

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

Dunes Motor Inn, Inc.
a New Hampshire corporation duly organized,
having a principal place of business at
2281 Ocean Boulevard
Rye, New Hampshire 03871

vs.

New Hampshire Department of Resources
and Economic Development
172 Pembroke Road
Concord, New Hampshire 03301

**VERIFIED PETITION FOR
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF**

NOW COMES Dunes Motor Inn, Inc., by and through its attorneys, Shaheen & Gordon, P.A., and petitions this Court for preliminary and permanent injunctive relief. In support of this request, Dunes Motor Inn, Inc. states as follows:

Parties

1. Dunes Motor Inn, Inc. (the "Inn") is a corporation with a principal place of business located at 2281 Ocean Boulevard, Rye Beach, New Hampshire 03871. Its primary business purpose is the operation of a beachside motor inn known as the Dunes Motor Inn.

2. New Hampshire Department of Resources and Economic Development ("DRED") is a department of the New Hampshire State Government established under

RSA 12-A. Its principal office is located at 172 Pembroke Road, Concord, New Hampshire 03301.

Jurisdiction and Venue

3. This matter is a claim of public and private nuisance and seeks the imposition of a preliminary and permanent injunction. Jurisdiction is conferred upon this Court pursuant to NH RSA 491: 22 and the general equity powers conferred under NH RSA 498:1.

4. Merrimack County is the appropriate venue because DRED's principal place of business is located in Concord.

Facts

5. Dunes Motor Inn, Inc. owns and operates Dunes Motor Inn. The Inn is a family-owned seaside resort situated directly across the street from Jenness State Beach. It has been owned by Martha Leary and her family since 1962.

6. The Inn boasts oceanfront accommodations with 45 guest rooms, 36 of which afford guests an unobstructed ocean view. The Inn also hosts weddings and other events; its seaside location provides a desirable backdrop for photographs. Customers travel from all over the northeast and other parts of the United States and from Canada to stay at the Inn and enjoy its distinctive view of the Atlantic Ocean.

7. The Inn's oceanfront location is especially unique due to the limited amount of shoreline available in New Hampshire. New Hampshire has only 18 miles of

coastline – the shortest in the United States. A portion of the coastline is inaccessible by the public due to its private ownership.

8. Jenness State Beach (“Jenness Beach”) is a state park with a parking area for a small stretch of beach and ocean access for swimmers and bathers. Its operating season runs from April through October; lifeguards are on duty beginning Memorial Day weekend through late August.

9. Jenness Beach is one of the smaller beaches located on New Hampshire’s coastline. It has only 67 parking spaces (compared to over 1,000 parking spaces at Hampton Beach or 485 parking spaces at Wallis Sands State Beach).

10. There is a small, 443 square-foot bathhouse located at Jenness Beach. The bathhouse holds bathroom facilities for both men and women, exterior changing rooms and an exterior shower. The bathhouse was recently renovated in 2014.

11. In February 2016, DRED announced plans at a public meeting to construct a new bathhouse at Jenness Beach. The proposed facility will increase the size of the bathhouse to 1,482 square feet (exclusive of the steps and ramp) - over 3 times the size of the current bathhouse. Importantly, it will also increase in height to 25 feet, over 2 stories.

12. The proposed size and location of the new bathhouse will significantly obstruct the view of the ocean from the road, sidewalk and the Inn. There will no longer be a view of the ocean from various vantage points along the road or adjacent sidewalk.

Guests who stay at the Inn will no longer enjoy a full unobstructed ocean view from their room.

13. The obstructed ocean view will result in significant business losses for the Inn. Although guests would be willing to pay a premium for views of the ocean, guests will not be willing to pay the same nightly rate for a room with a view of a bathhouse. The proposed large, disproportionate bathhouse will also likely result in a diminution of property values for the Inn.

14. Despite the significant increase in size, the proposed bathhouse provides minimal additional facilities for beachgoers. One additional toilet will be added to the women's restroom; one additional toilet and one additional urinal will be added to men's restroom.

