan. 15, 2019. Part of QMC's property includes frontage on Post Road. *See* Ex. 2 (Master Plan). QMC divides its cemetery into sections, which are defined on its Master Plan.[4] *See* Ex. 2; Tr. 48:10-49:3, Jan. 15, 2019. The sections are further subdivided into lots, and then into grave spaces. *Id.* at 49:7-13. Each lot contains up to twelve grave spaces. *Id.* at 49:20-24. A section may contain up to 120 grave spaces. *Id.* at 50:24-25. Each grave space holds one full-body casket and four cremains, or up to six cremains. *Id.* at 50:14-17.

QMC offers three price points for grave spaces, with low-range gravesites costing $810 per space, mid-range gravesites costing $950 per space, and high-range gravesites costing $1,060 per space. *Id.* at 56:6-58:5. The low-range grave spaces are located closest to Post Road. *Id.* at 56:10-16. According to Haddad, about 500 low-priced spaces are located in Sections 308, 309, 310, 30A, 30B, and 311 on the Master Plan. *Id.* at 56:20-23. QMC also generates revenue from additional services such as opening and closing grave sites for a full body, providing grave liners, and constructing monuments. *Id.* at 60:14-25.; *see also* Ex. Q.

The Master Plan serves as a guide for current and future development of the cemetery. (*Id.* at 48:10-49:3.) When QMC develops its land into additional sections, it endeavors to follow along the perimeter of the Master Plan from bottom to top, so as to allow for grave space offerings in all three price ranges. *Id.* at 55:16-21; 142:22-143:1. Additionally, QMC develops its sections in

[4] The current version of the Master Plan was developed in 1989. (Tr. 124:7-9, Jan. 15, 2019.)

order, or, in other words, adjacent to one another. *Id.* at 64:13-17. Lots may take more than a year to develop due to clearing, testing, and pinning the land. *Id.* at 89:2-10. At the time of trial, approximately sixty-five percent of the property was developed. *Id.* at 142:13-15.

B

Pre-1984 Flooding on Post Road

Flooding in the vicinity of QMC's property on Post Road had been an issue for some time. *See, e.g.,* Ex. I (citing a long-standing drainage problem on Post Road); Ex. 43 (noting in a 1984 memorandum that "highway runoff is ponding in the street creating a hazardous situation"); Tr. 596:24-597:5, Jan. 23, 2019. In the 1920s, and prior to 1929, a twelve-inch cast iron pipe and two catch basins were installed beneath Post Road. *Id.* at 518:13-20. These drainage features are located at Station 359 + 33, which is adjacent to Lot 7. *Id.* at 519:22-24; 255:8-13; 260:18-261:10, Jan. 16, 2019; *see also* Ex. QQ. This location represents the low point, or very close to a low point, of a drainage area spanning approximately 18.4 or 18.8 acres. (Tr. at 252:20-253:5, Jan. 16, 2019; 793:3-18, Jan. 24, 2019.) Based on elevation, water flows through the pipe toward the cemetery property. *Id.* at 520:14-18, Jan. 23, 2019. There is no record that this pipe has ever been removed or replaced.[5] *Id.* at 527:6-9.

Prior to QMC's acquisition of Lot 7 in 1969, the former owner gave verbal approval to the State to construct an open ditch on the side of Post Road at the location of the pipe and catch basins. *See* Ex. F at 1; *see also* Tr. 602:20-25; 621:24-622:1, Jan. 23, 2019; Ex. 36-I at 17-19. At trial, Kalander described this area of the property in the 1960s and 1970s as "a depression" in the area of proposed lots 308, 309, and 310. (Tr. 602:20-25; 621:18-23, Jan. 23, 2019.) According to

[5] However, the evidence at trial did show that RIDOT installed an extension plastic pipe to the main pipe near Post Road approximately five years prior to trial, after a catch basin had fallen. (Tr. 748:21-25; 752:11-25, Jan. 24, 2019.)

Kalander, flooding was typical on Post Road during that time, but the cemetery did not experience the same flooding issues. *Id.* at 598:16-599:14; 650:20-651:21.

In the 1970s and 1980s, the State reached out to QMC several times in an attempt to find a solution for the Post Road flooding problem. *See* Exs. F, I; *see also* Ex. G. QMC rejected a 1971 request by the State for a drainage easement running from Post Road to an existing man-made lake on QMC property. (Ex. F.) In a letter rejecting the request, the QMC general manager wrote that "[t]he Cemetery Corporation . . . must protect the rights of it's [sic] Lot Owners and not allow any easements across its property which would restrict the full use of land for burial purposes." *Id.* In 1976, at QMC's request, the State removed a team conducting a feasibility study on QMC property related to the flooding issue. *See* Ex. G. Again, in 1984, QMC rejected a State proposal for a drainage line running from Post Road to the manmade pond on cemetery property "for the purpose of relieving the drainage problem on Post Road." (Ex. I at 1.) However, QMC agreed to consider an alternate proposal to create a seepage pit "adjacent to the problem area on Post Road." (Ex. I at 2.) QMC ultimately agreed to the State's alternate proposal. *See* Ex. 1.

C

Easement Agreements

1

1984 Agreement and Construction

On December 4, 1984, RIDOT and QMC entered into a "Temporary Drainage Easement" agreement (1984 Easement). *See* Ex. 1 at 1; *see also* Ex. J. The 1984 Easement stated that "the State is aware of a flooding problem caused by heavy rains on Post Road in North Kingstown, Rhode Island, northerly of its intersection with Essex Road" and further that QMC "owns property adjacent to the area of this flooding problem known as Assessor's Plat 156, Lot 9." *Id.* Pursuant to

the 1984 Easement, QMC granted the State "for drainage purposes a temporary easement over its property known as Assessor's Plat 156, Lot 9, as shown on the attached plans labeled Exhibits A, B and C[.]"[6] *Id.* Furthermore, the easement "include[d] the right of the State to construct, maintain and operate a temporary drainage system feeding into a seepage pit on the said Cemetery property." *Id.*

The 1984 Easement was to run "from the date of th[e] agreement until the subject portion of Post Road is reconstructed by the State." *Id.* The State agreed to "make all reasonable efforts to complete reconstruction in the subject area during the year 1989," but could not "guarantee said completion date." *Id.* The 1984 Easement also provided certain terms and conditions, including temporary fencing and a seepage pit limited to thirty feet in diameter. *Id.* at 1-2. The State also agreed to refill the seepage pit and "substantially restore the area of the pit to its condition prior to the agreement" once the Post Road reconstruction was complete. *Id.* at 2. The 1984 Easement was recorded in the North Kingstown Land Evidence Records at Book 429, Page 294. *See id.*

After executing the 1984 Easement, the State constructed a drainage system, including a seepage pit (Seepage Pit), on QMC property. (Tr. 599:15-21, Jan. 23, 2019.) The trial evidence demonstrates that the Seepage Pit was constructed on Lot 7, not Lot 9, as was described in the text of the 1984 Easement. *Id.* at 222:11-17, 228:5-19, Jan. 16, 2019; 370:18-371:10, Jan. 17, 2019; *see* Ex. 1 at 1. Cemetery employees testified that the Seepage Pit is located in the area of lots 308 and 309 or 310 on the Master Plan. (Tr. 69:1-13, Jan. 15, 2019; 162:1-8, Jan. 16, 2019.) Lot 7 is located closer to sections proposed for future development on the Master Plan. *Id.* at 225:24-227:9. Since its construction, the State has completed yearly maintenance on the Seepage Pit. *Id.* at

[6] The recorded version of the 1984 Easement contains only Exhibits A and C. *See* Ex. 1. It appears to be missing Exhibit B, which was included in the 1990 Easement recording. *See* Ex. 3; *see also* Ex. L.

746:12-16; 750:11-23, Jan. 24, 2019; *see also id.* at 614:21-615:2, Jan. 23, 2019. QMC has not been able to develop the lots on which the Seepage Pit is located. *See id.* at 154:12-155:3, Jan. 15, 2019; 226:15-18, Jan. 16, 2019.

2

1990 Agreement

On October 23, 1989, then-General Manager of QMC, W. Russell Eldridge, contacted the State by letter regarding the 1984 Easement. *See* Ex. K. The letter stated that the 1984 Easement "will terminate on December 31, 1989" and that because it was "apparent that the related highway reconstruction will not be completed by this date of termination[,]" the 1984 Easement would need to be "extended or renewed." *Id.* Consequently, on February 6, 1990, the parties entered into another "Temporary Drainage Easement" agreement (1990 Easement). *See* Ex. 3; Ex. L.

The 1990 Easement mirrored the terms of the 1984 Easement in nearly all respects. *See* Exs. 1 and 3. The 1990 Easement, however, indicated that the Post Road reconstruction was scheduled for 1990, and that the State would "make all reasonable efforts to complete reconstruction in the subject area by December 31, 1992." (Ex. 3 at 1.) This agreement and its exhibits demonstrating the schematics of the easement plan were recorded in the land evidence records at Book 644, page 1. *Id.* In particular, the recorded 1990 Easement contained Exhibit B, missing from the 1984 Easement recording. *See* Exs. 3 and L. Exhibit B to the 1990 Easement indicates a total easement area measuring 4200 square feet, the QMC property line, and an "edge of pavement" marking.[7] (Ex. 3 at 5.) Moreover, the drawing contains a notation for an "existing C.B. STA 359+33" with a pipe running from the road to QMC's property. *Id.*; *see also* Tr. 992:21-

[7] The easement area on QMC property ultimately measures 3,810 square feet, as part of the easement rests on State property. *See* Ex. X at 4.

24, Jan. 29, 2019 (expert testimony stating that "the easement documents showed the seepage pit near a catch basin, that is the only identifying mark that is out there").

