COMMONWEALTH OF MASSACHUSETTS.

APPEALS COURT.

No. 2012-P-0213.

Essex County Division.

Alice L. Bentley, Mary T. Gronski, Laurie Pelletier, Alfredo Pelico, Odili G. Sarmiento, Kelly A. Duff, Carl L. Fucillo, Brenda Joyce Fucillo, Betsi Bell, and Pamela Anastas,
Plaintiffs-Appellees,

v.

Lynn Water and Sewer Commission,
Defendant-Appellant.

ON A CONSOLIDATED APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT DEPARTMENT.

Brief for the Plaintiffs-Appellees, Alice L. Bentley et al.

George O. Gregson
BBO # 210940
George O. Gregson, P.C.
325 Central Street
Saugus, MA 01906
Tel:(781)233-1133

Dennis P. Derrick
BBO # 121160
7 Winthrop Street
P.O. Box 37
Essex, MA 01929-1203
Tel:(978)768-6610

Table of Contents.

Table of Authorities.

Cases.

Statutes and Other Authorities.

Statement of the Issues Presented for Review.

1. Where the evidence of the Landowners Pelletier and Gronski showed that they had sustained at least $50,000 in damages as a result of the flooding of their home, was the jury's award of this amount reasonable?

2. Were the presentment letters of Carl A. Fucillo, Brenda Joyce Fucillo, Betsi Bell and Pamela Anastas sufficient for the purposes of G.L.c. 258, § 4, where they reasonably apprised LWSC of their claims, generated LWSC's investigation of their claims and then its ultimate responses which denied their claims?

3. Did Judge Fahey commit reversible error when she instructed the jury to assess LWSC's liability in terms which encompassed LWSC's claim that the flooding was caused by an "Act of God" and where the jury found that irrespective of such a claim, LWSC was responsible for the injuries which the Landowners sustained?

4. Where every legal resource shows that 302 CMR 10.11 was in effect on May 12, 2006, did the trial court commit reversible error by instructing the jury that it could consider whether LWSC's violation of this regulation was evidence of its negligence in the way it managed the events of May 12-18, 2006?

5. In view of the jury's finding that LWSC was responsible for the Landowners' damages because of its failure to superintend and maintain its reservoir system in a reasonably safe manner, is the parties' Agreement for Judgment obligating LWSC to do just that, i.e., superintend its water supply and storage system in a safe manner, enforceable?

6. Where none of LWSC's arguments on appeal have any merit and all of them have been put forward solely with the intent to delay the implementation of the judgments below for as long as possible to the detriment of the Landowners, is LWSC's appeal frivolous warranting an award to the Landowners of their appellate attorney's fees?

Statement of the Case.

The defendant-appellant Lynn Water and Sewer Commission ("LWSC") owns and manages the water supply and storage system which furnishes water to 90,000 residents in the City of Lynn, Massachusetts as well as to all of its businesses (A.297;298;300;Tr.III:20-21). According to the uncontradicted testimony of LWSC's executive director, Daniel F. O'Neill, an LWSC employee since 1986 who was its chief engineer for twelve of those years, the storm water and wastewater system was built in the late nineteenth century and consists of four (4) major reservoirs together with a series of conduits connecting these four ponds which are designed to maintain the safe storage and transmission of water before it is treated prior to delivery to Lynn residents and businesses for their use (A.297;Tr.III:19-21).

These four reservoirs which hold a maximum of 4.2 billion gallons of storm water are Hawkes Pond, Walden Pond, Birch Pond and Breeds Pond with the water treatment facility being located downstream from Breeds Pond and closest to the City of Lynn (A.297;300;Tr.I:113-114;III:

21-22). Hawkes Pond is supplied with water by the Saugus River to the west by way of a diversionary canal operating near Route 128 in Lynnfield; this canal is a manual gate system which operates by gravity and is opened "depending on the water that's available in the...River [and the City's] needs" (A.197;Tr.III:23-24). DEP guidelines limit LWSC to diverting 8.93 million gallons of water per day from the Saugus River over a 365-day period (Tr.III:26-27).

Hawkes Pond also receives water from the watershed surrounding it, i.e, all the rain and snow which falls in this 1.86 square-mile area goes into this pond by way of several brooks, especially Hawkes Brook (Tr.III:27-28; 32). Finally, Hawkes Pond receives by an 18" pipe all the water from the catch basins located on the southbound side of the Route 1 highway which it abuts(A.297;298;Tr. III:28-29).

As for Walden Pond, the largest storage reservoir in the system, the Ipswich River farther to the north supplies it with water by means of a 36" transmission line that pumps water beginning in the Wakefield/Reading town line south to northern tip of Walden Pond (A.297;Tr.III:

24-25). DEP guidelines limit LWSC to 5.31 million gallons of water per day from the Ipswich River in the period between December 31st and May 31st (Tr.III:26-27). In addition, LWSC can pump water from Hawkes Pond under Route 1 into Walden Pond (A.297;298;Tr.III:26;30). Finally, Walden Pond has a 1.75 square-mile watershed area which deposits rain and snow into the pond; and catch basins on the Route 1 highway northbound deposit water into a runoff area leading to Walden Pond (A.298;300;Tr. III:31-32).

LWSC can pump water held by Walden Pond through the Glen Lewis Pump Station to Breeds Pond to the southeast; there is a gravity feed from Walden Pond to Breeds Pond as well (A.297;Tr.III:32-33;34-35). Breeds Pond's 1.07 square-mile watershed supplies it with water as well (A.300;Tr.III:35). A gravity feed moves this pond's water to a low-level pump station where the water is delivered to a treatment facility and then to customers(Tr.III:35).

The fourth and smallest reservoir in the system is Birch Pond, located on the Lynn/Saugus town line (A.297; 300;Tr.III:33). It receives water through a controlled gravity feed from Walden Pond as well as from its own

watershed (A.297;300;Tr.III:33-34). Its water then flows by gravity downstream through a pipe to a pump station where LWSC delivers it to a treatment facility and then to customers(Tr.III:34).

