The State of New Hampshire

CARROLL COUNTY **SUPERIOR COURT**

Ossipee Bluffs Association

v.

Donald Lee, Sr.

Docket No.: 04-E-077

ORDER

Hearing on the merits held from 9/5/06 to 9/11/06 in reference to the Petition for Injunctive Relief and Damages and Nuisance (filed 6/1/04). Subsequent to a review, the Court directs the following determination(s).

By way of background, the Petitioner - Ossipee Bluffs Association ("OBA") is an association of land owners, which, together with its members, owns lakefront property located in Bradford Cove on Ossipee Lake in Ossipee, New Hampshire. The OBA is comprised of approximately 110 residential lots and its property on Bradford Cove is located on the west side of the mouth of the Lovell River. Said property encompasses a boat basin, mooring field, docks, boat ramp, swim area, parking lot and picnic tables. The Respondent, Donald R. Lee, Sr. ("Lee") currently resides in Beverly, Massachusetts and owns two (2) lots on which a seasonal home is located on Lattie Shore Road in Ossipee, New Hampshire. The Respondent's lots are more particularly described on the Town of Ossipee Tax Map 39, as Lots #25 and #26. The Respondent's property is also located on Ossipee Lake immediately east of Bradford Cove on the other side of the mouth of the Lovell River across from the Petitioner's property. Within the pending Petition, the Petitioner seeks injunctive relief averring, in part, that the Respondent constructed two (2) "unpermitted breakwater structures" with concrete blocks, gravel,

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rock and sand (see Writ at p.1). Accordingly, the Petitioner submits that the said breakwater structures:

> "caused an alteration of direction and velocity of the current exiting the Lovell River, and also the current in the Lake, thereby causing the deposition of large volumes of sand in Bradford Cove, filling and choking said cove, and unreasonably interfering with [the petitioner's] use and enjoyment of its lakefront property for boating, swimming, bathing and other lake based recreation. " (Id.).

The Petitioner seeks a permanent injunction requiring the Respondent to remove the breakwater(s) and the sandbar which Petitioner avers will result in the re-creation of a "fan-shaped delta" area at the mouth of the Lovell River which existed prior to the Respondent's alleged actions (see Plaintiff's Exhibits #6 and #7).

The evidence received at trial indicated that, prior to the subject actions of the Respondent, that a "typical fan-shaped delta" was in existence at the mouth of the Lovell River. In 1988, the Respondent constructed on Lot 26 a "breakwater" comprised of approximately 300 concrete blocks which went approximately fifty (50) feet into Ossipee Lake and same also caused to be placed a substantial amount of sand to support said "breakwater." On 9/30/88, the Respondent "retroactively" filed a Wetlands Permit Application for the above-said breakwater with the Wetlands Board (jurisdiction now vested in the reorganized Department of Environmental Services – "DES"). In submitting said application, the Respondent indicated that "the overall results in 2 or 3 years would be the formation of a natural point of land." (See Exhibit #15.) The requested wetlands permit was never issued and accordingly the subject "breakwater" structure was deemed constructed in violation of the applicable statute, RSA 482-A:3, 1. On 4/12/89, State personnel inspected the immediate area and specifically Lot 26, and observed a non-permitted "breakwater" structure, which consisted of rocks, gravel and concrete blocks extending from the shore of Lot 26 and involving ninety (90) feet of

concrete block structure. The structure was effectively functioning as a breakwater and, State personnel further observed that an estimated 30 or 50 cubic yards of sand had been piled and spread above and below the water level in the area of the structure. The evidence indicated that the construction of this breakwater was done without authorization from the Wetlands Board; nor did the Respondent request to receive a grant in writing for the placement of fill in public waters pursuant to RSA 482-A:17. On 6/28/89, the Wetlands Board transmitted to the Respondent a "Removal Action Notice" which directed removal of the unauthorized cement breakwater structure and the 108 cubic yards of sand and directed that the said Respondent-Lee shall submit proof of compliance (see Exhibit #17). On 8/10/89, State personnel again inspected the Respondent's subject lots and found that the gravel and rock that constituted the breakwater structure had apparently been substantially removed and that the concrete blocks had been placed above the high water mark. On 8/22/89, the Wetlands Board determined not to impose administrative fines on the Respondent as a result of the above action; but on 9/7/89, informed the Respondent "that any future work in the Lake would require a permit to be issued and posted."