15. There is scant evidence, if any, to indicate that such a large facility is necessary to meet the needs of beachgoers. At a May 10, 2016 meeting of the Rye Planning Board, Johanna Lyons of DRED presented regarding the proposed changes. She indicated that she conducted an informal survey at the beach over three days in 2015, inclusive of the hottest day of the summer, to determine the necessary size of the bathhouse. Notes accompanying the survey indicated that although there were occasional lines at the women's restroom, they "resolved after a few minutes."

16. Upon information and belief, the proposed bathhouse is designed to meet the needs of beachgoers when Jenness Beach is at 100% capacity – approximately only 201 hours per year; less than 8% of the beach season and just over 2% of the entire year.

Put another way, the bathhouse addresses an issue which occurs only 2% of the year with a solution which burdens the Inn and the general public 100% of the year.

17. The proposed bathhouse fails to address the more pressing safety and crowd control issues which presently challenge beachgoers and the community at large. For instance, many beachgoers are forced to park up to a quarter mile away from Jenness Beach due to the lack of parking at the beach. Beachgoers often walk in the street due to inadequate sidewalks in the area. Despite this obvious and pressing problem, the proposed changes to Jenness Beach fail to provide additional parking for beachgoers.

18. Upon information and belief, DRED intends to begin construction on the new bathhouse late October or early November, 2016. The project is set to be completed for the opening of the 2017 season.

Count I
Private Nuisance

19. Petitioner incorporates all paragraphs above and below.

20. The bathhouse as proposed presents an unreasonable interference with the use and enjoyment of the Inn's property. It is a substantial interference which will have an appreciable and tangible interference with the Inn's property interests.

21. The harm to the Inn far outweighs the utility of the bathhouse. The bathhouse, as proposed, is unnecessarily large and needlessly impedes the Inn's ocean views – a valuable and rare property characteristic in New Hampshire.

22. The size of the bathhouse – while appropriate for other locations in the state – makes it the proverbial “pig in the parlor” when placed on Jenness Beach.

23. The utility of the proposed bathhouse must be weighed against its impact on the Inn. The size of the bathhouse far outweighs its utility; it is expanding by 300% to meet needs which only exist for 201 hours out of the year. In contrast, it will impede the view of the ocean for the guests at the Inn for 8760 hours of the year.

Count II
Public Nuisance

24. Petitioner incorporates all paragraphs above and below.

25. The proposed bathhouse interferes with a right common to the general public – the ability to enjoy the ocean view from locations proximate to the beach.

26. Due to New Hampshire’s limited coastline, there are few places in the state where one can view the ocean from publicly accessible property. The proposed bathhouse will obstruct the view of the ocean for those passing by on the road, traversing the sidewalk or staying at the Inn.

COUNT III
Preliminary Injunction

27. Petitioner incorporates all paragraphs above and below.

28. Preliminary injunctive relief is a provisional remedy that preserves the status quo pending a final determination of the case on the merits. New Hampshire Dep’t. of Environmental Serv. v. Mottolo, 155 N.H. 57, 62 (2007). An injunction may issue when there is an immediate danger of irreparable harm to the party seeking such

relief and there is no adequate remedy at law. Id. A party seeking an injunction must show it would likely succeed on the merits. Id. It is within a trial court's discretion to grant an injunction after consideration of the facts and established principles of equity. Id.

29. The building of the bathhouse constitutes both a public and a private nuisance due to its size, scale, height, location and limited utility for DRED and the beachgoers.

30. There is scant evidence, if any, to indicate that such a large facility is necessary to meet the needs of beachgoers. At a May 10, 2016 meeting of the Rye Planning Board, Joanna Lyons of DRED presented regarding the proposed changes. She indicated that she conducted an informal survey at the beach over three days in 2015, inclusive of the hottest day of the summer, to determine the necessary size of the bathhouse. Notes accompanying the survey indicated that although there were occasional lines at the women's restroom, they "resolved after a few minutes." The proposed bathhouse is designed to meet the needs of beachgoers when Jenness Beach is at 100% capacity – approximately 200 hours per year or less than 8% of the beach season and just over 2% of the entire year.