All four reservoirs have spillways to provide "high-level relief" (Tr.III:39). That is, when water reaches a certain level, the spillway is a controlled, manageable way for the dam not to "overtop," an event which could lead to dam erosion, a dam breach and potential loss of life (Tr.III:39). For example, the Hawkes Pond spillway discharges its water into adjacent wetlands which absorb the runoff, sending it toward Hawkes Brook, then to the Saugus River watershed and eventually via the Saugus River to the Atlantic Ocean (A.297;298;Tr.III:40).

The spillway for Walden Pond likewise discharges its excess water onto adjacent wetlands through an outlet channel 25-30 feet wide on its western side (A.298;300; Tr.III:42-43). The water then traverses the natural topography of the area to a 36" drain located in the rear of a parking lot owned by Jimmy's Restaurant on Route 1; this drain goes under the restaurant, across Route 1 by way of a 5' X 7' boxed culvert where it discharges the

water into wetlands and then into the Saugus River leading eventually to the Atlantic Ocean (A.298;301;Tr.III:42;56-59;61).

Besides relieving its high water by means of the spillway, Walden Pond also has a 24" relief valve located below the pond so that it can lower the reservoir level from its bottom in an emergency (A.298;Tr.I:147-148;III:42-43;78-79). When opened, it discharges water from Walden Pond from its bottom level into the adjacent wetlands immediately to the west of the pond and, exactly like the water from the spillway, it traverses the natural topography of the area to the aforementioned 36" drain located in the rear of a parking lot owned by Jimmy's Restaurant on Route 1; then under the restaurant, across Route 1 by way of a 5' X 7' boxed culvert where it discharges into wetlands and then into the Saugus River and eventually the Atlantic Ocean (A.298;Tr.III:79-81).

As LWSC's O'Neill testified,

> ...[B]oth of these systems are critical to getting to the Saugus River. Walden Pond is traversing out a[n] outlet channel, through wetlands, into a piping system, under a building, across Route 1, into wetlands, and into the Saugus

> River.
>
> And the same with Hawkes. It's discharging out the outlet in a controlled manner, though a piping system, and ultimately into the Saugus River.

(Tr.III:42).

As for Birch Pond, its spillway discharges water into wetlands at the bottom of the pond and ultimately into Birch Brook, then to Moore's Brook and then to the Saugus River downstream and eventually the Atlantic Ocean (A.297;Tr.III:44). The spillway for Breeds Pond likewise discharges water into Moore's Brook, then to the Saugus River and then the Atlantic Ocean (A.297;Tr.III:45-46).

LWSC's "river to reservoir" water supply and storage system was in operation in May of 2006 and despite the fact that there was a 2" rainstorm earlier in the week and that heavy rains of 2-4" were forecast to begin on Friday, May 12, 2006, LWSC maintained Walden Pond at 96.1% of capacity and Birch Pond at 96.2% of its capacity, both nearing full status (A.148;Tr.I:113-114;119; 120). That is, up until within days of this storm, LWSC had pumped water into Walden Pond from both the Ipswich River and Hawkes Pond at the rate of 30 million gallons per day even though it needed on average of just 10

million gallons per day to supply the residents of Lynn, with the result that Walden Pond and Birch Pond were nearly full (Tr. I:117-118). LWSC shut down both of these pumps on May 12, 2006, waiting until just prior to the storm to do so (A.148;Tr.I:118).

As the storm continued through the weekend and into Sunday, May 14, 2006, 5.57 inches of rain had fallen in the area and the forecast was for an additional 2" to 4" of rain through Monday, May 15th (A.150;Tr.I:126). LWSC's inspection of Walden Pond on Sunday at 5:00 PM revealed that water was being discharged into the spillway to a depth of 11", washing away rocks and causing rumbling sounds (A.151;Tr.I:143). However, LWSC could not divert Walden Pond's water anywhere else because both Birch Pond and Breeds Pond were full (Tr.I:122-123).

By the morning of Monday, May 15th, water from the spillway had caused significant flooding (5' in depth) of adjacent wetlands and homes on Hawkes Street, Walden Pond Avenue and Aldo Drive—all below the Walden Pond Dam—and the evacuation of the residents in this area was ordered (A.153). Concerned that the continuing strong flow of now 18" of water in the spillway could compromise the integ-

rity of the dam on the western side of Walden Pond, LWSC opened the 24" relief valve at the bottom level of Walden Pond which released water into this very same area, i.e., the adjacent wetlands and homes along Hawkes Street, Walden Pond Avenue and Aldo Drive, an area which was *already* underwater as a result of the spillway's unchecked flow (A.154;Tr.I:148;II:21).

All of the water discharged by LWSC into this wetland and nearby residential area should have then traversed the natural topography of the land to the 36" drain located in the rear parking lot owned by Jimmy's Restaurant on Route 1; then under the restaurant, across Route 1 by means of a 5' X 7' boxed culvert where it could be discharged into wetlands and then into the Saugus River and to the Atlantic Ocean (A.298;Tr.III:79-81). But because this 36" drain was plugged with vines, vegetation and other debris, it could not drain the water sitting in this residential neighborhood abutting the spillway and wetlands(A.159-164). It was not until Thursday, May 18th, that a contractor hired by the Town of Saugus was able to identify the location of the plugged drain (still under several feet of water) and free it of

debris so that "the water level in the parking lot immediately started to recede" (A.164;Tr.II:26-27).

In the aftermath of these events, the plaintiffs-appellees Alice L. Bentley, Mary T. Gronski, Laurie Pelletier, Alfredo Pelico, Odili G. Sarmiento, Kelly A. Duff, Carl L. Fucillo, Brenda Joyce Fucillo, Betsi Bell, and Pamela Anastas ("the Landowners"), all residents of this flooded neighborhood immediately adjacent to the flooded wetlands and all of whom own homes which were inundated by LWSC's massive discharge of its water onto their properties during this storm in mid-May of 2006, brought these timely civil actions against LWSC in the Essex Division of the Superior Court Department (A.1-25;32-50;58-74;82-96).