Subsequently, in 1990 aerial photographs (Exhibit #9) of the area indicated that some accretion of sand was occurring near the subject breakwater.

On 7/22/94, DES personnel again inspected the Respondent's Lot 26 to insure compliance with the earlier 1989 removal action notice. At that time, same noticed that there was sand accumulating next to the wall. Subsequently, on 9/13/94, DES transmitted a letter to the Respondent indicating that the efforts to remove the wall and sand fill that had been the subject of the earlier removal action notice directed in 1989 was not sufficient to prevent further build-up and accordingly, further removal of the wall

and the sand were required (see Exhibit #18). Aerial photographs taken by the Army Corps. of Engineers in 1995 indicate that a sandbar was indeed beginning to form and that the previous Lovell River channel had been re-routed (see Exhibit #10). On 11/7/95, the evidence indicated that State personnel again inspected the subject lot – Lot 26 – and found no change in the wall since 1989.

On 5/1/2001 another inspection occurred on the subject Lot 26 and it was found that a 70' concrete and stone breakwater had been constructed on the site with the appropriate permit. A further inspection by the DES indicated that a 19' non-permitted breakwater had been constructed in the lake on the Respondent's Lot 25. Both walls and/or breakwaters were not permitted by the said Department.

As a result, on 8/1/2001, the DES issued a letter of deficiency ("LOD" – see Exhibit #21) to the Respondent that directed that the Respondent,

> a) remove the unauthorized breakwaters; b) operate any removal equipment landward of the high water mark of Ossipee Lake; c) install siltation and erosion controls, if necessary, to prevent water quality degradation; d) document the removal with photographs; and, e) submit the photographs to the Department by 10/15/2001.

The evidence indicated that the Respondent did not respond to the Department in reference to said LOD.

On 4/17/02, the DES issued Administrative Order #2002-15 (Exhibit #23) in reference to the Respondent which found that same had violated RSA 482-A:3 (I) by,

> a) constructing a structure in and on the bank of Ossipee Lake on Lot 25 without Department authorization; b) constructing a structure in and on the bank of Ossipee Lake on Lot 26 without Department authorization; and c) causing accumulation and deposition of sand and sediment adjacent to the unauthorized structures.

Accordingly, Section E of the said Administrative Order provided that the Respondent shall:

1. By June 1, 2002, completely remove both of the unauthorized structures with the following conditions:

a. Both walls to be removed from Department jurisdiction;
b. Any equipment used for removal to be operated landward of the high water mark of Lake Ossipee;
c. Siltation and erosion controls shall be installed to prevent any water quality degredation; and,
d. Photos documenting removal to be submitted within 10 days of completing removal.

2. Retain a hydrogeologist or sedimentologist ("consultant") to identify the origin of the sandbar material located lakeward of Lots 25 and 26, and submit a report prepared by the consultant by June 30, 2002.

3. If the consultant determines that some or all of the sandbar material is eroding from Lots 25 and 26, submit by August 30, 2002, a remediation and restoration plan, prepared by the consultant, for the removal of the sandbar and restoration of the lake bottom of Lake Ossipee.

4. Carry out restoration and removal of sand deposition in Ossipee Lake upon approval by and as conditioned by the Department.

The Respondent subsequently submitted a Request for Reconsideration of the said Administrative Order on 5/2/02 and an evidentiary hearing was conducted by the DES on 12/12/02. Subsequent to same, a Notice of Decision was issued on 6/20/03 (Exhibit #27). Specifically, the Amended Administrative Order changed the time specified for completion in Section E.1 of the Administrative Order from 6/1/02 to 8/1/03. Further, the Amended Order provided in reference to section E.3 & E.4 the following:

3. a. By August 1, 2003, submit a plan to remove enough material from the Lake adjacent to where the walls were constructed to breach the sandbar and reestablish flow through the area. Include in the plan a time table for the removal, which shall occur during low flow/draw-down conditions no later than fall/winter 2003.

b. Implement the plan as conditioned and approved by DES.