D

Post-Easement Reconstruction Discussions

At the end of 1992, the drainage system remained on QMC property and the State had not started, let alone completed, Post Road reconstruction in accordance with the goal stated in the 1990 Easement. *See* Ex. 3; *see also* Ex. M. After 1992, the State continued to entertain a Post Road reconstruction project.[8] *See* Ex. 16; Tr. 608:4-13, Jan. 23, 2019. The trial evidence demonstrates that the State continuously worked with Caputo and Wick on design and improvement plans for an overall Post Road reconstruction project beginning in 1983 and running through the time of litigation; part of the improvement plans may have included the section of Post Road adjacent to QMC property.[9] *See* Tr. 683:19-684:6, 718:7-22, Jan. 24, 2019; 911:19-912:21, Jan. 25, 2019; *see, e.g.*, Exs. 16; 36 B-2 at 2; 37Q; Ziadeh Dep. Tr. at 77, Oct. 10, 2018.

In the beginning of 1993, a former general manager of QMC reached out to the State to discuss the water runoff onto QMC property. *See* Exs. M and N. QMC's then-general manager made it known that QMC did not want the State to use the area for drainage as QMC intended to develop it for additional burial grounds. *See* Ex. N. The State indicated at that time that it compensated owners for any takings. *See id.*

The record is devoid of other specific discussions regarding the Seepage Pit between QMC, through its then-general managers, and the State until 1998. *See* Tr. 642:2-644:2, Jan. 23,

[8] The reconstruction project was continuously delayed by environmental issues, right-of-way issues, and condemnation issues; it failed to reach the construction phase. (Ziadeh Dep. Tr. at 91-93.)

[9] RIDOT completed a project resurfacing Post Road in 2011. (Tr. 711:4-10, Jan. 24, 2019.) This project did not impact the drainage system. *Id.*

2019. Beginning in 1998 and through 2004, Kalander met several times with RIDOT's Project Manager, Emile Ziadeh (Ziadeh) regarding a Post Road reconstruction project. *Id.* at 608:4-21, 641:1-25. These meetings arose as a result of Kalander's role as a member of the Board of Elders of a neighboring church. *Id.* at 609:23-25, 645:3-10, Jan. 23, 2019. Kalander made it known to Ziadeh during their discussions that he was also a member of the QMC board. *Id.* at 610:2-3. On occasion, Kalander would update the QMC board about his meetings with the State related to the project with the church. *Id.* at 645:8-14. Ultimately, the State presented a proposal to the church to compensate it for a taking related to the Post Road project, but the church rejected the State's proposal in 2004. *Id.* at 612:15-614:11.

E

Flooding Incidents and Remedial Measures

Even with the installation of the Seepage Pit, Post Road still experienced flooding during "intense rainfall." *See* Ex. 13 at 4. Testimony at trial established that during rain events, the Seepage Pit fills with sheet water run-off from Post Road. *Id.* at 70:16-71:3, 144:1-13, Jan. 15, 2019; 640:7-12, Jan. 23, 2019. Haddad, Kalander, and Kyle Garman (Garman), operations manager for QMC, all testified that the Seepage Pit fills with stormwater runoff during rain events lasting a few hours. *Id.* at 70:20-25, 144:1-25, 145:21-146:4, Jan. 15, 2019; 640:7-12, 661:19-662:12, Jan. 23, 2019. Garman testified that sections 308, 309, and 310 as well as "in the surrounding area . . . 311, 30A and 30B" are affected by the flooding, depending on the amount of rainfall. *Id.* at 145:7-20, Jan. 15, 2019. More specifically, he stated that "[a]s the seepage pit fills with rain, it fills to . . . surface level, and then spreads on the surface of the ground[.]" *Id.* at 145:13-16. Plaintiffs also introduced several photographs at trial depicting water on QMC property in 2010, 2018, and 2019. *See generally* Tr. 14-44, 155, Jan. 14, 2019; Exs. 39A-H. This drainage

system had little ability to treat pollutants contained in the stormwater runoff. Tr. 301:12-22, Jan. 16, 2019; 899:16-22, Jan. 25, 2019.

In or before 2010, the flooding from Post Road extended onto QMC property, beyond the Seepage Pit, and onto a neighboring property south of the pit on three occasions. *Id.* at 310:16-18, 311:18-22, Jan. 17, 2019. The owner of the neighboring property testified at trial that this flooding occurred in 2006 or 2007, 2009, and 2010. *Id.* Flooding also extended into developed gravesite areas in 2009 and 2010. *Id.* at 71:7-16, Jan. 15, 2019. The 2010 storm was an extraordinary weather event that produced the most wide-ranging flooding on QMC property. *See id.* at 147:24-148:21; 162:17-21, Jan. 16, 2019. According to Haddad, during the 2010 storm, flooding extended into developed sections on lots 306 and 307, and into lots 242 through 250. *Id.* at 81:19-21, Jan. 15, 2019.

After the flooding in 2009 and 2010, QMC dug a trench spanning approximately 400 feet, located behind the Seepage Pit, and constructed a berm and sandpit to the right of sections 306 and 307. *Id.* at 71:21-25; 72:1-73:25; 165:10-13, Jan. 16, 2019. Since the installation of the berm and sandpit, cemetery personnel have not seen standing water or seepage in the area flooded by the 2010 storm. *Id.* at 81:6-82:7, Jan. 15, 2019; 164:21-165:13, Jan. 16, 2019. Garman testified that since 2010, he has seen water overflow from the Seepage Pit on sections 308 and 309, but it is "mostly contained right now into th[e] area where the berm is." *Id.* at 171:8-23. Garman also testified that water may travel into the area of sections 250-252 after "substantial storms," but that does not occur on every occasion. *Id.* at 172:1-24. Haddad testified that since 2010, she has not seen standing water or seepage in the areas flooded by the 2010 storm. *Id.* at 82:5-7, Jan. 15, 2019.

F

Renewed Discussions with the State

On June 15, 2010, Hartley sent an email on behalf of QMC to RIDOT requesting a meeting to resolve "a water problem that has been ongoing for years on [QMC] property due to a Temporary Drainage agreement that has been in effect since 1990." (Ex. GG.) Counsel for QMC followed up in a 2011 letter to the State notifying it of QMC's belief that it had claims against the State for an "unauthorized taking of drainage easements on cemetery property." (Ex. HH.) In 2013, the State provided proposals to QMC for remedying the flooding via the Post Road Reconstruction Project. (Tr. 616:10-618:22, Jan. 23, 2019; 693:11-22, Jan. 24, 2019.) After QMC selected one of the three proposals and communicated their selection, the State replied shortly thereafter, indicating that it had no funding to proceed with any of the three proposals. *Id.* at 618:7-18; 619:9-10, Jan. 23, 2019.

On April 20, 2015, QMC initiated the instant suit against the State and Michael P. Lewis, in his official capacity as Director of State's Department of Transportation. *See* Compl. In its Third Amended Complaint, QMC alleges that it has suffered damages to its property arising out of the State's construction, maintenance, and operation of the temporary drainage system on QMC's property. (Third Am. Compl. ¶ 13.) QMC alleges that RIDOT constructed, maintained and operated this drainage system and seepage pit on the wrong Lot—Lot 7—rather than Lot 9, as contemplated in the first easement agreement. *Id.* ¶ 12. It further alleges that the State has failed to remedy the flooding and has directed runoff onto its property exceeding the bounds of the easement contemplated in the 1984 and 1990 Agreements. *Id.* ¶¶ 13, 18, 20. Plaintiff brings claims for inverse condemnation, continuing trespass, and due process under its Third Amended Complaint. This matter was tried without a jury, beginning in January of 2019.

G

Expert Testimony

At trial, the Court heard expert testimony from several witnesses. QMC presented L. Robert Smith, a professional civil engineer; Richard Lipsitz, a registered land surveyor; and William E. Coyle, III, a real estate appraiser. *Id.* at 194:7-8, Jan. 16, 2019; 354:8-17, 408:11-22, Jan. 17, 2019. The State offered expert testimony from Kevin Harrop, a licensed professional engineer; David Crispin, a professional engineer and land surveyor; and Thomas Andolfo, a real estate appraiser. *Id.* at 760:8-18, 762:14-19, Jan. 24, 2019; 914:19-24, Jan. 25, 2019; 1019:1-5, Jan. 29, 2019. These experts opined on several topics, including those summarized herein.

Several experts opined as to the topography of the QMC property and adjacent Post Road area. In particular, Smith and Lipsitz discussed a map created by their company, Waterman Engineering, depicting elevation levels and color-coded areas of flooding based on the 2010 storm and other computer calculations. *See id.* at 208:9-216:12, Jan. 16, 2019; 360:1-361:8, Jan. 17, 2019; *see* Ex. 10. Harrop, on the other hand, referenced a map of QMC created by his company, Caputo and Wick. *Id.* at 776:9-780:25, Jan. 24, 2019. Generally, several of the experts opined that the area of Post Road adjacent to the Seepage Pit represents a low area, and that water would tend to flow toward this low area. *Id.* at 253:2-5, Jan. 16, 2019; 373:20-374:3, Jan. 17, 2019; 780:14-25, Jan. 24, 2019. Lipsitz, however, qualified his opinion, stating that "[t]here are other areas on the cemetery that are lower than that area," including lower areas on Lot 9. *Id.* at 373:20-374:3, Jan. 17, 2019.

The expert testimony was also generally consistent regarding the as-built location of the Seepage Pit on Lot 7. *Id.* at 222:11-17, Jan. 16, 2019; 370:18-371:10, Jan. 17, 2019; *see also id.* at 862:3-9, Jan. 25, 2019; 992:13-24, Jan. 29, 2019. However, the experts differed as to the intended

location of the Seepage Pit, according to the schematics attached to the 1990 Easement. *See* Ex. 3 at 5. More specifically, Smith testified that although the plan attached to the 1990 Easement showed a pipe running to QMC's property and that the existing pipe entered QMC property at Lot 7, he could not say with certainty that the easement drawing demonstrated the existing pipe. *Id.* at 255:8-13, 260:18-261:21, Jan. 16, 2019. Crispin, on the other hand, testified that he did not "see anything that says that [the Seepage Pit is] not located where it is," further stating that "there is information that shows it being located near the catch basin, which is at the low point in the road." *Id.* at 993:17-21, Jan. 29, 2019. Crispin also opined that the area may be developed into gravesites "[w]ith proper preparation[.]" *Id.* at 942:5-8, Jan. 25, 2019; *see also id.* at 950:2-11, Jan. 29, 2019.

