

**STATE OF VERMONT
SUPERIOR COURT – ENVIRONMENTAL DIVISION**

THE NATURAL RESOURCES)	
BOARD,)	Docket No.
Petitioner,)	
)	
v.)	ASSURANCE OF
)	<u>DISCONTINUANCE</u>
)	
BRIAN COTTON & ISLAND)	
EXCAVATING CORP.,)	
Respondents.)	

Pursuant to the provisions of 10 V.S.A. § 8007, the Natural Resources Board (hereinafter "Board") and Brian Cotton & Island Excavating Corp. (hereinafter, collectively "Respondents") hereby enter into this Assurance of Discontinuance (Assurance), and stipulate and agree as follows:

VIOLATION

Respondents have failed to obtain a permit amendment pursuant to NRB Rule 34 (A) prior to commencing the activities discussed herein.

STATEMENT OF FACTS

1. Mr. Cotton's property (the "Property") is located on the east side of Sweeney Farm Road, on the eastern shoreline of South Hero Island, in the town of South Hero.
2. South Hero, Vermont is a "10-acre town" for the purpose of assessing "development" under Act 250.
3. The Property is subject to Land Use Permit #6G0540, which was initially issued on March 12, 2002, and is owned by Respondent, Brian Cotton.
4. Mr. Cotton hired Respondent, Island Excavating Corp. (hereinafter "Island"), to complete the excavating and tree work discussed herein.
5. Island, by and through its Vice President, Timothy Parizo, acknowledged that Island performed the work discussed herein.
6. Island was on notice that an Act 250 LUP had been issued for the Property. Furthermore, in performing the work discussed herein, Island used the "Site and Grading Plan" that clearly indicates: 1) "Refer to Land Use Permit for extensive conditions about tree cutting and view

corridor maintenance along the lakeshore bank” and 2) “Permit-required 25’ ‘undisturbed, naturally vegetated and unmaintained buffer zone’ – see Land Use Permit for specifics.”

7. Shortly before performing the work discussed herein, Act 250 District Coordinator, Geoff Green, warned Island that they had violated an Act 250 Permit with very similar conditions.
8. At all times relevant to the matter discussed herein, Mr. Cotton owned the Property and directed the work discussed herein.
9. At all times relevant to the matters discussed herein, Timothy Parizo was the Vice President of Island and he, or his agents, performed the work, in violation of Act 250, more thoroughly discussed below.

DESCRIPTION OF VIOLATIONS

1. **Stairway violation.** During the reconstruction of the access stairway at least two tree trunks or branches of greater than 4 inches in diameter were removed in contravention of the LUP.
 - a. Condition 23 of the LUP states, in pertinent part: “...The construction of each access stairway shall not remove any vegetation 4” and greater and shall not remove the roots or stumps.”
2. **Tree cutting violation.** Trees and branches have been removed on the Property within the designated lakeshore buffer zone, without the permission of the District Coordinator.
 - a. Condition 25 of the LUP states: “Prior to the sale of the first lot, the Permittees shall conduct a site visit with the District Coordinator, a representative from the Agency of Natural Resources, the County Forester, and any other appropriate person to identify dead or dying trees or downed branches within the 75 foot setback zone. Any dead or dying tree or downed branches may be removed along with any other minor trimming as necessary to create a view corridor to the lake and mountains from each building site. Live and healthy trees shall not be removed or considered minor trimming. Once this initial cutting is complete, there shall be no cutting of trees within the buffer zone. Minor maintenance trimming of the view corridor may be approved by the District Coordinator.”
 - b. The site visit occurred on April 19, 2002. During that visit, a team of experts agreed to allow the Property’s then owner, E. & E. Sweeney Trust, to conduct some very limited vegetation management within the buffer zone. The conclusions from that site visit noted that: “As the bank along this lot supports a healthy stand of cedar, it was decided to create 2 “keyhole” views, where there already are slight openings through the trees, by pruning the lower limbs off some cedars growing along the steep bank. A third area at the far southern end of the lot is also an existing keyhole view. The sumac located