Appending to their respective complaints their deeds together with their presentment letters to LWSC under G.L.c. 258, § 4, the Landowners in three counts claimed that LWSC had committed negligence, negligent trespass and a nuisance when it caused water from Walden Pond to flood their properties(A.8-10;37-39;62-64;88-91). A final count sought an injunction against LWSC barring it from discharging any further water from the Walden Pond dam

outlet/watershed "until such time as LWSC had conducted the necessary and reasonable survey and made the necessary improvements and repairs to the pipes, culverts and canals comprising the water drainage system associated with Walden Pond and the Walden Pond dam" (A.11;39;64; 91-92).

In support of their claims of negligence and nuisance, the Landowners alleged that in violation of the duty it owed to abutting landowners to manage the Walden Pond dam in such a manner that landowners would not be injured, LWSC opened a valve located in Walden Pond on May 15, 2006, "allowing a massive amount of water to flood the immediate and surrounding area below and beneath the dam site abutting the [Landowners'] properties" (A.6-10;35-38;60-64;86-90). Moreover, even though it knew that the drainage system in the area below the dam was defective because of flaws associated with its culverts, pipes and spillways, it failed to construct, service and maintain this drainage area so that water once released from Walden Pond was properly channeled away from their homes (A.7-9;36-37;61-62;87-89). The inability of LWSC's defective drainage system to handle this massive dis-

charge of water caused the flooding of their respective properties and damage to their person as well as to their personal property and land (A.9;37;62;89).

LWSC's answer denied all of the material allegations of liability for the flooding or for the Landwoners' damages(A.26-31;51-57;75-81;97-103). In its affirmative defenses, it claimed *inter alia* that the Landowners' presentment letters were inadequate; that it acted at all times reasonably and in good faith; that its acts were not the sole cause of the Landowners' injuries; and that the defective condition of the land, if any, was not on property under its ownership or control (A.29-30;54-56; 78-80;100-102).

With the pleadings in this posture, the Landowners' four separate civil actions against LWSC were consolidated for a four-day jury trial before Fahey, J., in the Superior Court Department, beginning on July 13, 2011 (A. 3;33;59;83;104-117;148-301;Tr.I:1-155;II:1-173;III:1-221;IV:1-39). At the close of the Landowners' case, the trial judge allowed LWSC's motion for a directed verdict only as to the Landowners' count in their complaints alleging negligent trespass (A.120;Tr.II:143-144).

On July 15, 2011, the Landowners' claims went to the jury on the issues of LWSC's strict liability for negligence, its ordinary negligence and nuisance (Tr.III:200-213). The jury returned with a verdict finding that LWSC's operation or misoperation of the Walden Pond dam was a substantial contributing cause of the Landowners' injuries; that LWSC was negligent in its operation of its reservoir/dam system and that it was a substantial contributing cause of the Landowners' damages; and that LWSC's conduct in this regard created a nuisance on the Landowners' properties (A.118-119). It awarded damages of $50,000 to Alice Bentley; $50,000 to Mary Gronski and Laurie Pelletier; $50,000 to Alfredo Pelico and Odili Sarmiento; $25,000 to Kelly Duff; $68,000 to Carl Fucillo and Brenda Fucillo; and $25,500 to Pamela Anastas and Betsi Bell (A.119). Judgments consistent therewith entered on July 22, 2011 (A.121-124).

Following the denial of LWSC's post-trial motions and the entry of an Agreement for Judgment on the Landowners' final count in their complaints seeking injunctive relief against LWSC obligating it to be more vigilant in superintending and maintaining its water storage

system and related drainage areas (A.125-127), LWSC appealed the judgments to this Court (A.85;128-129).

Statement of the Facts.

Six of the Landowners (Laurie Pelletier of Hawkes Street, Alfredo Pelico of Hawkes Street, Kelly Duff of 104 Broadway (Route 1), Alice E. Bentley of Hawkes Street, Carl Fucillo of Aldo Drive and Pamela Anastas of Walden Pond Avenue) testified to the massive flooding of their properties which took place on Sunday, May 14th, and Monday, May 15th, an inundation of their homes and neighborhood which reached 5' to 6' in depth; destroyed most, if not all, of their personal and real property; and lasted until Thursday, May 18th, when the 36" drain located in the rear of the parking lot at Jimmy's Restaurant was finally unplugged by a contractor working for the Town of Saugus (Tr.I:5-28;42;44-50;73-79;91-99;107; II:63-71;137-138).

They and other witnesses also described with particularity the damages which they sustained as a result of the water damage to their homes, their own dislocation

while their homes were being rehabilitated and/or undergoing mold remediation, their costs in replacing their lost and damaged personal property—--some with priceless sentimental value---and their expenses incident to having their lives uprooted for many months (Tr.I:28-29;33-39;50-51;52-70;84-90;100-106;II:71-76;78-89;138-141). They also introduced into evidence their presentment letters to LWSC detailing their respective claims and seeking reimbursement for their damages(A.24-25;46-47;70-71;93-94;Tr.I:30-32;47;81-82;98-99;II:65;133-135).

Beyond this evidence and in order to prove LWSC's liability under strict liability principles, for ordinary negligence or for nuisance, the Landowners adduced the testimony of Lawrence Silva, a registered professional civil engineer in Massachusetts since 1974 specializing in dam safety and reservoir design (Tr.II:92-94). Silva reviewed all the records associated with this mid-May storm, including the contemporaneous notes made by LWSC's operators of the Walden Pond dam (A.148-176) as well as a post-event report issued by Camp, Dresser and McKee ("CDM"),a Cambridge engineering and consulting firm hired by LWSC to evaluate these events and make recommendations

(Tr.II:92-93).