Relatedly, the expert testimony varied as to the effectiveness of the Seepage Pit in its current location and on Lot 9. Smith opined that, based on his calculations of various storms, the Seepage Pit is "vastly undersized to handle the runoff from any storm starting around an inch and up." *Id.* at 227:18-22, Jan. 16, 2019. Smith further testified that constructing the Seepage Pit on Lot 9 would have been "beneficial . . . in the lesser storms." *Id.* at 222:18-25. Harrop testified that the Seepage Pit provided a some, but minimal benefit to alleviate water in storm conditions. *Id.* at 787:10-18, Jan. 24, 2019. According to Harrop, if the Seepage Pit was not present on QMC's property, water would still disperse onto the property because it is the low point, and, in fact, without the pit, the water would cover more of the property. *Id.* at 787:22-788:13. Furthermore, Harrop opined that if the drainage easement were placed on Lot 9 instead, water would still collect in the current location of the pit first because it is the low point. *Id.* at 792:23-793:9.

As to damages, QMC's expert appraiser testified that he used an income based approach in which he "identif[ied] the area that would have been involved in the easement . . . and identif[ied] the areas that were actually utilized over and above the easement area" and then was

"able to calculate how much gravesites were impacted as a result of this intrusion." *Id.* at 429:12-21, Jan. 17, 2019; *see also id.* at 426:1-2. Coyle testified that QMC's property has a special purpose as a cemetery and that its highest and best use would be using the land for graves. *Id.* at 420:2-17; 425:20.

As to the particular value, Coyle testified that the proper measure of damages in the case of a partial taking is tantamount to the rental value of land taken for the period of time the land was held.[10] *Id.* at 433:5-436:4, Jan. 17, 2019; 469:2-473:11, Jan. 18, 2019. Coyle testified that the number of gravesites affected by periodic flooding includes 1,506 graves at a cost of $875 per grave plus 500 graves at a cost of $750 per grave. *Id.* at 430:23-432:24, Jan. 17, 2019. Accordingly, Coyle assessed the total loss of gravesites to be 2,006 graves at a gross cost of $1,692,750. *See* Ex. 36C-2 (Coyle Appraisal) at 12. Coyle opined that the estimated market value for use of the graves equaled $1,164,234 over twenty-six years. *Id.* at 12. More specifically, Coyle testified that 273 graves valued at $750 were impacted in the specific easement area, and that another 227 graves valued at $750 were "alternatively impacted," meaning that they were located in the area leading toward the seepage pit where the "sand bank" was located. (Tr. 433:5-434:18, Jan. 17, 2019.) Moreover, Coyle opined that an additional 1,506 graves were impacted "as a result of either the poor placement or overflow catching." *Id.* at 434:12-15. In his appraisal, Coyle estimated that the loss of these 1,733 graves totaled $59,520 per year. (Coyle Appraisal at 12.)

Andolfo, the State's expert on damages, testified that he used a "sales comparison approach" in his assessment, which focuses on the sale of land. (Tr. 1023:4-6; 1026:7-9, Jan. 29,

[10] Coyle testified that his approximate measure of damages was obtained by calculating the total value of all the individual gravesites, multiplied by four percent (4%), which represents the safe rate of return one could expect to receive for rental property annually. (Tr. 430:21-434:18, Jan. 17, 2019; 469:2-471:16, Jan. 18, 2019.)

2019.) Andolfo based his calculations on a "full taking" of a drainage ditch measuring 3,810 square feet, on Lot 9, with the assumed taking date of January 1, 1993.[11] *Id.* at 1021:16-1022:14. According to Andolfo, market value approach is preferred to income and cost approach for a full taking because of the small site and vacant land. *Id.* at 1026:1-9. In his report, Andolfo concluded that the value per square foot retrospective to January 1, 1993 equaled $1.57; total, the just compensation based on a 3,810 square foot area equaled $6,000, plus $5,537 in interest through November 3, 2017. (Ex. X.) At trial, Andolfo opined that the total damages for the taking and interest would be $12,050. (Tr. 1032:6-9.) Andolfo noted that this valuation would be different for a temporary taking over time, as well as if the claim were outside the statute of limitations or there was no trespass. *Id.* at 1060:10-16.

II

Standard of Review

In a non-jury trial, the standard of review is governed by Rule 52(a) of the Superior Court Rules of Civil Procedure, which provides that "[i]n all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, "'[t]he trial justice sits as a trier of fact as well as of law.'" *Parella v. Montalbano*, 899 A.2d 1226, 1239 (R.I. 2006) (quoting *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984)). "'Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" *Id.* (quoting *Hood*, 478 A.2d at 184). It is well established that "assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court."

[11] Andolfo testified that he later found out that the Seepage Pit was located on Lot 7, not Lot 9, but that this fact did not change his opinions. (Trial Tr. 1022:11-17, Jan. 29, 2019.)

McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005). The trial justice may also "'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" *DeSimone Electric, Inc. v. CMG, Inc.*, 901 A.2d 613, 621 (R.I. 2006) (quoting *Walton v. Baird*, 433 A.2d 963, 964 (R.I. 1981)).

In a decision on a non-jury trial, "a trial justice 'need not engage in extensive analysis and discussion of all the evidence.'" *Parella*, 899 A.2d at 1239 (quoting *Donnelly v. Cowsill*, 716 A.2d 742, 747 (R.I. 1998)). "Even 'brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.'" *Now Courier, LLC v. Better Carrier Corp.*, 965 A.2d 429, 434 (R.I. 2009) (quoting *Broadley v. State*, 939 A.2d 1016, 1021 (R.I. 2008)). The trial justice need not "'categorically accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justice's decision are sufficient findings of fact to support his [or her] rulings.'" *Notarantonio v. Notarantonio*, 941 A.2d 138, 147 (R.I. 2008) (quoting *Narragansett Electric Co. v. Carbone*, 898 A.2d 87, 102 (R.I. 2006)).

III

Analysis

A

Statute of Limitations

Defendants first argue that QMC's claims for inverse condemnation (Count I) and procedural and substantive due process (Count III) are barred by the three-year statute of limitations. (Defs.' Post-Trial Mem. of Law & Mem. Of Law Supp. Renewed Mot. J. as a Matter of Law Pursuant to Rule 52 (Defs.' Post-Trial Mem.) at 8-15.) Defendants further argue that any claim arising out of the wrongful placement of the drainage system would be barred, including the

continuing trespass claim. (Defs.' Reply Mem. at 2-3.) QMC responds that by their terms, the Easements have not expired, and therefore the statute of limitations has not elapsed on any of its claims. (Pl.'s Reply to Defs.' Post-Trial Mem. at 5-6.) QMC also argues that Defendants are estopped from asserting a statute of limitations argument because they "continually made express representations *and* engaged in affirmative conduct that deceived QMC into believing to its detriment that the State would remedy flooding[.]" *Id.* at 7 (emphasis in original). Last, QMC argues that equitable tolling under G.L. 1956 § 9-1-20 would apply in this case to remedy any statute of limitations issue, and that Plaintiff did not discover its cause of action until the State indicated that it would not be moving forward with the Post Road Reconstruction project in 2013, and its filing in 2015 would be within the three-year limitations period. *Id.* at 9-10.

1

Injury

First, Defendants argue that water runoff has existed on Plaintiff's property from Post Road dating back to 1929, well prior to Plaintiff's ownership of the property. (Defs.' Post-Trial Mem. at 11.) In their Supplemental Memorandum, Defendants contend that the two latest plausible dates of injury occurred on December 4, 1984 or January 1, 1993. (Defs.' Suppl. Post-Trial Mem. at 10.) Defendants argue that on December 4, 1984, Plaintiffs (1) were on notice that the Seepage Pit was constructed on Lot 7 and (2) it is the earliest date on which the drainage system caused an increase in water on Plaintiff's property. *Id.* Defendants further point to January 1, 1993 as a potential injury date, arguing that the parties would have reasonably expected the 1990 Agreement to expire on December 31, 1992, or Plaintiff would have at least been on notice by that date that the State could not meet its intended reconstruction completion date, as set forth in the 1990

Agreement. *Id.* at 10-11. Therefore, Defendants argue, the statute of limitations for Plaintiff's claims would have expired on January 2, 1996, at latest. *Id.* at 11.

In their Reply Memorandum of Law in Support of the Renewed Motion for Judgment as a Matter of Law and Post-Trial Reply, Defendants also add that any claim Plaintiff asserts stemming from the placement of the Seepage Pit on Lot 7, rather than Lot 9, is barred by the statute of limitations because those claims accrued when the Seepage Pit was constructed in 1984. *See* Defs.' Reply Mem. at 2-3. Defendants argue that, notwithstanding its contention that the Seepage Pit was intended for Lot 7, any claim for wrongful placement is one sounding in tort and therefore expired three years after the pit's construction in 1987. *Id.*

Conversely, Plaintiff claims that the 1990 Agreement has not expired by its terms, and that with a valid easement granting the State the right to drain surface water onto QMC property, it could not have known the State was not going to remedy the flooding problem until it represented as much. (Pl.'s Reply to Defs.' Post-Trial Mem. at 5-6.) Therefore, Plaintiff argues, the statute of limitations could not have expired on its claims. *Id.*

"Generally, a cause of action accrues and the applicable statute of limitation begins to run at the time of the injury to the aggrieved party." *McNulty v. Chip*, 116 A.3d 173, 181 (R.I. 2015) (internal citation omitted). Turning to the claim for inverse condemnation first, Defendants suggest that the Court apply a three-year limitations period because Plaintiff's claim sounds in tort, citing a decision of this Court in *Hauser v. Davis*, No. C.A. KC 93-0295, 2000 WL 1910031 (R.I. Super. Dec. 21, 2000). (Defs.' Post-Trial Mem. at 9-10.) Defendants argue that because the takings claim is rooted in trespass, and because it is against the State, the Court should look to

either G.L. § 9-1-14[12] or § 9-1-25[13]. Plaintiff does not argue that a different statute of limitations should apply. (Pl.'s Reply to Defs.' Post-Trial Mem. at 6-7.) In *Hauser*, this Court applied the three-year statute of limitations under § 9-1-25 to a plaintiff's claim for inverse condemnation, noting that "[a] wrongful taking is no less a tort because the taker is a government." *Hauser*, 2000 WL 1910031, at *3. The Court applies that standard here but notes that even if a longer statute of limitations could apply to this claim, Plaintiff's claim for inverse condemnation would have expired well prior to the filing of its Complaint in 2015. *See Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 95 (1st Cir. 2003) (suggesting that the time for filing a state takings claim in Rhode Island would be at most ten years).