31. The proposed bathhouse fails to address the more pressing safety and crowd control issues which presently challenge beachgoers and the community at large. For instance, many beachgoers are forced to park up to a quarter mile away from Jenness Beach due to the lack of parking at the beach. Beachgoers often walk in the street due to

inadequate sidewalks in the area. Despite this obvious and pressing problem, the proposed changes to Jenness Beach fail to provide additional parking for beachgoers.

32. The utility of the proposed bathhouse must be weighed against its impact on the Inn. The size of the bathhouse far outweighs its utility; it is expanding by more than 300% to meet needs which only exist for 201 hours out of the year. In contrast, it will impede the view of the ocean for the guests at the Inn and others for 8,760 hours of the year.

33. The loss of the ocean view as a result of the construction of the bathhouse is an irreparable harm which will be suffered by the Inn, as well as the public at large, if a preliminary injunction preventing the construction of the bathhouse is not issued.

34. DRED's proposed destruction of the ocean view, enjoyed by both the Inn and the community at large, leaves the Inn without an adequate remedy at law.

35. A preliminary injunction is in the public's best interest as it will preserve the public's present view of the ocean.

36. For the reasons set forth above and after, and in accordance with the Motion for Preliminary Injunctive Relief filed contemporaneously herewith, a hearing on preliminary injunctive relief is necessary and appropriate to enjoin the proposed bathhouse.

Count IV
Permanent Injunction

37. Plaintiff incorporates all paragraphs above and below.

38. The Inn is likely to succeed on the merits of its underlying claims for private and public nuisance.

39. The loss of the ocean view as a result of the construction of the bathhouse is an irreparable harm which will be suffered by the Inn, as well as the public at large, if a preliminary injunction preventing the construction of the bathhouse is not issued.

40. DRED's proposed destruction of the ocean view, enjoyed by both the Inn and the community at large, leaves the Inn without an adequate remedy at law.

41. A permanent injunction is in the public's best interest as it will preserve the public's present view of the ocean.

Count V
Substantial Benefit

42. Petitioner incorporates all paragraphs above and below.

43. Under the substantial benefit theory, attorney's fees may be awarded when a litigant's action confers a substantial benefit upon the general public." *Frost v. Comm'r, New Hampshire Banking Dept.*, 163 N.H. 365, 378 (2012) (internal indicators omitted; quoting *Bedard v. Town of Alexandria*, 195 N.H. 740, 744, 746 (2010) (stating the "theory is based on a promotion of a public interest either by a private party or a public official.")). *See also Silva v. Botsch*, 121 N.H. 1041, 1043 (1981) ("It is well settled in New Hampshire that when a trustee successfully litigates in good faith for the primary benefit of the trust as a whole, the court may award him attorney's fees.").

44. Attorney's fees are awarded to plaintiffs who pursue legal recourse to the benefit of the community at large. In *Schaefer v. Eastman Cmty. Ass'n.*, the court

awarded attorney's fees under the substantial benefit theory to plaintiffs who brought suit against a condominium association to enforce its by-laws. No. 99-E-0062, 2002 WL 34716798 (N.H. Super. Ct. Sept. 28, 2002). Explaining his reasoning, Justice Mangones wrote that "[t]he purpose of granting fees in this case would not be to penalize Eastman, but, rather, to compensate plaintiffs for their efforts on behalf of Eastman residents in upholding the members' property rights and interests. *Id.*

45. The pursuit of injunctive relief to prevent the impairment of the ocean views is meant to preserve a benefit for the residents of Rye, as well as the members of the public who traverse the public roadways adjacent to Jenness Beach.