Silva testified that in May of 2006, LWSC as a dam operator was obligated by 302 CMR 10.11, a regulation issued by the Commonwealth's Department of Conservation and Recreation and the Office of Dam Safety, to have both an operation and maintenance plan as well as an emergency action plan for the Walden Pond dam (Tr.II:96-98). The operation and maintenance plan would spell out the maintenance and inspection protocol which LWSC should undertake on a daily basis so that if LWSC opens the 24" valve at the bottom level of Walden Pond and discharges water, it will "know that the channels and the pathways for where that water's going to go, are clear, maintained, and [that] they're in a condition that they'll be able to accept that water...in order to take it away from the... location of the...dam itself" (Tr.II:99). As he testified, such a plan is crucial where the storage system here is comprised of *four* different ponds and is a very old dam system requiring ongoing maintenance, update and repair (Tr.II:100-101).

However, Silva found no such operation and maintenance plan being implemented by LWSC prior to or during

the events of May 12-17 of 2006 (Tr.II:100-101). In fact, he asked LWSC for its operation and maintenance plan but none was ever forthcoming (Tr.II:101). Moreover, the CDM report also identified LWSC's failure to have such a plan in place as a crucial omission which needed to be rectified (Tr.II:101).

Silva also believed that LWSC's failure to have an emergency action plan in place contributed to the flooding of the Landowners' properties (Tr.II:101-102). Especially where storms are predicted but are greater than anticipated and where the water storage system is very old and consists of several ponds, Silva thought that having such a plan would give LWSC the flexibility "to discard some water in order to be able to create capacity for that rainfall that you will be getting" so that the point is never reached where water is going out a spillway (Tr.II:102-103). Moreover, because the Walden Pond dam is a "high hazard" dam, located immediately near residential and commercial property, the safe operation of this dam means that the spillway should *never* be used since it could compromise the entire structure (Tr.II:103-105).

As Silva observed, in this storm, LWSC

> **opened the gates (the 24" relief valve) ...because they already let themselves ...get 18 inches over the top of the spillway, and they were now in imminent ...danger of losing the entire structure, where had they managed it differently, they would have never gotten to 18 inches above the spillway or have—because if they had a proper operating plan which would've allowed for more storage capacity prior to an actual storm event, that you always have reserve capacity there, and then also had a clear plan as to how you were going to discard water in the event that conditions became different, that you actually could monitor.**
>
> **[T]he key here is...that there's no way to operate this system without having these elements in place....**
>
> ***....It's a man-made creation. You create these ponds. You now regulate 'em by pumping from one to the other to store this water. You divert water from the Ipswich River up until the end of May in order to load...these ponds with water so that you have plenty of water to sell. Okay?***
>
> **....And so that's what happened here is, you...keep these reservoirs up so high that you don't have the ability, the flexibility of how to...deal with storms. Whether or not they're 3 inches, 6 inches, 8 inches, whatever they are, in terms of amount of rainfall, you need to have a**

> plan for how you deal with the types of storms that you could encounter.
>
> ...[T]hat's...basically...what's going on here. And that was pretty clear in reading everything.

(Tr.II:107-108)(emphasis supplied).

Nor was Silva's opinion changed by the size of this storm. He first noted that its size was comparable to a storm in 1998 and another in 1996; but regardless of the storm's size, there was still a responsibility on the part of LWSC "to manage that rainfall and that reservoir system in such a way as not to cause harm to...folks that have been living below this dam---for all these years" (Tr.II:109). He also thought that the entire flood event for the Landowners was intensified by the plugged 36" drain in the rear parking lot at Jimmy's Restaurant on Route 1, a crucial part of the dam's drainage field which LWSC failed to maintain over the years(Tr.II:128).

The Homeowners also adduced the testimony of Richard Dawe, LWSC's superintendent of water treatment and supply, together with his contemporaneous notes of his activities during this storm (A.148-176;Tr.I:112-152;II:5-63). While Dawe admitted that he kept all the reservoirs

almost full just before this storm by pumping into them *three times* the water needed to meet the demands of his customers in Lynn, he claimed it was done to keep enough water available for the approaching dry season (Tr.I:113-114;117-121). As he saw it, the flooding of the Landowners' properties was not due to any unpreparedness or mistakes in planning or management on LWSC's part but rather because the size of the storm itself, a so-called 100-year storm event, "overwhelmed the whole system"(Tr.I:123). He conceded, however, that two other storms, one in 1998 and another in 1996, equaled this storm in the amount of water received (8"-9" within a 24-hour period) (Tr.I:130-131).

Dawe also admitted that it was his job to make sure that no matter what kind of storm takes place, there should never be water going down the spillways (Tr.I:132-133). But he claimed that given this extreme storm event, the fact that water started running down the Walden Pond spillway onto abutting properties thereby requiring his opening of the 24" relief valve at the bottom level of Walden Pond, was "out of [his] control" and "above our ability" (Tr.I:134;II:29).

Dawe further conceded that LWSC had no emergency action plan to handle this situation but wasn't sure if the regulation (302 CMR 10.11) imposing this requirement on dam owners applied in May of 2006, even though he later admitted that the regulation was promulgated in November of 2005 (Tr.I:138-139;II:7-8;12-13). Nor was he aware of the strict liability language of G.L.c. 253, § 48B, which provides in pertinent part:

> **The owner of a dam shall be responsible for liability for damage to property of others or injury to persons, including but not limited to loss of life, resulting from the operation, failure of or misoperation of a dam....**

(Tr.I:140-142).

Dawe further admitted that he did not know until Monday, May 15th, about the plugged 36" drain in the rear of property owned by Jimmy's Restaurant on Route 1, a crucial part of the drainage field for spillway water and for water released by the 24" relief valve at the bottom level of Walden Pond(Tr.I:142-149). Nor did he realize that it was actually plugged up until Wednesday (May 17th) or Thursday (May 18th) when the standing flood waters refused to drain from the area (A.160-163;Tr.I:

147). As he testified,

> So when there was flooding down at Hawkes Street, which I found about on Monday morning, I did not think that there was a blockage. I just figured everywhere was underwater because of the extreme storm event.