- between the 25' mark and the top of bank can be cut down, but trees of other species within this area should be left to mature." (memo from Susan Warren to Geoff Green, Act 250 District Coordinator, Jeff Sikora, Buermann Engineering, Jim Tessmann, County Forester, and Mark Sweeney, representing former owner E. & E. Sweeney Trust, dated May 13, 2002).
- c. Photos taken on the Property during the 2002 site visit show a healthy stand of cedar with two very narrow obstructed views toward the lake. Since then, trees and branches have been removed on the Property within the designated lakeshore buffer zone, without the permission of the District Coordinator.
3. Earth Disturbance, Unnatural Vegetation, and Fencing Requirement. Earth and vegetation have been disturbed and removed within the lakeshore buffer zone. The Respondents have planted a lawn within the lakeshore buffer zone. In addition, the Respondents have not maintained a permanent fence delineating the lakeshore buffer zone.
- a. Condition 26 of the LUP states: "The Permittee and any assigns or successors in interest shall maintain a 25' undisturbed, naturally vegetated and unmaintained (except for view corridor maintenance), buffer zone from the top of the bank, this is approximately 75' from the mean low water mark (elevation 95.5) of Lake Champlain. The buffer zone shall be defined by a fence that will be permanent and maintained by each property owner."
4. The removal and disturbance of vegetation and of the lake shore on the Project Tract is in direct contravention of the express terms of the LUP. As such, Respondents have violated the terms of the LUP and Act 250 by failing to obtain a permit amendment prior to commencing the activities discussed herein. The activities are considered a material change to the permitted project pursuant to Act 250 Rule 34(A) and, thus, an Act 250 permit amendment was required.

AGREEMENT

Based on the aforementioned Statement of Facts and Description of Violations, the parties hereby agree as follows:

- A. The Respondents shall immediately cease any and all non-permitted activities on the Project Tract.
- B. Respondents agree to the following Restoration Plan:

- I. Stabilization Work: Shoreline stabilization shall occur during the winter months when the ground and lake are frozen and the lake surface is reasonably low, to minimize ecological impacts to the lake. Work shall proceed in an expeditious manner, anticipated to take no more than two weeks, and the area immediately stabilized upon completion. Stabilization work on the property shall include the following:
- 1) Respondents shall install a row of wire-reinforced silt fence along the shoreline immediately downslope from all disturbed areas.
 - 2) Respondents shall regrade all disturbed areas of the Lake Champlain shoreline to approximate natural, pre-disturbance topography. This regrading will require the replacement of all fill that was removed. Benchmarks for establishing natural slope gradient shall be found on adjacent undisturbed areas of shoreline as evidenced in Exhibits A through C. All fill or topsoil placed upon the property shall be clean loam, free of noxious seeds and invasives, and conducive to the growth of native plants. A layer of non-woven filter fabric shall be placed upon the fill, and 6" of topsoil shall be placed on top of the fabric. Some native stone shall be placed upon the new slope. Any stone placed upon the shoreline shall be of the same geologic type as the Property's native stone, to match the Property's natural aesthetic and ecological conditions. To the maximum extent possible, stone used in the restoration shall be pulled from the existing disturbed areas onsite. The largest pieces of native stone will be placed only upon the toe of the new slope, extending from the south edge of the boat launch cut area southerly to the southerly property line, from an elevation not below 98.0 ft. up to the elevation of natural, pre-disturbance tree growth as evidenced in Exhibits A through C. This slope stabilization work shall not be cause for delaying the Restoration Work outlined below. Any stone brought in from sources beyond the project tract must match the color, size and shape of the native stone. The parties recognize and agree that it is essential to this restoration plan that the natural aesthetic of the project tract be matched to adjacent undisturbed areas to the maximum extent practicable.
 - 3) Any remaining disturbed areas shall be protected with mulch or rolled jute netting to stabilize exposed soils.