WHEREFORE, Petitioner respectfully requests this Honorable Court:

- A. Schedule this matter for a hearing on the requested preliminary injunctive relief in accordance with the Motion for Preliminary Injunctive Relief filed contemporaneously herewith.
- B. Issue preliminary injunctive relief enjoining Respondent from constructing the bathhouse;
- C. Issue permanent injunctive relief enjoining Respondent from constructing the bathhouse;
- D. Award Petitioner her attorney's fees and costs associated with the filing of this action; and
- E. Such other relief as may be just and equitable.

DUNES MOTOR INN, INC.

October 12, 2016

By: Martha Leary
Martha Leary, President
Duly Authorized

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

Personally appeared, before me, the above-named Martha Leary, President and duly authorized representative of Dunes Motor Inn, Inc., and made oath that the above statements on behalf of Dunes Motor Inn, Inc. are true to the best of her knowledge and belief.

Dated: 10/12/16



Carmen J. Gagnon
Notary Public/Justice of the Peace
My Commission Exp. _____

Respectfully submitted,
Dunes Motor Inn, Inc.
By Its Attorneys,
SHAHEEN & GORDON, P.A.

October 12, 2016

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THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

DOCKET #217-2016-CV-00600

Dunes Motor Inn, Inc.

v.

New Hampshire Department of Resources & Economic Development

ABUTTER'S MOTION TO INTERVENE

NOW COMES Ryan FitzSimons, by and through his attorneys, Hoefle, Phoenix, Gormley & Roberts, PA, and respectfully moves to intervene in the captioned matter for the reasons that follow:

I. Overview

This is an action for public and private nuisance, as well as a petition to enjoin relating to the proposed construction of an over-sized bathhouse at Jenness Beach State Park in Rye, NH. The captioned petitioner is the owner of a resort across the street from the proposed construction. Mr. FitzSimons is the immediate abutter, who will be significantly and adversely affected by the erection of a structure on the scale proposed so close to his home.

II. Standard for Intervention

Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause....

N.H. Super. Ct. R. CIV 15.

Courts have been liberal in interpreting Rule 15 and its predecessors, and those decisions are subject to review only on an “abuse of discretion” standard.

The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice. A trial court should grant a motion to intervene if the party seeking to intervene has a right involved in the trial and a direct and apparent interest therein. *Snyder v. N.H. Savings Bank*, 134 N.H. 32, 35, 592 A.2d 506 (1991). It is within the trial court's discretion to grant intervenor status. *Samyn–D'Elia Architects v. Satter Cos. of New England*, 137 N.H. 174, 177, 624 A.2d 970 (1993). We will not overturn the trial court's decision unless we are persuaded that the court's exercise of discretion is unsustainable. *See Brzica*, 147 N.H. at 446, 791 A.2d 990.

Lamarche v. McCarthy, 158 N.H. 197, 200 (2008).

As the most direct abutter, it is plain that FitzSimons has a “direct and apparent interest” in a proposed structure that will markedly impact his home, as discussed *infra*. There could be no credible challenge to his standing to file an independent claim and, *ergo*, his interests satisfy the minor burden necessary to permit intervention.

III. Timing

It would, at first blush, appear that the Dunes’ and FitzSimons’ petitions are filed late in the game, but that is a circumstance of the State’s making. FitzSimons was not aware of the project until mid-June, 2016, at which point it was presented as a *fait accompli*.

Since June there has been a concerted effort to get the State to consider the impact of this ill-conceived project on both the abutters and the Town in general. Despite a meeting with abutters voicing opposition, a public meeting that demonstrated unanimous opposition, a petition of hundreds of residents objecting, and the Town’s Select Board publicly opposing the project, the Department of Resources and Economic Development’s (“DRED”) response has been that, because they had already paid for the design, they

could not afford the costs to attempt to reduce the structure to make it more palatable. Instead, they said that, for bureaucratic reasons, they were required to press forward in 2016 and could not wait.