(Tr.I:147). In fact, it was not until Thursday that a contractor hired by the Town of Saugus was able to identify the location of the plugged drain (still under several feet of water) and free it of debris so that "the water level in the parking lot immediately started to recede" (A.164;Tr.II:26-27)

Yet Dawe's own notes reflect that he was aware that the area where the 36" drain is located "was subject to dumping" (A.160), "was frequently used for illegal dumping" and was thus prone to obstruction (A.163). But he claimed that LWSC was not responsible for clearing this drain since it was not on LWSC's property (Tr.II:26-27). He had no opinion about the 1974 deed conveying this area containing the 36" drain from the City of Lynn to the predecessor of Jimmy's Restaurant's but reserving to Lynn (and LWSC) "any and all flowage rights which it presently possesses...." (A.246;Tr.II:47-49).

As for opening the 24" relief valve on Monday, May 15th, Dawe admitted that he did so in order to lessen erosion of the spillway and that he left it open until May 28th when it was closed completely (A.169;173;Tr.II: 52-53).

After the Landowners rested, LWSC adduced the testimony of O'Neill, its executive director, who relied upon the storm's severity as the primary reason for his system's failure to handle the water which caused the flooding of the Landowners' properties(Tr.III:48-49;51-53-59). However, O'Neill admitted that he knew from experience that the crucial 36" drain in the rear of Jimmy's Restaurant could become clogged with vegetation and debris; and he conceded that there was neither an operation and maintenance plan nor an emergency action plan specifically designed for the Walden Pond dam, a high hazard dam directly abutting residential and commercial properties (Tr.III:64-65;70-73;108-109;111-112).

He also admitted that the 24" relief valve was opened on Monday, May 15th, thereby flooding the Landowners' properties, in order to prevent the "further scouring" of the spillway (Tr.III:79-81). Despite the provisions of

the 1974 deed giving LWSC the right to maintain its "flowage rights" in the 36" drain behind Jimmy's Restaurant, O'Neill claimed that LWSC had no responsibility to check this drain periodically for blockage (Tr.III:85-87).

Finally, LWSC's expert, civil engineer Mitchell Heineman of CDM, again identified the cause of the flooding of the Landowners' properties as the severity of the storm itself rather than anything LWSC did or failed to do in managing its "river to reservoir" water storage system (Tr.III:122-131;137;157-158).

Argument.

1. The Damages Which The Jury Awarded To Laurie Pelletier And Mary Gronski Were Fair And Reasonably Supported By The Evidence.

"Because the jury are a pillar of our judicial system, nullifying a jury verdict is a matter for the utmost judicial circumspection." *Finard & Company, LLC v. Sitt Asset Management*, 79 Mass. App. Ct. 226, 229 (2011) quoting *Cahaly v. Benistar Property Exchange Trust Co.*, 451 Mass. 343, 350 (2008). Thus in reviewing the judgments below, including the jury's verdict awarding damages, this Court will review the evidence at trial in the light most favorable to the Landowners. *Mazzoferro v. Dupuis*, 321 Mass. 718, 719 (1947). *Corbin v. Hodson*, 9 Mass. App. Ct. 900 (1980).

As a general matter, a jury's award of damages must stand unless to permit it to do so would amount to an abuse of discretion. *Baudanza v. Comcast of Massachusetts, I, Inc.*, 454 Mass. 622, 630 (2009). *Bartley v. Phillips*, 317 Mass. 35, 43-44 (1944). *Anzalone v. Strand*, 14 Mass. App. Ct. 45, 47 (1982). The field of discretion

open to Judge Fahey in this area is very broad. *Bartley*, 317 Mass. at 44. "[O]nly in rare instances can it be ruled that there has been an abuse of discretion amounting to an error of law." *Bresnahan v. Proman*, 312 Mass. 97, 101-102 (1942). *Magaw v. MBTA*, 21 Mass. App. Ct. 129, 137-138 (1985).

In assessing damages, the jury was not bound to reach mathematically precise results, *Rombola v. Cosindas*, 351 Mass. 381, 383 (1966); *Don v. Soo Hoo*, 75 Mass. App. Ct. 80, 85 (2009). If it is a reasonable approximation falling within the general range of the parties' proof, this Court will not interfere with what is primarily a jury question. *Griffin v. General Motors, Inc.*, 380 Mass. 362, 371 (1980). *Pemberton v. Boas*, 13 Mass. App. Ct. 1015, 1018-1019 (1982). In this sense, much of the damage computation must be left to the estimate and good sense of the jury, even upon meager evidence. *Griffin*, 380 Mass. at 366. *Bleicken v. Stark*, 61 Mass. App. Ct. 619, 624 (2004).

With this law in mind, the Landowners submit that the jury was properly instructed by the trial court on each of the elements of its damage award for property

loss and associated injuries, especially the restorative rather than punitive nature of such an award (Tr.III: 214), and that its eventual verdict in favor of Laurie Pelletier and her 89-year-old mother Mary Gronski in the amount of $50,000 was firmly anchored by the credible evidence and not excessive in any regard. The trial judge therefore did not abuse her discretion in denying LWSC's post-trial motion to alter and amend the judgment in this regard.

In the first place, both Pelletier and her mother were entitled to damages which restored them to "as good a position" as existed before LWSC's tortious conduct. *Trinity Church v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 50 (1987). *Wall v. Platt*, 169 Mass. 398, 405 (1897). Where property loss is implicated by the operative facts, the damage computation should accommodate for the reasonable cost of repair where the cost does not exceed a diminution in value. See, e.g., *Hill v. Metro Dist. Comm'n*, 439 Mass. 266, 273 (2003) (when "property can be repaired, a plaintiff is entitled to recover "the expense of doing those repairs"). Moreover, the injured plaintiff is also entitled to "the intervening loss of

rental value for the period reasonably needed to repair the injury." *Rattigan v. Wile*, 445 Mass. 850, 861 (2006) quoting *Guaranty-First Trust Co. v. Textron, Inc.*, 416 Mass. 332, 337 (1993).