- II. Restoration Work: Restoration of the buffer zone area of the Property shall be completed no later than May 30, 2014 and shall include the following:
- 1) Applying native seed mix and mulch/jute netting to stabilize all exposed soils;
 - 2) Establishment of native plants appropriate to a Limestone Bluff Cedar-Pine Forest throughout the buffer zone area (see Wetland, Woodland, Wildland pages 160-162. Thompson and Sorenson, University Press, 2005) – community abstract attached;
 - 3) In currently unforested areas of the buffer zone, planting of northern white cedar trees of no less than 7 feet in height, at a spacing conducive to the formation of a future overstory of northern white cedar on the property;
 - 4) During the replanting process, allow for two future small “keyhole” views, comparable to the views that were created immediately following the 2002 site visit with then-permittee, E. & E. Sweeney Trust;
 - 5) Install deer exclusion fencing of no less than 8 feet in height around all replanted areas to prevent new plantings from herbivory. Fencing shall stay in place until the trees are 8-10 feet tall;
 - 6) Install the permanent fence required within Condition 26 of the Permit; and install temporary and/or permanent erosion control measures within the restoration areas as appropriate;
 - 7) The primary goal throughout the Buffer Zone shall be to establish a mature forest that is primarily northern white cedar;
 - 8) Permanently cease from mowing, managing, cutting, pruning, excavating or otherwise disturbing native vegetation or earth within the lakeshore buffer zone, except by explicit permission of the District Coordinator.
- III. Oversight: Respondents shall contract with a consulting forester, consulting ecologist, or landscape manager to monitor and control (removal and appropriate disposal) any non-native, invasive species that become established on the disturbed soil areas of the site. Monitoring and control shall occur during the months of June-September for five seasons following restoration. Monitoring and control shall be

for all species listed as noxious weeds under the VT Agency of Agriculture's Noxious Weed Quarantine Rule.

(http://agriculture.vermont.gov/plant_pest/plant_weed/invasive_noxious_weeds)

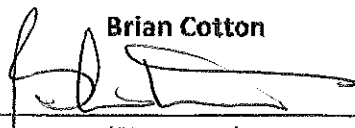
- C. Respondents shall (a) respond to any and all requests for information from the Act 250 District 6 Environmental Commission or the Coordinator for the Commission (as applicable) by the date set by the Commission or Coordinator; and (b) in good faith meet and comply with all scheduling or other orders or memoranda issued by the Commission.
- D. No later than 30 days following the entry of this Assurance as an Order by the Superior Court, Environmental Division, the Respondents shall pay the following:
1. Pursuant to 10 V.S.A. Ch. 201, a civil penalty in the amount of **Twenty Six Thousand Eight Hundred and Seventy Five Dollars and Zero Cents (\$26,875.00)** for the violations noted herein, by good check made payable to: "Treasurer, State of Vermont."
 2. Pursuant to 10 V.S.A. §8010(e)(2), the amount of **Eight Hundred Fifty-Six Dollars and Zero Cents (\$856.00)**, to reimburse the Natural Resources Board for the costs of this enforcement action by good check made payable to: "Vermont Natural Resources Board."
 3. The amount of **Ten Dollars and Zero Cents (U.S.) (\$10.00)**, for the purpose of paying the recording fee for the filing of a notice of this Assurance in the Town of South Hero land records, by good check made payable to: "Town of South Hero, Vermont."
- E. No later than 30 days following the entry of this Assurance as an Order by the Superior Court, Environmental Division, Respondents shall mail the Board an executed Acceptance of Service, on a form approved by the Board, showing that Respondents have actual notice of the Judicial Order and Assurance of Discontinuance.
- F. All payments and documents required by this Assurance shall be sent to:
- Vermont Natural Resources Board
Dewey Building
1 National Life Drive
Montpelier, Vermont 05620-3201
- G. Respondents are jointly and severally liable for all obligations under this Assurance.
- H. The Respondents shall not deduct or attempt to deduct any payment made to the State pursuant to this Assurance from that of Respondents' reported income for tax purposes or attempt to obtain any other tax benefit from such payment.