4. a. Hire a hydrogeologist or sedimentologist acceptable to DES to monitor the area for a period of five years from the date the walls and sandbar material are removed and to submit written annual reports to DES. The reports shall include photographs and charts or graphs representing baseline conditions and the current year's conditions in a form that allows reasonable comparison, together

with the consultant's assessment of whether sedimentation in the area is decreasing at a reasonable rate.

b. If after three years of the monitoring period the consultant concludes that sedimentation is not decreasing at a sufficient rate to prevent sandbar growth, submit a plan to remove additional material from the Lake, including a time table for the removal, and implement the plan as conditioned and approved by DES.

Subsequently, on 11/21/03, the Respondent informed the DES that he would begin removing the breakwater and on November 26, 2003, the DES inspected the site and noted that the 70-foot concrete breakwater had apparently been removed. (The Court finds that the evidence provided at trial indicates otherwise – see Exhibit #30.) Nevertheless, the Respondent had not conducted the work or the monitoring required under the amended sections E.3 and E.4 of the Amended Administrative Order and, specifically, had not submitted a plan to breach the sandbar and reestablish flow through the area adjacent to the location of the unauthorized breakwaters; nor has the Respondent conducted the required monitoring and subsequent remedial actions as directed by the DES.

Consistent with Petitioner's Exhibit #12, an aerial photograph taken on or about 7/29/03 indicated that the breakwater on Lot 26 was still in place and, as a result, a large westward hooking sandbar was increasing in size since a July 2002 area photo (Exhibit #11).

At trial, the Respondent admitted that he had failed to comply with the Administrative Order or Amendment thereto regarding submission of a plan to breach the subject sandbar, nor has same been breached as directed. Nevertheless, in response to the Petitioner's injunctive request(s), the Respondent testified that much of the material that had accumulated at the Lovell River would have occurred as the result of the natural flow of what was characterized by all witnesses as a "juvenile" river.

Accordingly, the Respondent objected to being held responsible for accumulation of all materials at the subject mouth of the Lovell River. Specifically, consistent with the Stipulation of the parties (dated 9/8/06), "some of the material that had been deposited in Bradford Cove since 1988 may have come from sources other than the Lovell River, such as from erosion of the banks of the Lake adjacent to the Cove, from airborne sources, from rainfall, from overland runoff of rain or meltwater, or from other sources. " Further, consistent with the parties' Agreement-Stipulation (dated 9/5/06) it was stipulated that the boat basin owned by OBA has "needed periodic dredging to maintain an open channel into Ossipee Lake."

By agreement of the parties, the deposition of James L. Cattaneo taken on 7/13/05 was introduced as a full exhibit. In said deposition, Mr. Cattaneo testified as to his recollections that a substantial sandbar structure had been in place since he began visiting the area in the 1960's. As to whether same encompassed a sandbar and/or a delta is uncertain through this deposition testimony.

Since the subject Administrative Order and Amendment thereto was directed, the evidence indicated that the sandbar has been increasing both in volume and dimension. As a result, the use of the Petitioner-OBA's lakefront for the related activities has been substantially prejudiced. Specifically, the area in front of the Petitioner's property has become increasingly more shallow and accordingly the use of same for both boating and mooring purposes has been effected. Consistent with the Court Order (dated 9/19/05) (see Plaintiff's Exhibit #35) the Court GRANTED the Petitioner's Motion in Limine (filed 7/11/05). In so doing, the Court directed in part;

> Although the respondent argues all the issues before the DES are not the same issues presented in this case, the petitioner only seeks to estop the respondent from relitigating the issues upon which the DES has made final conclusions and which the parties dispute in this case. Thus, in the interest of

judicial economy, this Court will bar the respondent from challenging, contradicting, or relitigating the findings of fact and conclusions of law reached by the DES in its Notice of Decision on Administrative Order No. D #2002-15, and that Order as amended, to the extent the issues addressed in said orders are similar to the issues in dispute in this case, and to the degree the DES made final, conclusive determinations on the matters relevant to this case.

Accordingly, there is no question that the Respondent violated various provisions of the applicable statutes including RSA 482-A:3 (I) and in so doing caused the accumulation and deposition of substantial amounts of sand and sediment adjacent to the walls constructed by him in Ossipee Lake. Further, since that time, the Respondent has failed to remediate the damages that he has caused by his actions.