Given these parameters for awarding damages, Pelletier testified that after the flood, she immediately made a list of personal property destroyed by the flood at her mother's home at 53 Hawkes Street and produced an inventory of items worth $27,000 which had to be replaced (Tr.I:28-29;32-34). Besides these lost items, she also testified that she spent $3,800 on hotel accommodations caused by their dislocation from Hawkes Street; she also spent sums for a rental car and clothing; she sustained lost wages; and there were repairs to the home's furnace (Tr.I:35-36). Pelletier further testified that as time went on, other property beyond her original inventory in her mother's home degraded through rust and had to be replaced, e.g., a furnace oil tank (Tr.I:39-40). She also identified in her testimony *another* $25,000 in damages beyond the approximately $27,000 worth of destroyed items already claimed (Tr.I:37-39).

When read in the light most favorable to Pelletier

and Gronski, this testimony exceeded $50,000 in damages and all of this evidence therefore justifies the jury's award of $50,000 in order to reasonably restore them to the *status quo ante*. None of the figures adduced by Pelletier amounted to "conjecture, surmise or hypotheses," *John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 22 (1911), and any inconsistencies on this score went to its weight rather than its admissibility. LWSC's spare appellate argument grossly understates the evidence which the jury heard.

Because the jury's award comes within the permissible parameters of the evidence and is well within the bounds of reasonableness, the award should stand. After all, the jury was free to calculate Pelletier's and Gronski's damages as it saw fit and it plainly did so in this case consistent with the evidence and the trial judge's instructions. Judge Fahey accordingly did not abuse her discretion in denying LWSC post-judgment relief on this ground.

2. The Presentment Letters Of Carl A. Fucillo, Brenda Joyce Fucillo, Betsi Bell And Pamela Anastas Meet The Requirements Of G.L.c. 258, § 4.

G.L.c. 258, § 4, the Massachusetts Tort Claims Act, provides in pertinent part that "[a] civil action shall not be instituted against a public employer on a claim for damages under this chapter unless the claimant shall have first presented his claim in writing to the executive officer of such public employer within two years after the date upon which the cause of action arose...." Such presentment must be made "in strict compliance with the statute." *Gilmore v. Commonwealth*, 417 Mass. 718, 721 (1994) quoting *Weaver v. Commonwealth*, 387 Mass. 43, 47-48 (1982). *Lodge v. District Attorney for the Suffolk Dist.*, 21 Mass. App. Ct. 277, 283-284 (1985). As the *Weaver* Court made clear, the Act requires presentment of notice to the official who has the authority to investigate and settle the claim under G.L.c. 258, § 5, before suit is instituted. *Id.*

Balanced against this requirement of strict compliance with the presentment requirement is the Legislature's instruction that the provisions of G.L.c. 258, §

4, be "construed liberally for the accomplishment of the purposes thereof." St. 1978, c. 512, Section 18. *Vasys v. Metropolitan District Commn.*, 387 Mass. 51, 57 (1982). The two major purposes of the presentment requirement are: (1) to allow plaintiffs with valid causes of action to recover in negligence against governmental entities in Massachusetts; and (2) to ensure that the executive officer with the authority to settle claims will have an adequate opportunity to investigate the circumstances surrounding the claim so that inflated or unworthy claims are rejected, valid claims are settled expeditiously and future like claims will be prevented. *Lodge*, 21 Mass. App. Ct. at 283 & n. 15, citing *Weaver*, *supra*. See *Gilmore*, 417 Mass. at 721-722. *Accord*, *Vasys, supra; Rodriquez v. Cambridge Housing Authority*, 59 Mass. App. Ct. 127, 133-134 (2003); *Martin v. Commonwealth*, 53 Mass. App. Ct. 526, 529 (2002).

Thus "[a]n appropriate balance should be struck [in measuring the adequacy of the presentment letters challenged here] between the public interest in fairness to injured persons and in promoting effective government." *Whitney v. Worcester*, 373 Mass. 208, 216 (1977). The

Landowners submit that in the circumstances of this case, this balance is best struck by holding, as Judge Fahey did below, that the two presentment letters on behalf of Carl A. Fucillo, Brenda Joyce Fucillo, Betsi Bell and Pamela Anastas satisfy the purposes of G.L.c. 258, § 4, because they reasonably apprised LWSC of their claims, generated an adequate investigation by LWSC and provoked its ultimate but wrongful denial. The trial judge therefore was right to deny LWSC's motion to direct a verdict against these Landowners for this reason and her ruling should stand.

As an initial matter, LWSC does *not* dispute on this appeal that these presentment letters were timely, see *Weaver*, 387 Mass. at 45, or that they were presented to the appropriate executive officer of LWSC. See *Lodge*, 21 Mass. App. Ct. at 281. Indeed, both letters were addressed to the "Lynn Water Commissioner;" and both generated written responses from Attorney Stephen E. Kiley who wrote that he represented LWSC, that he was in charge of its investigation of these claims and that he had spoken with the "appropriate representatives" of LWSC in deciding that relief could not be afforded these Landowners

(A.49-50;73-74). Moreover, Attorney Kiley copied LWSC's Executive Director, Daniel O'Neill, with his correspondence (A.50;74). This was clearly sufficient for purposes of the statute. See *Carifio v. Watertown*, 27 Mass. App. Ct. 571, 574 (1989) (Kaplan, J.)(holding that "on any reasonable view of the facts, there was sufficient communication of the claim to the proper executive officer and the statute should be held satisfied.").

The only issue raised by LWSC on appeal is that the letters did not adequately spell out a claim of negligence so that its executive officer was aware that this was a potential claim that needed to be investigated and, if appropriate, settled. *Martin*, 70 Mass. App. Ct. at 529 citing *Gilmore*, 417 Mass. at 721-722. Specifically, LWSC argues that because these Landowners---none of them lawyers---did not use the specific terms "strict liability," "negligence" or "private nuisance" in their respective letters, LWSC was never put on notice that they were making such claims against it (LWSC Brief at 22-23;25). This remarkable assertion of lack of notice by LWSC about the Landowners' claim of negligence is disingenuous, belied by the record and unsupported by law.