Here, it is evident that Plaintiff's inverse condemnation claim relates to two distinct injuries: (1) the area involving the seepage pit and (2) the "other property owned by QMC that is flooded beyond the seepage pit." (Pl.'s Trial Br. at 13.) As to the section of property on which the seepage pit and drainage system were installed, Plaintiff argues that "[t]he State's acts in constructing the seepage pit in the wrong location, outside of the area of either the 1984 or 1990 Easements, and failing to remedy the flooding it collected and distributed onto [Plaintiff's] property as was represented by the State, constitute a taking of land for public uses without just

[12] Section 9-1-14(b) provides that "[a]ctions for injuries to the person shall be commenced and sued within three (3) years next after the cause of action shall accrue[.]"

[13] Section 9-1-25 reads, in full:

> "Except as provided in subsection (b) of this section and in § 9-1-51, for cases of sexual abuse, when a claimant is given the right to sue the state of Rhode Island, any political subdivision of the state, or any city or town by a special act of the general assembly, or in cases involving actions or claims in tort against the state or any political subdivision thereof or any city or town, the action shall be instituted within three (3) years from the effective date of the special act, or within three (3) years of the accrual of any claim of tort. Failure to institute suit within the three-year (3) period shall constitute a bar to the bringing of the legal action." Section 9-1-25(a).

compensation." (Pl.'s Trial Br. at 13.) To the extent that Plaintiff's takings claim relates to the wrongful placement on Lot 7, that claim would fall outside of any applicable statute of limitations.[14] Assuming for purposes of the statute of limitations that the drainage system was constructed outside of the bounds of the 1984 and 1990 Easements, Plaintiff would have been on notice of the condemnation of Lot 7 for a drainage easement when the pit was constructed in 1984. *See United States v. Dickinson*, 331 U.S. 745, 748 (1947) ("Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.") Moreover, if the State acquired an easement by prescription over this lot for drainage, it would have acquired this property interest at latest 1994, and assuming that the statute of limitations began to run on this date, Plaintiff's claim would have expired well in advance of its 2015 Complaint.

As to the claim for inverse condemnation outside of the area in which the drainage system is located, Plaintiff asserts that Defendants "exacerbated" the flooding by directing sheet water runoff onto Plaintiff's property, outside the bounds of the easement, and failed to remedy this issue, which amounted to inverse condemnation of Plaintiff's property without just compensation. (Third Am. Compl. ¶¶ 20-22.) Plaintiff makes clear in its Third Amended Complaint that the "exacerba[tion]" of flooding was caused by the State's placement of a drainage system on its property and subsequent directing of sheet water runoff from Post Road to the Seepage Pit. (Third Am. Compl. ¶ 13.) This issue can readily be viewed as dating back to 1984.

[14] Unlike its allegation in the Third Amended Complaint for continuous trespass, Plaintiff does not specifically set forth an allegation for inverse condemnation regarding wrongful placement of the drainage system. *See* Third Am. Compl. ¶ 21. However, in its Trial Brief, Plaintiff suggests that its inverse condemnation claim relates to both a "taking of Lot 7" as well as the "further taking" of stormwater exceeding the area of the seepage pit. (Pl.'s Trial Br. at 12.)

Moreover, the Court does not agree with Plaintiff that the potential effectiveness of the 1990 Easement saves its claim. Plaintiff contends that it did not have notice of its rights to a claim for taking until after 2013, because it would not have brought this claim while the State had a valid easement for drainage on QMC's property. (Pl.'s Reply to Defs.' Post-Trial Mem. at 5-6, 9.) However, assuming the 1990 Easement remains valid, as Plaintiff argues, Defendants retain an unexpired property interest for drainage over Plaintiff's property. This fact is incongruent with Plaintiff's argument that damages for the condemnation stem back to 1993, when the State failed to meet the anticipated deadline for Post Road remediation. *See* Pl.'s Trial Br. at 7, 17; Pl.'s Reply to Defs.' Suppl. Post-Trial Mem. at 2 ("Defendant's permanent use of QMC property under the guise of a temporary agreement, is not a valid use, and has not been a valid use since January 1993."); Ex. 3. If, as Plaintiff suggests, its injury occurred in 1993, the three-year statute of limitations would have expired well prior to the commencement of the action. Additionally, Plaintiff asserts that it is entitled to pre-judgment interest dating back to December 4, 1984, which it argues is the "date of the inverse condemnation." *See* Pl.'s Trial Br. at 7, 17; Ex. 3. Nevertheless, the expiration of the easement impacts the statute of limitations with regard to a condemnation of the easement area, not those areas of the property outside of the specified boundary for which Plaintiff claims damages due to overflow flooding. In any event, the Court finds that Plaintiff's inverse condemnation claim dates back more than three years prior to the filing of the Complaint.

Likewise, Defendants argue that a three-year statute of limitations applies to Plaintiff's due process claims in Count III of its Third Amended Complaint. (Defs.' Post-Trial Mem. at 13-15 (citing *Walden, III, Inc. v. State of Rhode Island*, 576 F.2d 945, 946 (1st Cir. 1978)); *see also Hauser*, 2000 WL 1910031, at *4 (applying the three-year statute of limitations for torts to due process claims). The allegations related to Plaintiff's due process claims in its Third Amended

Complaint rely principally upon the same facts as its inverse condemnation claims. *See* Third Am. Compl. ¶¶ 31-35. Moreover, Plaintiff argues that its due process claims particularly relate to the fact that Plaintiff "induced" Plaintiff into a temporary easement, which effectively the State could make permanent through its inaction. (Pl.'s Trial Brief at 15.) For the reasons discussed above, these injuries also date back to the 1984 Easement and subsequent construction of the drainage features on Plaintiff's property. Indeed, even if the injury did not date back to 1984 with the execution of the agreement, or 1990 when QMC signed the second agreement, Plaintiff would have been on notice of Defendants' "inaction" in 1993, when the State failed to meet its anticipated deadline for remediation, as set forth in those documents. *See* Exs. 1, 3; Pl.'s Trial Br. at 15 (arguing that the State deprives QMC of its property "by failing or refusing to perform the very acts that it promised as the basis of the Easements it induced QMC to sign; remedying the flooding it caused to the QMC's property"). Consequently, the Court finds that Plaintiff's due process claim expired by any measure of the statute of limitations prior to Plaintiff's 2015 Complaint.

Plaintiff's claim for continuing trespass, however, survives a statute of limitations challenge. '"[A] continuing trespass or nuisance must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct."' *Boudreau v. Automatic Temperature Controls, Inc.*, 212 A.3d 594, 604 (R.I. 2019) (quoting *Carpenter v. Texaco, Inc.*, 646 N.E.2d 398, 399 (1995)). "Under the continuing tort doctrine, where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease." *Id.* at 602 (citing 54 C.J.S. *Continuing Torts* § 223 at 258 (2010)). In dicta, our Supreme Court has at least suggested that a case with similar facts—water runoff onto a plaintiff's property due to State construction—could have constituted a continuing trespass that would not be barred by the statute

of limitations. *West v. Town of Narragansett*, 857 A.2d 764, 765 n.1 (R.I. 2004). Classification of a continuing trespass as a tort necessitates the application of a three-year statute of limitations pursuant to § 9-1-25.

In the Third Amended Complaint, Plaintiff asserts that a continuous trespass on its property has resulted from Defendants causing sheet water runoff to enter and flood the property and the failure to remedy this problem, as well as Defendants' failure to remove the temporary drainage system placed on Lot 7, which Plaintiff alleges is wrongful and contrary to the 1984 and 1990 Easements. (Third Am. Compl. ¶¶ 25-27.) Assuming, for purposes of statute of limitations, that the Defendants' actions with respect to the drainage system and Seepage Pit constitute tortious conduct, the statute of limitations on the continuous trespass claim has not elapsed. *See Boudreau*, 212 A.3d at 602. Evidence at trial demonstrates that the Seepage Pit remains on Lot 7, and that the State maintains this Seepage Pit on a periodic basis. *See* Tr. 370:18-371:6, Jan. 17, 2019; 746:12-16; 750:11-23, Jan. 24, 2019. If, as Plaintiff argues, Defendants have no property interest in a drainage easement on that particular parcel of property, the State's ongoing presence through the direction of water into the Seepage Pit and beyond, as well as the maintenance of the drainage system, could constitute a continuous tort. *See* Ex. 3; Tr. 750:11-23, Jan. 24, 2019. Furthermore, the record demonstrates that flooding occurs during moderate or heavy rainstorms. *Id.* at 70:16-71:3; 144:1-13, Jan. 15, 2019; 640:7-12, Jan. 23, 2019. Therefore, the statute of limitations does not bar a claim for continuous trespass.

2

Tolling/Estoppel

Plaintiff argues that there are two possible avenues for relief from any statute of limitations bar it faces: (1) that Defendants are equitably estopped from arguing that the statute of limitations

has expired based on its representations that it would remedy flooding; or (2) that the statute of limitations can be tolled under § 9-1-20. (Pl.'s Reply to Defs.' Post-Trial Mem. at 6-8.)