As represented above, the Petitioner's request for injunctive relief is based on a theory of alleged private nuisance. Under applicable New Hampshire law, the burden is on the Petitioner to prove "the existence of a nuisance by a preponderance of the evidence to determine whether injunctive relief is appropriate." Cook v. Sullivan, 149 N.H. 774, 780 (2003) (quoting Dunlop v. Daigle, 122 N.H. 295, 298 (1982)). "To constitute a nuisance, the Respondent's activities must cause harm that exceeds the customary interferences with land that a land user suffers in an organized society, and be an appreciable and tangible interference with a property interest." Cook v. Sullivan, 149 N.H. at 780. "A private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property." Cook v. Sullivan, 149 N.H. at 780 (quoting Dunlop v. Daigle, 122 N.H. 295, 298 (1982)). Consistent with Cook v. Sullivan in determining whether a nuisance exists, "[t]he proper consideration of all relevant circumstances involves a balancing of the gravity of the harm to the Petitioner against the utility of the Respondent's conduct, both to himself and to the community" should be undertaken by the Court. Indeed, as reviewed in Robie v. Lillis, 112 N.H. 492, 496 (1972), "liability is imposed only in those cases where

the harm or risk to one is greater than he ought to be required to bear under the circumstances."

The Court finds, consistent with the above, that the Petitioner has satisfied its burden of proving that the Respondent's actions caused a substantial and unreasonable interference with the rights of the Petitioner to the use and enjoyment of their jointly owned beach, docks, marina, and swimming area, in constructing the subject illegal breakwater(s) and same continues to do so. Accordingly, the Court finds that the Respondent has caused a private nuisance which necessitates appropriate injunctive relief.

In evaluating the appropriateness of injunctive relief, the Court is directed to utilize the same balancing test that is used to first identify whether a nuisance exists, "although the scales must weigh more heavily in the [Petitioner's] favor because of the extraordinary nature of this form of relief." Robie v. Lillis, 112 N.H. at 497. The propriety of affording equitable relief to a nuisance in a particular case rests in the sound discretion of the Trial Court and said judgment should be exercised according to the circumstances and exigencies of each case. Geiss v. Bourassa, 140 N.H. 629, 631 (1996). A Court's Order must encompass a sustainable exercise of discretion. See id.; see also State v. Lambert, 147 N.H. 295, 296 (2001) (explaining unsustainable exercise of discretion standard). By way of example, the Supreme Court opined in Dunlop v. Daigle, 122 N.H. at p. 300 that, if the Defendant's activity can be carried on without causing unreasonable interference to the Plaintiffs, then same should not be required to remove their house. Nevertheless, an Order requiring such removal might be deemed justified if there is no other way to abate the private nuisance. See, Urie v. Franconia Paper Co., 107 N.H. 131, 134 (1966) . Further, consistent with Webb v. Town of Rye,

108 N.H. 147, 153-54 (1967), once a right to equitable relief has been established, the powers of the Trial Court are broad and the means flexible to shape and adjust the precise relief to the requirements of the particular situation. Wilmont Homes, Inc. v. Weiler, (Del. 1964) 202 A.2d 576, 580; 1 Pomeroy's Equity Jurisprudence, s. 109, p. 140.

In rendering an injunctive determination, the Court must consider the rights of the Respondent, as well as those of the Petitioner and should not interfere with the Respondent's use and enjoyment of his property further than is necessary to give the Petitioner the protection to which it is entitled. 66 C.J.S., Nuisances, s. 129, p. 925. It is established within the applicable New Hampshire case law that if by the use of certain specific appliances or methods, operations on Respondent's property, which are deemed to constitute a nuisance, could be carried on without causing unreasonable injury to the use and enjoyment of neighboring properties; Respondent should not be enjoined from all use of its property for the particular purpose but only against his use in a manner found to be unreasonable. Livezey v. Bel Air, 174 Md. 568, 577; Hannum v. Gruber, 346 Pa. 417, 426. See Annot. 52 A.L.R. 2d 1134. To state same succinctly, the injunctive cure directed must respond to abatement of the nuisance and not encompass additional measures unfairly prejudicial to the Respondent or non-parties to the pending action.