In the first place, *Attorney Kiley's own written responses to the Landowners' presentment letters identify the basis of the Landowners' claims as ones founded on negligence*. He writes to both of them:

> **The actions of LWSC were appropriate and necessary under the unusual circumstances with which it was confronted. It is only required to pay claims that result from its *negligent* actions. *No such negligence occurred in this situation*.**

(A.49;73) (emphasis supplied). Indeed, Kiley's entire response as LWSC's agent is framed in exculpatory language seeking to undo its liability *in negligence* for causing the flood of the Landowners' homes(A.49-50;73-74). It is therefore disingenuous in the extreme for LWSC to claim now that the Landowners' presentment letters were somehow inadequate for not identifying a precise legal basis for their claims in negligence and that this supposed omission hampered LWSC's duty to investigate its validity.

In the second place, LWSC's argument asks this Court to believe that LWSC did not know as a dam owner that it could be strictly liable in negligence under G.L.c. 253, § 48B, for the damages which these Landowners sustained as a result of its failure to manage its water storage

system in a safe manner. G.L.c. 253, § 48B, provides that LWSC as the owner of the Walden Pond dam "*shall* be responsible for liability for damage to property of others or injury to persons, including but not limited to loss of life, resulting from the operation, failure of or misoperation of a dam....(Tr.I:140-142)(emphasis supplied). The Landowners presentment letters on their face assiduously describe and clearly implicate the provisions of G.L.c. 253, § 48B, and LWSC's argument that it could not surmise or guess about its strict liability in negligence to the Landowners under G.L.c. 253, § 48B, is fatuous.

In the third place, *none* of this Court's decisions addressing the adequacy of the content of a claimant's presentment letter supports LWSC's argument. The presentment requirement is "not intended to demand such rigid particularization [of a claim] as to reincarnate sovereign immunity and bar legitimate claims for failing to invoke perfectly the correct 'Open Sesame.'" *Martin*, 53 Mass. App. Ct. at 530 citing *Vasys*, 387 Mass. at 57. All that is required is that a claimant's letter "not [be] so obscure that educated public officials should find themselves baffled or misled with respect to [the Homeown-

ers'] assertion of a claim for [negligence]...." *Gilmore*, 417 Mass. at 723. See *Garcia v. Essex County Sheriff's Department*, 65 Mass. App. Ct. 104, 109 (2005) citing *Martin*, 53 Mass. App. Ct. at 529 and *Rodriquez*, 59 Mass. App. Ct. 134.

Contrary to *Garcia*, *supra*, and consistent with *Martin*, 53 Mass. App. Ct. at 531, "it would take no great leap for the public official receiving the letter [i.e., LWSC's executive director, Daniel F. O'Neill] to infer that" the Landowners might have suffered injury as a result of LWSC's negligent management of this storm event. Their letters are a model of particularity concerning the facts of their claims, i.e., they both explicitly declare that they suffered discrete and itemized injuries to their respective properties as a result of LWSC's "open[ing] of the manual spillover valve" and its "open[ing] the manual spillover" (A.46-47;71).

Moreover, it is not so obscure as to baffle or mislead LWSC. *Martin*, 53 Mass. App. Ct. at 530. The Landowners' claims are clearly founded upon LWSC's strict liability under G.L.c. 253, § 48B, or general negligence

principles, to maintain its water storage system, specifically the Walden Pond dam, in a safe manner. No other reading of these letters comports with reason or common sense; and Attorney Kiley's responses thereto on behalf of LWSC prove this point. Neither would the public official receiving the Landowners' presentment letters, i.e., O'Neill or Attorney Kiley, be baffled or misled as to the factual investigation necessary for resolution of their claims short of suit. See *Martin*, 53 Mass. App. Ct. at 531. In sum, these presentment letters put O'Neill "on notice of the time, place, and factual basis of the claims sufficiently to allow the opportunity to investigate, evaluate, settle, and avoid further liability." *Id*. at 532. *Rodriquez*,59 Mass. App. Ct. at 136. They were therefore adequate in all respects. *Id*. citing *McAllister v. Boston Hous. Authy.*, 429 Mass. 300,305 n.7 (1999).

Nor did the Landowners' claims which were advanced in their presentment letters diverge in any material respect from their claims brought forward at trial. See *Rodriquez*, 59 Mass. App. Ct. at 134-135 citing *Gilmore*, 417 Mass. at 723 n.6 and *Martin*, 53 Mass. App. Ct. at 530. Contrast *Wightman v. Methuen*, 26 Mass. App. Ct. 279,

280-281 (1988). Thus any conclusion other than these presentment letters were sufficient under G.L.c. 258, § 4, would elevate form over substance, reinforce "arbitrary or trick means of saving the governmental entities from their just liabilities," as disapproved of in *Carifio*, and makes proper presentment a "fetish" at odds with the right of plaintiffs to be compensated for their injuries by public entities. See *Vasys*, 387 Mass. at 57 (1982) quoting *Whitney v. Worcester*, 373 Mass. at 216.

Finally, the record shows that LWSC's executive director O'Neill had actual notice of the Landowners' flood claims, mooting the presentment requirement in any event. *Bellanti v. Boston Pub. Health Comm'n*, 70 Mass. App. Ct. 401, 407 (2007). O'Neill admitted at trial that he was present at the Walden Pond dam when its spillway flooded the Landowners' homes on May 15, 2006 (Tr.III:46-49). In fact, O'Neill in his official capacity as LWSC's executive director ordered his employees to open the 24" relief valve at the bottom level of Walden Pond which caused further flooding of the Landowners' homes (Tr.III: 78). LWSC and its executive director therefore had actual notice of the events which gave rise to the Landowners'

claims and their presentment letters were therefore unnecessary for the purposes of satisfying G.L.c. 258, § 4.