First, Plaintiff cites to *McAdam v. Grzelcyk*, 911 A.2d 255, 259 (R.I. 2006), for the proposition that Defendants should be estopped from asserting the expiration of the statute of limitations as a defense. (Pl.'s Reply to Defs.' Post-Trial Mem. at 6-7.) In *McAdam*, our Supreme Court noted that it "in exceptional circumstances, settlement negotiations can estop a party from invoking the statute of limitations if accompanied 'by certain statements or conduct calculated to lull the claimant into a reasonable belief that his claim will be settled without a suit.'" *McAdam*, 911 A.2d at 259 (quoting *Gagner v. Strekouras*, 423 A.2d 1168, 1169 (R.I. 1980)). More specifically, the Supreme Court in *McAdam* stated that "there are two scenarios in which estoppel can arise: '(1) the insurer, by his actions or communications, has assured the claimant that a settlement would be reached, thereby inducing a late filing, or (2) the insurer has intentionally continued and prolonged the negotiations in order to cause the claimant to let the limitation pass without commencing suit.'" *Id.* at 259-60 (quoting *Gagner*, 423 A.2d at 1170). Ultimately, in that case, the Supreme Court determined that the plaintiff failed to produce evidence demonstrating that the defendant either induced the plaintiff into its late filing or intentionally prolonged the negotiations to lull plaintiff into the late filing. *Id.* at 260. Two years later, our Supreme Court added that this principle is meant to apply only in exceptional circumstances. *National Refrigeration, Inc. v. Travelers Indemnity Co. of America*, 947 A.2d 906, 911 (R.I. 2008).

Plaintiff also invokes § 9-1-20 to save its claims from the statute of limitations bar. (Pl.'s Reply to Defs.' Post-Trial Mem. at 8.) Section 9-1-20 provides:

> "If any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him or her the existence of the cause of action, the cause of action shall be deemed to accrue

> against the person so liable at the time when the person entitled to sue thereon shall first discover its existence." Section 9-1-20.

Our Supreme Court has held that "[i]n order to prove that fraudulent concealment has taken place, 'it is a plaintiff's burden to show (1) that the defendant made an actual misrepresentation of fact; and (2) that, in making such misrepresentation, the defendant fraudulently concealed the existence of the plaintiff's causes of action.'" *Polanco v. Lombardi*, 231 A.3d 139, 153 (R.I. 2020) (quoting *Boudreau*, 212 A.3d at 601). "'[M]ere silence or inaction on the part of the defendant does not constitute actual misrepresentation in this context.'" *Id.* at 153-54 (quoting *Boudreau*, 212 A.3d at 602).

As applied to the case at bar, Plaintiff argues that the State "continually made express representations *and* engaged in affirmative conduct that deceived [Plaintiff] into believing to its detriment that the State would remedy flooding onto [Plaintiff's] property as part of its Post Road reconstruction project." (Pl.'s Reply to Defs.' Post-Trial Mem. at 7-8.) According to Plaintiff, it had a "reasonable belief that its dispute with the State had been settled, and that [it] merely had to wait for the State to fulfill its obligation under the open-ended time limit it drafted into the easement agreements." *Id.* at 7. As to false misrepresentation under § 9-1-20, Plaintiff similarly asserts that by its representations and affirmative conduct, the State deceived Plaintiff into believing that the State would remedy the flooding. *Id.* at 9. Plaintiff argues that "millions of dollars were expended over three decades to create and especially to modify remediation plans and designs" and that "it was not until sometime in 2013 that QMC discovered it had a cause of action against the State[.]" *Id.*

For either of these theories to apply, the Court must first find that the State made representations to Plaintiff regarding remedying the flooding issue on Plaintiff's property, or by its affirmative conduct, demonstrated the same. This involves an analysis of the communication

between the parties from 1984-2015. Indeed, Defendants' attack on Plaintiff's tolling arguments relies on a review of these communications. More specifically, Defendants argue that Plaintiff has not demonstrated that the State, by affirmative representation or conduct, induced Plaintiff to act or failed to act as to the resolution of drainage issues. (Defs.' Reply Mem. at 10.) Defendants assert that "[s]imply put, there was no promise or guarantee of Post Road's reconstruction by RIDOT to the Cemetery." *Id.* at 11. Moreover, Defendants argue that: (1) the State did not at any time prior to 2013 offer any plans or solutions to flooding issues and that Plaintiff was not aware of any design work until mid-trial; (2) Plaintiff cannot rely on an open design contract between the State and its consultant to support its equitable tolling argument; (3) communications between Kalander and RIDOT or a project engineer are not enough to support tolling. *Id.* at 10-16.

Beginning with 1984, it is undisputed that Plaintiff and the State communicated in February and December regarding a drainage easement in favor of the State over Plaintiff's property. *See* Exs. I, 1. Of course, this easement was executed on December 4, 1984. *See* Ex. 1. It is further undisputed that Plaintiff reached out to the State in 1989, requesting that the State renew or extend the 1984 Easement given its potential termination, a communication which led to the execution of the 1990 Easement effectively extending the easement in favor of the State. *See* Exs. K and 3. In the 1984 and 1990 Easements, the State did represent that it would remedy flooding through a reconstruction project. *See* Exs. 1 and 3.

Both parties also agree, and the record demonstrates, that after execution of the second agreement between the parties, communication between Plaintiff and the State occurred on back-to-back days in 1993. *See* Exs. M and N. During this communication with the State, a representative for Plaintiff commented on its desire to use the portion of its land at issue for additional burial spots and further, that QMC did not want the State using the area for drainage.

See id. Based on a written summary of this telephone conversation, it appears that the State's Project Manager told Plaintiff that it was "completely redesigning the drainage system," that there were "few options for drainage in this area" and that owners were typically compensated for such use of property. (Ex. N.) The record demonstrates that there clearly was communication between the parties in 1993 regarding the easement, although the Court is less clear that this communication amounts to a representation by the State to remedy the flooding issue. Even if this communication does amount to a representation, it occurred more than twenty years before Plaintiff filed its Complaint.

Plaintiff next points to a 1997 RIDOT letter to the North Kingstown Town, purporting to explain several meetings between QMC and the State regarding a stonewall and installation of a sidewalk. (Pl.'s Reply to Defs.' Suppl. Post-Trial Mem., Ex. A (Pl.'s Timeline of Communications) at 6; Ex. 4.) The 1997 letter further notes that the State was aware of the drainage problem on Plaintiff's property and that reconstruction of Post Road would eliminate the need for a drainage system on the property. *See* Ex. 4 at 2. Defendants argue that this letter is "insufficient to demonstrate a 'communication' between Plaintiff and the State" as it is correspondence between the State and the town manager. (Defs.' Suppl. Sur-Reply at 2.) Defendants further argue that the letter contains no promise to perform any reconstruction or remedy. *Id.* The Court agrees. Even if this 1997 letter could be construed as demonstrating communication between the parties by way of noting non-specific meetings, there is nothing in the letter that can be construed as a representation from the State to QMC regarding reconstruction.

Next, Plaintiff cites several "meetings" and "discussions" between the parties, specifically through Kalander and RIDOT Project Manager Ziadeh, between 1998 and 2010. (Pl.'s Timeline of Communications at 6-7.) Plaintiff suggests that it was during these meetings between the parties

that the State communicated its intent to remediate the drainage issues. *Id.* Conversely, Defendants contend that Ziadeh expressly dismissed the notion that he would have made a promise to Plaintiff that construction would commence. (Defs.' Suppl. Sur-Reply at 2-3 (citing Ziadeh Dep. at 94-95.)) Moreover, Defendants argue that Plaintiff's assertion of these meetings lack specificity, and that Kalander primarily attended these meetings in his capacity as a member of the Quidnessett Church Board of Elders, and not as a member of the QMC Board. *Id.* at 4.

After review of this testimony, the Court cannot definitively determine that the State made representations to QMC that it would remedy the issue, such that Plaintiff should not assert its rights by filing an action for inverse condemnation and due process. Indeed, Kalander did testify that he had several meetings with Ziadeh regarding Post Road reconstruction. (Tr. 608:4-25, 641:1-25, Jan. 23, 2019.) Ziadeh confirmed this fact. *See* Ziadeh Dep. Tr. at 85. However, Kalander attended these meetings in his capacity as a member of the Church, not in his capacity as a member of the QMC board. (Tr. at 609:23-25, 645:3-10, Jan. 23, 2019.) Although Kalander stated that he "made it known" to Ziadeh that he was on the QMC board and also testified that he would report on the substance of these meetings to the QMC board, the Court finds persuasive Defendants' argument that these meetings were not meant to be a communication between the State and QMC regarding Plaintiff's property. *See id.* at 610:2-3. Kalander stated that it was "continuously communicated" that a Post Road project would occur, and further stated that he was told "it is just a matter of time." *Id.* at 604:9-17. This testimony lacks specific dates or meetings at which these assurances were made. Furthermore, the Court affords some weight to Ziadeh's testimony that he understood that the drainage problems on Plaintiff's property would be corrected with a new construction contract, but that he would not have made any promise to Kalander that the project would move to the construction phase. Ziadeh Dep. Tr. at 74-75, 94-96. In light of the fact that

tolling is only applied in limited circumstances, the Court cannot say with certainty that the State made promises to Plaintiff regarding construction which would remedy the flooding on its property during meetings between Kalander and Ziadeh.

As of 2010, communication between the parties ramped up. *See* Ex. GG. On October 18, 2011, Plaintiff informed the state of its intent to bring suit. (Ex. HH.) By 2013, the State had provided Plaintiff three proposals for remedying the flooding. (Tr. 616:10-618:18, Jan. 23, 2019; 693:11-22, Jan. 24, 2019.) However, the State ultimately informed Plaintiff that it did not have funds to complete any of the projects. *Id.* at 618:7-18; 619:9-15. There is no doubt that this 2013 proposal was intended to be a promise to remedy the situation, but by this point, the statute of limitations had lapsed, and the Court cannot conclude that there is evidence by way of communication or affirmative action by the State prior to this date to toll the limitations period.