In determining the scope and quantum of equitable relief to be granted, the Trial Court received and considered evidence pertaining to such remedial actions which might alleviate the harm caused to the Petitioner. See Johnson v. Shaw, 101 N. H. 182, 188 (1957); Hannum v. Gruber, 346 Pa. 417, 426. If deemed equitable in view of all the surrounding circumstances, the Court should consider affording the Respondent a

reasonable opportunity to improve conditions and abate the nuisance before more substantial injunctive measures are directed. Urie v. Franconia Paper Co., 107 N. H. 131, 134 (1966); Herring v. Walker Company, 409 Pa. 126, 135; Krulikowski v. Polycast Corporation, 153 Conn. 661. This is especially true when, as in this case, the interest of the public is involved. Bowers v. Calkins, 84 F. Supp. 272, 278 (D. N. H. 1949); Livezey v. Bel Air, 174 Md. 568, 577; Gibson v. Baton Rouge, 161 La. 637; Space Aero Products Co. v. Darling Co., 238 MD. 93, 128.

As accurately stated by the Petitioner in its Amended and Final Memorandum of Law (dated 9/08/06), at trial, the Court did express some reservations concerning directing a different "remedy" than that ordered by the DES in its June 20, 2003 Amended Administrative Order No. WD #2002-15 (see Exhibit 27). The Petitioner avers that the Court "should not shy away from this obligation" (see page 8). Nevertheless, a number of unanswered concerns regarding the specific injunctive relief requested by the Petitioner – OBA exists. Specifically, at trial, no competent evidence was produced by either party as to the adverse effect(s), if any, that would be occasioned on adjacent properties owned by non-parties were the Petitioner's requested relief ("complete removal of sandbar" – Exhibit #33A) or the preferred alternative ("channelization; partial dredge of sandbar and embayment" – Exhibit #33C) directed; nor is it clear that same has been effectively reviewed by the DES. Further, in view of the substantial volume of material to be removed under either option, same presumably gives rise to jurisdictional questions dealing with the Army Corps of Engineers. The Court would further note, that consistent with testimony elicited from one of the Petitioner's experts and the corresponding Request for Findings of Fact #49, "a solution involving pushing the sandbar sediment into deeper water to breach the bar and thus re-establish a natural

delta would cost about a third or a quarter as much as removing the sediments from the lake". Although on its face same appears to be logical and would presumably result in significant monetary savings to the Respondent; this course of remedy is arguably not consistent with the direction of the DES which specified, in part, that "any equipment used for removal to be operated landward of the high water mark of Lake Ossipee" (see Paragraph 1b of the Administrative Order #2002-15 – Exhibits #23 and #26). There further exists the question broached in the uncontradicted testimony and Stipulation of the parties, that the Respondent is not responsible for all the sand and sediment that had accumulated in the immediate area of Bradford Cove and the mouth of the Lovell River.

Accordingly, the following provisions are directed:

1. That the Respondent shall, at his sole expense, forthwith contract with a qualified professional engineer, to produce a plan, time table and application and to apply to the Department of Environmental Services ("DES") for all necessary approvals and permits to perform material removal in the area of the Bradford Cove, Lake Ossipee, NH, which expeditiously results in the removal of the present sandbar and reestablishment of the "typical fan-shaped delta," which was in existence prior to the Respondent's non-permitted above-said actions. Said plan shall encompass removal of those materials that the DES determines are the result of the Respondent's non-permitted activities, as above said.

2. That Respondent shall, at his sole expense, forthwith pay the appropriate professionals to implement the removal plan, as provided above, or as modified and permitted by said DES. In approving the plans submitted by the said Respondent as

directed; the Court assumes that the above-said concerns will be addressed by the DES.

Petitioner's Proposed Findings of Fact and Conclusions of Law

FINDINGS OF FACT:

GRANTED: #1- #45, #50, #51 & #52

GRANTED in part: #46, #47, #48, #49 – (Requests consistent with testimony of witnesses received. No actual competent construction testimony was produced).

"CONCLUSIONS" OF LAW:

GRANTED: #1- #12

DENIED, in part consistent with the above: #13

9/27/06
Date

James D. O'Neill III
Presiding Justice