- I. The State of Vermont Natural Resources Board reserves continuing jurisdiction to ensure compliance with all statutes, rules, and regulations applicable to the facts and violations set forth herein.
- J. Nothing in this Assurance shall be construed as having relieved, modified, waived or otherwise affected the Respondents' continuing obligation to comply with applicable state or local statutes, regulations or directives.
- K. This Assurance shall become effective only after it is signed by all parties and entered as an order of the Superior Court, Environmental Division. When so entered by the Superior Court, Environmental Division, this Assurance shall become a judicial order pursuant to 10 V.S.A. § 8007(c). In the event that such order is vacated, the Assurance shall be null and void.
- L. Pursuant to 10 V.S.A. § 8007(d), Respondents shall not be liable for additional civil or criminal penalties with respect to the specific facts set forth herein relative to the Natural Resources Board, provided that the Respondents fully comply with this Assurance.
- M. This Assurance addresses violations under Act 250 only. It does not address any other state, federal or municipal violations.
- N. This Assurance sets forth the complete agreement of the parties, and it may be altered, amended, or otherwise modified only by subsequent written agreements signed by the parties hereto or their legal representatives and incorporated in an order issued by the Superior Court, Environmental Division. Alleged representations not set forth in this Assurance, whether written or oral, shall not be binding upon any party hereto, and such alleged representations shall have no legal force or effect.
- O. When this Assurance is entered as a judicial order, a violation of any provision of this Assurance shall be deemed to be a violation of a judicial order and may result in the imposition of injunctive relief and/or penalties, including penalties under 10 V.S.A. chapters 201 and/or 211.
- P. This Assurance is subject to the provisions of 10 V.S.A. §§ 8007 and 8020.

SIGNATURES


The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

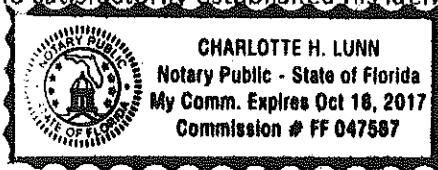
Dated at LIGHTHOUSE PT, ~~Vermont~~ FLORIDA, this 16TH day of DECEMBER, 2013.

By 
Brian Cotton
(Signature)

STATE OF ~~VERMONT~~ FLORIDA
COUNTY OF BROWARD, ss.

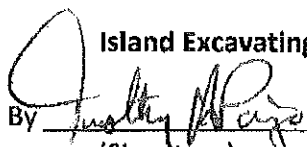
BE IT REMEMBERED that on the 16TH day of DECEMBER, 2013, personally appeared Brian Cotton, Brian Cotton signer and sealer of the foregoing instrument who is known to me or who satisfactorily established his identity to me.

Before me,

Notary Public
My Commission Expires: _____



The provisions set forth in this Assurance of Discontinuance are hereby agreed to and accepted.

Dated at Grand Isle, Vermont, this 16th day of December, 2013.


Island Excavating Corp
(Signature)

Timothy A. Parizo, Duly Authorized Agent
(Printed Name)

STATE OF VERMONT
COUNTY OF GRAND ISLE, ss.

BE IT REMEMBERED that on the 16th day of December, 2013, personally appeared Timothy A. Parizo, as the duly authorized agent of Island Excavating Corp., signer and sealer of the foregoing instrument who is known to me or who satisfactorily established his identity to me and acknowledged the same to be his free act and deed and the free act and deed of Island Excavating Corp. and that he has the authority to contract on behalf

of **Island Excavating Corp.** and that he has been duly authorized to enter into the foregoing Assurance on behalf of that entity.

Before me,

Notary Public
My Commission Expires 2/10/2015

Dated in Montpelier, Vermont, this 11 day of February, 2013.

NATURAL RESOURCES BOARD

By: 

Ronald A. Shems, Chair