Plaintiff also argues in its Reply to Defendants' Post-Trial Memorandum that the State "present[ed] to QMC [] various remediation plans from 1984 and continuing into 2013," but it provides no citation to the record for this assertion. (Pl.'s Reply to Defs.' Post-Trial Mem. at 9.) Moreover, the Court agrees with Defendants that Plaintiff has not demonstrated specific dates as to when it was aware of any design work by the State as to the broader Post Road construction project, to the extent that this would have been enough to form the basis for any reliance by Plaintiff. *See* Defs.' Reply Mem. at 10. The Court also agrees with Defendants that evidence of an open design contract with Caputo and Wick is not sufficient to support the high burden for equitable tolling. *Id.* at 11. While it is true that the State may have been continuously entertaining Post Road reconstruction plans which likely would have included, in part, a solution to the flooding adjacent to and running on QMC's property, there is not enough evidence in the record to demonstrate that the State made any direct assurances to QMC about completion of the project

relative to its property, aside from 2013 proposals. *See* Tr. 616:10-618:18, Jan. 23, 2019; 693:11-22, Jan. 24, 2019.

In sum, Plaintiff has not set forth evidence that the State's communications with Plaintiff or affirmative conduct led Plaintiff to believe that the State would have remedied the flooding on Plaintiff's property, such that Plaintiff was induced into its late filing, rely to its detriment on these representations, or be intentionally stalled from filing suit. Consequently, Plaintiff's claims barred by the statute of limitations are not subject to tolling under either theory set forth by Plaintiff.

B

Laches

Defendants also assert that the doctrine of laches bars Plaintiff's claims. (Defs.' Post-Trial Mem. at 15.) '"Laches is an equitable defense that precludes a lawsuit by a plaintiff who has negligently sat on his or her rights to the detriment of a defendant."' *Hazard v. East Hills, Inc.*, 45 A.3d 1262, 1269 (R.I. 2012) (quoting *O'Reilly v. Town of Glocester*, 621 A.2d 697, 702 (R.I. 1993)). In order to successfully assert a laches defense, a defendant must show both delay and '"detrimental reliance on the status quo."' *Id.* at 1269-70 (quoting *Andrukiewicz v. Andrukiewicz*, 860 A.2d 235, 241 (R.I. 2004)). Consequently, "[i]n terms of legal significance, laches 'is not mere delay, but delay that works a disadvantage to another.'" *Id.* at 1270 (quoting *Chase v. Chase*, 20 R.I. 202, 37 A. 804, 805 (1897)). "[A]pplicability of the defense of laches in a given case generally rests with the sound discretion of the trial justice." *Id.* at 1270.

Defendant points to an allegation in Plaintiff's Third Amended Complaint in which Plaintiff states that consistent flooding issues have been ongoing for thirty years, constituting, according to Defendants, an admission that Plaintiff has delayed in filing suit. (Defs.' Post-Trial Mem. at 17 (citing Third Am. Compl. ¶ 18).) Furthermore, Defendants argue that the prejudicial

impact to them is "significant." *Id.* at 16. Defendants contend this is so because the issues predate Plaintiff's purchase of the parcels and many individuals with knowledge of both the flooding and 1984 Agreement are now deceased. *Id.* Plaintiff counters that the State continuously interacted with QMC between 1984 and 2015, when the State announced the plan would not continue. (Pl.'s Reply to Defs.' Post-Trial Mem. at 10.) Plaintiff further argues that Defendants cannot establish the second requirement under laches because there were several witnesses who testified at trial as to the extent of the flooding and installation of the seepage pit. *Id.* at 11-12.

Assuming without deciding that Defendants can establish delay, they have not shown the necessary prejudice for the doctrine of laches to apply. The Court agrees with Plaintiff that several witnesses at trial testified regarding the flooding on QMC property and the installation, maintenance, and location of the drainage system and seepage pit. *See, e.g.*, Tr. at 70:16-71:3; 144:1-17, Jan. 15, 2019; 640:7-12, Jan. 23, 2019. Furthermore, the Court heard testimony at trial regarding the historical background of the Post Road flooding, the placement of a 1929 Pipe, and the agreement between the State and the former landowner to dig a drainage ditch on what is now the seepage pit area. *Id.* at 518:13-20; Ex. F. The Court sees no other disadvantage to Defendants from the purported delay that would rise to the level of laches.

C

Continuing Trespass

Turning to Plaintiff's only remaining claim in its Third Amended Complaint, Plaintiff alleges that Defendants have "caused sheet water runoff to enter onto and flood [Plaintiff's land] without its permission and without privilege," and that Defendants have failed to remedy this flooding. (Third Am. Compl. ¶¶ 25-26.) Plaintiff also alleges that Defendants wrongfully constructed a drainage system and seepage pit on Lot 7, contrary to the terms of the 1984 and 1990

Easements, and that they have failed to remove the same drainage system. *Id.* ¶ 27. Plaintiff alleges that these actions constitute a continuous trespass upon Plaintiff's property. *Id.* ¶ 28.

"A 'continuing trespass' is defined as '[a]n unprivileged remaining on land in another's possession.'" *Mesolella v. City of Providence*, 508 A.2d 661, 668 n.8 (R.I. 1996) (quoting Restatement (Second) of *Torts* § 158 (1965)).[15] "A continuing trespass wrongfully interferes with the legal rights of the owner." *Santilli v. Morelli*, 102 R.I. 333, 230 A.2d 860, 863 (1967) (internal citation omitted). A claim under this theory may arise when a person or party fails to remove '"a structure, chattel, or other thing which he has tortiously . . . placed on the land . . . ."' *Regan v. Cherry Corp.*, 706 F. Supp. 145, 150 (D.R.I. 1989) (quoting Restatement (Second) of *Torts* § 161, Comment b (1965)). Our Supreme Court has further held that '"no one has a right to collect surface water in any considerable quantity upon his own premises and then turn the same in a concentrated form upon the premises of his neighbor in such a manner as to cause him damage"' and has applied that principle to a municipality, indicating that '"a city has no greater power over its streets, in the matter of disposing of surface water which accumulates thereon, than a private individual has in disposing of the surface water which falls or collects upon his own land."' *Klowan v. Howard*, 83 R.I. 155, 158, 113 A.2d 872, 874 (1955) (quoting *Johnson v. White*, 26 R.I. 207, 58 A. 658, 659 (1904)).

Plaintiff argues that the evidence at trial sufficiently supports a claim of continuous trespass. (Pl.'s Trial Br. at 10-11.) Plaintiff contends that it has demonstrated that the Defendants incorrectly located its drainage system on Lot 7 and has continued to use and maintain that system

[15] Similarly, Black's Law Dictionary defines continuing trespass as "[a] trespass in the nature of a permanent invasion on another's rights." *See* Black's Law Dictionary 1810 (11th ed. 2019).

without permission. *Id.* at 11. Furthermore, Plaintiff says that water containing pollutants exceeds the bounds of the seepage pit during any significant rain. *Id.*

Defendants assert several challenges to Plaintiff's claim. First, Defendants argue that they have a property interest in an easement for drainage purposes over Plaintiff's land. (Defs.' Suppl. Post-Trial Mem. at 5.) Defendants contend that the evidence adduced at trial demonstrates that the Seepage Pit was meant to be placed on Lot 7, notwithstanding the written terms of the easement. (Defs.' Reply Mem. at 2). Defendants also argue that if the State does not have an easement by instrument pursuant to the 1984 and 1990 Easements, it has perfected an easement by prescription which defeats Plaintiff's claim for trespass. (Defs.' Post-Trial Mem. at 21-23; Defs.' Suppl. Post-Trial Mem. at 5.)

As to any potential claim for continuous trespass which survives these threshold challenges, Defendants argue that Plaintiff's claim fails as a matter of law because (1) the flow of water onto Plaintiff's property occurs only sporadically and therefore is not continuous; (2) the State may make reasonable use of its land to maintain the public roadway, and Plaintiff did not adequately account for drainage in the planning and development of the cemetery; (3) the state has a statutory right to control the flow of surface water through a culvert within a state highway. (Defs.' Post-Trial Mem. 39-43.)

1

Permission for Drainage on QMC Property

In order to analyze the merits of this claim, the Court must first determine the existence and extent of the State's property interest in a drainage easement on QMC property. For this assessment, the Court turns to the 1984 and 1990 Easements. "The Court's duty is to effectuate the intent of the parties in construing instruments purporting to create easements." *Carpenter v.*

Hanslin, 900 A.2d 1136, 1147 (R.I. 2006). "When . . . the written terms of an agreement are clear and unambiguous, they can be interpreted and applied to the undisputed facts as a matter of law." *Mattos v. Seaton*, 839 A.2d 553, 558 (R.I. 2004). Also, "where terms of [an] easement are clear and unambiguous, neither oral testimony nor extrinsic evidence will be received to explain the nature or extent of the rights required." *Hilley v. Lawrence*, 972 A.2d 643, 649 (R.I. 2009). However, "when the language employed in the grant of the easement is ambiguous or uncertain, it may properly resort to a consideration of 'any concomitant circumstances which have a legitimate tendency to show the intention of the parties.'" *Waterman v. Waterman*, 93 R.I. 344, 349-50, 175 A.2d 291, 294 (1961) (quoting *Gonsalves v. Da Silva*, 76 R.I. 474, 477, 72 A.2d 227, 229 (1950)).

Preliminarily, the Court agrees with Plaintiff that the 1990 Easement, by its terms, remains valid. As explained above, the 1990 Easement states that the temporary drainage easement will continue "until the subject portion of Post Road is reconstructed by the State." *See* Ex. 3 at 1. The 1990 Easement also sets forth an aspirational date for finishing the project, noting that the State would "make all reasonable efforts to complete reconstruction in the subject area by December 31, 1992." *See id.* It is undisputed that reconstruction of Post Road as contemplated by the easement did not occur prior to 1992 and had not occurred as of the date of trial. *See* Ex. M. The State's failure to meet the aspirational project deadline does not affect the agreement's validity, as its plain language clearly indicates that expiration is contingent on completion of reconstruction and does not provide for an alternative trigger for extinguishment. *See* Ex. 3 at 1. Therefore, because the 1990 Easement has not expired, the State retains an easement over QMC property for the "right . . . to construct, maintain and operate a temporary drainage system feeding into a seepage pit . . . ." (Exs. 1, 3.)