The net result is that, despite the continued efforts of FitzSimons' and others to get a reasoned hearing from the State, they were never afforded that opportunity and the instant litigation became the only vehicle by which they could seek to protect their various investments and interests.

IV. Discussion

1. As noted in the Dune's action, DRED has proposed the replacement of an existing 443 square foot, one story, bathhouse with a roughly 1,100 square foot, two story structure¹ - with the net benefit of adding two toilets and one urinal. (Complaint ¶¶9,10²).
2. This, to address capacity issues that may not even exist. For example, when quantifying the need vs. demand at Hampton and North Beach State Parks for purposes of expanding bathhouse facilities, the State relied upon State income-producing parking as an indicator of usage. However, because the parking at Jenness beach is modest, there the State included parking on abutting, *private*, properties, *most of which have toilet facilities of their own for those utilizing their premises*, wholly undercutting the State's arguments regarding the need for the project.

¹. While the "L" shaped structure has 1,100 sf, the square roof covering the entire structure is 1,700 sf.

². All paragraph references are to the Dune's complaint.

3. The Dunes complaint outlines not only the impact of the new structure on its business, but also safety and crowding issues, as well as the impact on ocean views to the public at large.
4. FitzSimons shares those concerns and joins in the requested relief based thereon.
5. Additionally, however, there are a number of direct and unique impacts on his home if the project is to proceed as planned that are not addressed by the Dune's action.
6. Most significantly, the new structure will not be equipped with a fire suppression system. Given its seasonal nature, the building will sit empty and unattended for the bulk of the year.
7. The upshot is that, in the event of a fire, whether due to vandals, negligence or natural causes, the size of the structure, comprised primarily of flammable materials, would render ignition of FitzSimons' home a foregone conclusion.
8. While it is true that the existing bathhouse is closer to the property line than the proposed structure, the existing building's height and girth- and resultant availability of flammable materials- represent a fraction of the fire risk. Whereas the existing one-story structure is sheltered to the South by FitzSimons' home, the proposed building would sit open on all four sides, subject to all winds, and, at two stories³, be capable of much greater dispersion of flammable materials.
9. It is patently unfair to require that FitzSimons, alone, shoulder this risk to his home when there is no pressing need for the "super-sizing" of the bathhouse and, where no alternatives have been explored. Instead, DRED proposes to put the same dimensioned bathhouse at tiny Jenness Beach as it put at the sprawling Hampton

³. Including the cupola, the building approaches three stories.

Beach State Park. This “one size fits all” may be simpler from a planning perspective, but it is plainly misguided in application.

10. An additional consideration is that, unlike the current structure, the proposed building would significantly impair FitzSimons’ northern vista, up the Atlantic coast, which was one a primary consideration in his purchasing the home. As a result, the erection of the proposed structure would constitute a “taking”. “Governmental action which substantially interferes with, or deprives a person of, the use of his property in whole or in part, may therefore constitute a taking, even if the land itself is not taken.”

Sundell v. Town of New London, 119 N.H. 839, 845(1979).

11. Accordingly, for the reasons stated in the Dune’s Motor Inn’s petition as well as the reasons cited herein, FitzSimons joins in assertion of Private Nuisance, Public Nuisance, Temporary and Permanent Injunctive Relief.
12. Both parties have been consulted and () to the requested relief

WHEREFORE, it is respectfully requested that this Court:

- A. Permit Ryan FitzSimons to intervene in the captioned matter; and,
- B. Recognize and adjudicate his claims for:
 - a. Private Nuisance;
 - b. Public Nuisance;
 - c. Preliminary Injunction; and,
 - d. Permanent Injunction; and,
- C. Grant such further relief as is deemed just.

Respectfully submitted,

Ryan Fitzsimons
By His Attorneys
HOEFLE, PHOENIX,
GORMLEY & ROBERTS, PA

October 27, 2016

By: _____
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