Plaintiffs argue that despite the fact that Defendants retain a valid drainage easement over the property, they are entitled to recover on a claim for continuous trespass on Lot 7 because the State mistakenly placed the drainage system in that location. (Pl.'s Trial Br. at 11.) Defendants contend that this theory fails as a matter of law because they have established that the parties intended that the easement runs over Lot 7, have perfected an easement by prescription on that lot, or that Plaintiffs failed to exercise their rights on such a claim, and in fact, entered into a second agreement for drainage after the system was built. Defs.' Sur-Reply at 3-4; *see also* Defs.' Post-Trial Mem. at 35 ("[F]rom both an engineering and practical perspective, the only logical location for the Seepage Pit was where illustrated—on Lot 7—as that was the location of a pre-existing Drainage Ditch (1960s); 1929 Pipe and catch basin; and was the geographic low point of Post Road.")).

Certainly, the parties presented ample testimony regarding the intended placement of the Seepage Pit. First, the plain language of the 1984 and 1990 Easements states in two places on the first page that Plaintiff grants the State a temporary drainage easement over Assessor's Plat 156, *Lot 9*. (Exs. 1 and 3 (emphasis added)). However, the document also provides that the easements run over the property "shown on the attached plans labeled Exhibits A, B, and C which plans are incorporated by reference and made a part hereof." *Id.* The diagrams affixed to the easement text arguably create an ambiguity regarding intended location of the pit. *See* Ex. 3 at 5. Specifically, Exhibit B to the 1990 Agreement contains a notation for "Existing C.B." at Station 359+33, which abuts the easement boundary line. Ex. 3 at 5. The record demonstrates that the 1929 Pipe and two catch basins are located at Station 359+33, adjacent to Lot 7. Tr. at 519:22-24, Jan. 23, 2019; *but see* Tr. at 255:8-13; 260:18-261:21, Jan. 16, 2019 (Plaintiff's expert engineer, L. Robert Smith, testifying that he could not say with certainty that the schematics in Exhibit B to the 1990

Agreement demonstrated the 1929 Pipe.) Furthermore, Defendants offer as proof of the parties' intent an internal memo dated prior to the execution of the easement which stated that the easement was meant to extend from an existing catch basin. (Ex. 43.) Additionally, evidence at trial tends to show that Lot 7 serves as a logical placement for the drainage system. Specifically, testimony demonstrates that the current location of the seepage pit sits at or adjacent to a low point of the road, and that without the seepage pit on its current location, some water would still drain onto QMC property at the low point. *Id.*at 252:20-253:5, Jan. 16, 2019; 793:3-18, Jan. 24, 2019. Also, the State had previously installed an open ditch on Lot 7 with the permission of the prior owner. *See* Ex. F at 1.

Importantly, the parties renewed substantially the same easement agreement in 1990 after construction of the pit in 1984. *See* Exs. 1, 3. There is no evidence that the Plaintiff objected to the location at this point. In fact, it was Plaintiff who initiated contact with the State regarding the renewal of the easement. (Ex. K.) This fact further serves as strong evidence that the parties intended that the State retain an easement for drainage on Lot 7.

However, even assuming that the plain language of the express easement precludes Defendants from asserting a property interest in an easement by instrument over Lot 7, the Court finds that Plaintiff's actions imply permission to use the current location for drainage, and therefore, the Defendants' use of this lot for drainage would not be unauthorized or unprivileged. *See Mesolella*, 508 A.2d at 668 n.8. Permissive use of property may be inferred from surrounding circumstances but must be more than "silent acquiescence." *Butterfly Realty v. James Romanella & Sons, Inc.*, 93 A.3d 1022, 1033 (R.I. 2014) (analyzing permissive use in the context of easement by prescription). Plaintiff clearly granted Defendants permission to build a drainage system feeding into a Seepage Pit onto its property. *See* Exs. 1, 3. Indeed, Plaintiff admits, while defending

against the claim for prescriptive easement, that it is "uncontroverted that the State created the seepage pit on Lot 7 of QMC's property pursuant to the 1984 Agreement to accommodate the flow of water from the 1929 pipe and Post Road surface runoff." (Pl.'s Reply to Defs.' Post-Trial Mem. at 14-15.) Plaintiff further asserts that this permission was sought and obtained from QMC "in the form of the written 1984 Agreement, and then the written 1990 Agreement." *Id.* at 13.

Critically, as noted above, several years after the pit was constructed on Lot 7, Plaintiff took action to renew the same easement, without objection to the location of the drainage system at any time until midway through trial. *See* Exs. K, L. It is axiomatic that an owner is "'chargeable with knowledge of what is done openly on his land."' *Caluori v. Dexter Credit Union*, 79 A.3d 823, 829 (R.I. 2013) (quoting *Stone v. Green Hill Civic Association, Inc.*, 786 A.2d 387, 391 (R.I. 2001)). Therefore, Plaintiff knew, or should have known, that the Seepage Pit was constructed on Lot 7, yet, five years after its construction, it sought to renew the permission to use its property for drainage. *See* Exs. K, L. Additionally, in 1993, when QMC objected to the continued use of the Seepage Pit, it did so in the context of the State's failure to remedy the flooding and restore the land to its original condition, as contemplated in the 1990 Easement, not the location of the system. *See* Ex. N. The Court also notes that Plaintiff's conduct in renewing the very agreement it argues constitutes permission sufficient to defeat a claim for prescriptive easement on Lot 7 may also indicate waiver. *See Sturbridge Home Builders, Inc. v. Downing Seaport, Inc.*, 890 A.2d 58, 65 (R.I. 2005) (quoting *Ryder v. Bank of Hickory Hills*, 585 N.E.2d 46, 49 (Ill. 1991), *Modified on Denial of Reh'g* (Feb. 3, 1992) ("'An implied waiver may arise where a person against whom the waiver is asserted has pursued such a course of conduct as to sufficiently evidence an intention to waive a right or where his conduct is inconsistent with any other intention than to waive it."'))

Consequently, the Court is persuaded that Plaintiff's continuous trespass claim based on the wrong lot fails because it used the property pursuant to the Plaintiff's permission.[16]

2

Flooding Beyond Drainage Easement Boundary

The Court now turns to the merits of Plaintiff's other basis for its continuous trespass claim, that "[w]hile there is a temporary agreement in place that water can be diverted onto the Plaintiff's property into a seepage pit, the evidence . . . shows that the water has vastly exceeded the bounds of the incorrectly located seepage pit." (Pl.'s Trial Br. at 11.) Defendants argue that Plaintiff has not shown by a preponderance of evidence that drainage or sheet water runoff continuously exceeded the bounds of the easement. (Defs.' Reply Mem. at 4). Moreover, Defendants argue that Plaintiff's evidence at trial was devoid of specifics as to "(1) the extent, degree, or duration of time for which water remained outside the boundaries of the easement . . . or (2) the amount of water that was present as a result of any act or omission of the State as alleged by Plaintiff versus that which would occur naturally during rain events." *Id.*

[16] Based on the Court's ruling that Plaintiff permitted a drainage easement over its property and that Plaintiff is not entitled to recover for a continuous trespass based on the "wrong lot" theory, it need not address Defendants' alternative argument that the State has perfected an easement by prescription over the 1929 Pipe, 1960s Drainage Ditch, and Seepage Pit. (Defs.' Post-Trial Mem. at 21.) However, the Court notes that, if Defendants do not have permission for a drainage easement over QMC's property, while a close call, Defendants have not demonstrated an easement by prescription by "'clear and convincing evidence.'" *See Butterfly Realty*, 93 A.3d at 1030 (quoting *Drescher v. Johannessen*, 45 A.3d 1218, 1227 (R.I. 2012)). While, in many respects, this case is similar to *Greenwood v. Rahill*, 122 R.I. 759. 412 A.2d 228 (1980), as Defendants suggest, there is significant evidence in the record that the drainage easement was intended to be temporary and that the State requested permission to use QMC property for drainage on several occasions. *See* Exs. 3, F, I. *See Drescher*, 45 A.3d at 1228 (quoting *Tavares v. Beck*, 814 A.2d 346, 351 (R.I. 2003)) (brackets and deletion in original) (finding that a claimant must "show a use 'inconsistent with the right of the owner, without permission *asked* or given, . . . such as would entitle the owner to a cause of action against the intruder [for trespass]'") (emphasis added).

At trial, several of Plaintiff's fact witnesses including Haddad, Garman, and Kalander testified that during three significant rain events, Plaintiff's property flooded into developed grave sites—2006, 2009, and 2010.[17] (Tr. 71:7-16, Jan. 15, 2019; 310:16-18, Jan. 17, 2019.) Haddad further testified that she has not seen any standing water in the developed grave areas since 2010. *Id.* at 82:5-7, Jan. 15, 2019. As to flooding in and around the Seepage Pit but not on developed areas, Plaintiff's witnesses testified that upon a moderate rainfall, about one inch, the seepage pit flooded onto surrounding undeveloped areas of the cemetery. *Id.* at 70:16-71:3; 145:10-146:7; 640:7-12, Jan. 23, 2019. Garman described that after the seepage pit fills to surface level, the water "spreads on the surface of the ground." *Id.* at 145:13-16, Jan. 15, 2019. Furthermore, Plaintiff introduced evidence demonstrating that the Seepage Pit was incapable of handling the runoff diverted into the system from moderate or severe rainfall. *See* Ex. 13 at 3 ("The system is inadequate for all but the smallest storm events."); Tr. 227:18-22, Jan. 16, 2019 (Smith testifying that the drainage system is "vastly undersized to handle the runoff from any storm starting around an inch and up"); *id.* at 787:10-18, Jan. 24, 2019 (Harrop testifying that the Seepage Pit provided only minimal benefit to alleviate the runoff in storm conditions). It is also true that the cemetery took steps to curb the extent of the flooding after major storms in 2009 and 2010 by building a trench, berm, and sandpit in the area of the Seepage Pit. (Tr. 71:21-25; 72:1-73:25, Jan. 15, 2019;

[17] Plaintiff's expert engineer discussed a "red area" and "yellow area" overlay on Exhibit 10, a map prepared by Waterman Engineering. *See* Tr. 208:2-216:12, Jan. 16, 2019. Smith testified that this map was prepared using topographical information available from the State, in addition to determining the flooding elevation based on photographs taken after the 2010 storm, which Smith indicated reached elevation level 42. *Id.* at 263:2-18; 267:7-9. According to Smith, the "yellow area" constitutes overflow from flooding reaching elevation level 42. *Id.* at 272:19-24. However, the Court finds that no credible evidence exists demonstrating that the "yellow area" was subject to flooding during any storms as described by Plaintiff's fact witnesses. Indeed, none of the 2,006 gravesites included in Coyle's appraisal are located in the "yellow area." *Id.* at 459:15-16, Jan. 18, 2019.

165:10-13, Jan. 16, 2019.) The flooding has since been contained in this area during most storms. *Id.* at 171:8-172:24.

Clearly, the State collects surface water and runoff from Post Road and directs it onto Plaintiff's property for the purpose of alleviating the flooding on the roadway. To the extent that the State continuously causes flooding on Plaintiff's property beyond the permitted area of use, it is liable for trespass. *See Mesolella*, 508 A.2d at 668 n.8 (quoting Restatement (Second) of *Torts* § 158 (1965)). As set forth above, Defendants may not "collect surface water in any considerable quality upon [their] own premises and then turn the same in a concentrated form upon the premises of his neighbor in such a manner as to cause him damage." *Klowan*, 83 R.I. at 158, 113 A.2d at 874.

The evidence described above makes clear that the flooding beyond the bounds of the easement can be viewed in two groups: (1) flooding extending into developed gravesites after significant storms and (2) flooding in the normal course that occurs after moderate or heavy rainfall of an inch per hour, which spills over the Seepage Pit and into undeveloped cemetery property. As to the first category, trial evidence demonstrates that the flooding extended into developed gravesites on only three occasions after significant storms. *See* Tr. 71:7-16, Jan. 15, 2019; 310:16-18, Jan. 17, 2019; 162:17-21, Jan. 16, 2019. This infrequent flooding into developed areas of the cemetery therefore does not amount to a continuous trespass.

However, Plaintiff has demonstrated, by a preponderance of the evidence, that flooding occurs on a regular basis when the area experiences more than an inch of rain in a short period of time, and the drainage system cannot hold the sheetwater run-off and rainwater directed into the Seepage Pit, which causes water to flow onto the undeveloped portions of Plaintiff's property, beyond the easement boundaries. *Id.* at 70:16-71:3; 145:10-146:22, Jan. 15, 2019; 235:1-4, Jan.

16, 2019; 640:7-12, Jan. 23, 2019. Indeed, testimony from Defendants' expert suggests that the area surrounding the Seepage Pit extends beyond the sixty-by-seventy dimensions set forth in the easement agreements and, further, that the Seepage Pit is undersized for the "volume of water that it takes in" from Post Road. (Tr. 877:1-3; 887:21-25, Jan. 25, 2019.)

Defendants' reliance on *Silva v. Laverty*, 203 A.3d 473 (R.I. 2019) is unavailing.[18] Defendants point to *Silva* to support their position that an "inability to quantify and distinguish" the water which flows from "natural forces" versus the amount that would "appear because of some act or omission of the State" is fatal to Plaintiff's claim. (Defs.' Suppl. Post-Trial Mem. at 6.) In *Silva*, plaintiff brought an action in negligence and nuisance against neighbors for the flow of water from an underground pipe onto the owner's property. *See Silva*, 203 A.3d at 475. The Court upheld the trial justice's determination that plaintiff had failed to prove harm; specifically, plaintiffs did not prove that the flow of water onto their property caused the size of wetland on the property to increase. *Id.* at 482. This case is distinguishable, however, because there is no

[18] Although Defendants also cite to *Butler v. Bruno*, 115 R.I. 264, 341 A.2d 735, 740 (1975) and G.L. 1956 § 24-8-32 in support of the position that Defendants are not liable for the flow of surface water onto Plaintiff's property, this support is distinguishable from the continuous trespass based on the direction of water into the seepage pit and flooding therefrom. *See* Defs.' Post-Trial Mem. at 41. In *Butler*, the defendant filled in his land and built a retaining wall, which deflected the flow of surface water through his property and caused flooding on his neighbor's property. *Butler*, 115 R.I. at 266, 341 A.2d at 737. The Court adopted the surface water doctrine "rule of reasonable use," which hinges liability on a "determination of the reasonableness of [a defendant's] actions." *Id.* at 272, 341 A.2d at 739. Further, § 24-8-32 makes it unlawful to "obstruct, block, or close any intake or outlet" of a "culvert, drain, or watercourse [that] has been placed and maintained or has existed under or within a state highway for the purpose of disposing of surface water drainage." Section 24-8-32. Here, although the evidence demonstrates that the State has placed a pipe and catch basins beneath Post Road, the State has also built and maintained the Seepage Pit for drainage on Plaintiff's private property, and specifically collects and directs water thereto, unlike the defendant in *Bruno*, whose construction upon his own property caused a redirection of the surface water and flooding to his neighbor. *See id.* at 737. This case involves affirmative conduct on the part of the State to collect and direct water onto Plaintiff's property, rather than the mere natural flow of surface water.

indication that QMC experienced standing water and widespread flooding on Lot 7 prior to the installation of the drainage system, and, further, the record demonstrates that Defendants' actions have directly caused the increase in surface water on Plaintiff's property. Trial evidence demonstrates that although flooding on Post Road had been a long-standing issue, QMC did not experience the same problem until the State constructed the drainage system on its property. *See* Ex. I; Tr. at 598:16-599:14; 650:20-651:21, Jan. 23, 2019. Indeed, although there is some evidence that water would naturally flow to a low point at or adjacent to Lot 7, the record is clear that the State uses Plaintiff's property to alleviate flooding from Post Road by directing stormwater collected in a catch basin through a pipe, and onto Plaintiff's property. *See* Ex. 3; Tr. at 252:20-253:5, Jan. 16, 2019; 793:3-18, Jan. 24, 2019. Thus, at least some, if not a significant amount, of surface water that would normally collect on Post Road is diverted onto Plaintiff's property, in addition to the rainwater collected in the pit.

Because Defendants have directed stormwater and surface water runoff onto Plaintiff's property causing flooding during each moderate or severe rainstorm exceeding an inch, and that flooding has extended beyond the scope of the permitted area as described in the easements, Plaintiffs have succeeded on their claim for continuous trespass. Typically, the remedy for a continuing trespass is an injunction. *Santilli*, 102 R.I. at 338, 230 A.2d at 863 ("A continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass.") (internal citation omitted). There is an exception to this general rule regarding injunctive relief—it "does not apply in those exceptional cases where the substantial rights of the landowner may be properly safeguarded without recourse to an injunction which in such cases would operate oppressively and inequitably." *Id.* "Examples of 'these exceptional circumstances include, but

are not limited to, acquiescence, laches, or a *de minimis* trespass.'" *Paolino v. Ferreira*, 153 A.3d 505, 515 (R.I. 2017) (quoting *Rose Nulman Park Foundation ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25, 29 (R.I. 2014). "This Court has repeatedly made clear that a departure from the general rule that a continuing trespass should be remedied by injunctive relief is justified only in exceptional circumstances.") *Id.* at 31.

However, a review of Plaintiff's Third Amended Complaint reveals only a request for monetary damages; Plaintiff does not seek an injunction on its continuous trespass claim.[19] *See* Third Am. Compl. at 4 (seeking "damages in an amount consistent with the jurisdiction of this Honorable Court, together with interest, the expenses related to litigation including but not limited to its costs, reasonable attorney fees, and punitive damages"). Furthermore, the briefing and arguments in the record regarding damages have largely been framed in the context of a taking of the easement area, or the area encompassing the full extent of the flooding caused by the 2010 storm. *See, e.g.*, Pl.'s Trial Br. at 8-9. In light of this analysis, the Court will schedule further argument on the appropriate remedy in this case, in accordance with its determination on liability for the continuous trespass. The parties may submit further briefing on this issue and shall also address any claims for attorneys' fees and prejudgment interest as part of the determination of damages.

[19] Unlike the Third Amended Complaint, the parties' briefing is somewhat murky about the requested remedy at issue here. The State argues that "[t]he award of injunctive relief together with the monetary relief so sought by Plaintiff provides Plaintiff with the benefit of a double award." (Defs.' Sur-Reply at 9.) In its briefing, Plaintiff particularly highlights two cases in which plaintiffs were awarded injunctive relief to prevent unprivileged water drainage. *See Klowan*, 83 R.I. at 157, 113 A.2d at 873; *Lombeau, Inc. v. Woerner*, No. 05-1030, 2005 WL 2476227, at *4 (R.I. Super. Oct. 4, 2005); *see also* Pl.'s Mem. on Continuous Trespass at 3-5.

IV

Conclusion

For the reasons stated herein, Plaintiff is entitled to judgment on its claim for continuous trespass based on Defendants' diversion of water onto QMC property resulting in flooding beyond the permitted drainage easement area. The Court will determine damages at a later time, after the parties have an opportunity to be heard on the proper remedy, attorneys' fees, and prejudgment interest. Defendants are entitled to judgment on the remaining claims, including inverse condemnation and due process.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Quidnessett Memorial Cemetery v. State of Rhode Island, et al.**
CASE NO:	**WC-2015-0190**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**August 31, 2021**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**James S. Lawrence, Esq.**
For Defendant:	**Matthew I. Shaw, Esq.; Gregory S. Schultz, Esq.; Brenda D. Baum, Esq.**