3. The Trial Judge's Instructions To The Jury Incorporated LWSC's Claim That The Flood Which Inundated The Landowners' Homes Was The Result Of An "Act of God."

The Landowners' proof at trial allowed the jury to find more probably than not (1) that LWSC's management of its "river to reservoir" water supply and storage system exposed it to strict liability for the damages caused the Landowners under G.L.c. 253, § 48B, by its operation or misoperation of the Walden Pond dam on May 12-17, 2006; (2) that it was negligent in its management of its reservoir system for failing to keep the Landowners safe by (a) keeping its reservoirs inordinately full of water in order to sell this water despite the forecast of a severe storm, denying it the flexibility to move water to safe levels; (b) failing to have either an operation and maintenance plan or an emergency action plan in place for the Walden Pond dam, a high hazard dam, in order to allow it the flexibility to move water to safe levels, in violation of 302 CMR 10.11; (c) opening the 24" relief valve

at the bottom level of Walden Pond thereby flooding the Homeowners' properties *already* inundated by the dam's spillway water; and (d) failing to maintain the 36" drain at the rear of Jimmy's Restaurant, a crucial component of the Walden Pond dam's drainage field, so that it was unable to lead flood waters away from the Homeowners' properties, intensifying their damages; and (3) that it committed a nuisance when it allowed its water onto the Landowners' properties.

LWSC, on the other hand, sought to show that the losses sustained by the Homeowners were not the result of its negligence in managing its reservoir system but instead were the consequence of a 100-year storm, an event which it could not predict, over which it had no control and which now should excuse it from liability. Indeed, LWSC's trial counsel's entire closing argument to the jury was devoted to this claim that the storm was the *sole* cause of the Landowners' injuries, an "Act of God" for which it was not responsible (Tr.III:166-173).

Judge Fahey's jury instructions faithfully reflected these competing contentions when she guided them carefully through the process they would employ in determin-

ing the cause of the Landowners' harm. Addressing separately this issue of causation before defining the elements of the Landowners' three theories of recovery, she told the jury that

> **[e]ven if you're to find that the defendant's behavior was not proper, the defendant is not liable unless that conduct caused the harm to the plaintiff, either the operation or misoperation of the dam, creating a nuisance, or being negligent.**
>
> **To meet this burden, the plaintiffs need only show that there was greater likelihood or probability that the harm complained of, *was due to a cause for which the defendant was responsible, than from any other cause*.**
>
> **The defendant's conduct is the legal cause of the plaintiffs' injury if it was a substantial factor in bringing it about, and without which the harm would not have occurred. *If the harm would have occurred anyway, the defendant is not liable.* It does not matter what other concurrent causes contributed to the plaintiffs' injury, so long as the defendant's conduct was a contributing factor.**
>
> **....The plaintiff has the burden of proving by a preponderance of the evidence, that the defendant's conduct substantially contributed to causing the plaintiffs' injury....The defendant's**

> **conduct must contribute significantly to the result. It must be a material and important ingredient in causing the harm....**
>
> **If it was not a substantial factor, if the defendant's wrongful conduct was only slight, or insignificant, or tangential to causing the harm, the defendant cannot be held liable.**
>
> **....**
>
> ***What the plaintiff must show is that the harm each sustained was more likely due to the defendant's wrongful conduct, either operation or misoperation of the dam, or negligence, or nuisance, than to some other cause.***

(Tr.III:201-203) (emphasis supplied).

These instructions thus explicitly told the jury *three times* that if the evidence showed that "some other cause" besides LWSC's dam operation, negligence or nuisance brought about the harm sustained by the Landowners, then they must return a verdict for LWSC. This "some other cause" language clearly encompasses LWSC's claim made continuously at trial that the rain event was an "Act of God" which excused it from responsibility for the Landowners' injuries.

LWSC nonetheless argues on appeal that Judge Fahey was obligated to give the jury a separate instruction on

the "Act of God" defense in precisely those terms and her refusal to do so was reversible error; and it suggests that an instruction based upon an "Act of God" defense is warranted even in cases implicating the strict liability of dam owners under G.L.c. 253, § 48B (LWSC Brief at 26-35). The Landowners agree with LWSC that a defense based upon an "Act of God" event is not extinguished in strict liability cases like those invoking § 48B, and the trial judge's instructions made that perfectly clear. But they further submit that Judge Fahey's careful and comprehensive instructions on causation permitted the jury to find on *every* theory of liability advanced that this storm was an "Act of God," an unforeseeable event which could be "some other cause" excusing LWSC for the harm caused. Because the trial judge instructed the jury on the substance of LWSC's request, there was no reversible error and the judgments below should be affirmed.

It is the duty of the trial court to give full, fair, correct and clear instructions as to the principles of law governing all the issues presented by the evidence so that the jury understands its duty and can perform it intelligently. *Fein v. Kahan*, 36 Mass. App. Ct.

967, 967-968 (1994); *Narkin v. Springfield*, 5 Mass. App. Ct. 489, 491-492 (1977). The parties themselves are likewise entitled to an adequate and accurate statement of the law. *Cipollone v. D'Alessandro-Crognale, Inc.*, 333 Mass. 469, 475-476 (1956). *Hughes v. Whiting*, 276 Mass. 76, 79 (1931).

But Judge Fahey possessed considerable latitude in framing the language of her jury instructions, *Commonwealth v. Kelley*, 359 Mass. 77, 92 (1971), and she retained the power to fashion a charge which evenhandedly reflected the factual issues which the evidence showed were important for the jury to address. *Grant v. Lewis/Boyle, Inc.*, 408 Mass. 269, 275 (1990). In this regard, she was not required in her charge to adopt the requested language of either party. Nor was she bound in her instructions to argue the case for LWSC, *Collins v. Baron*, 392 Mass. 565, 567 (1984), or to charge on the legal effect of just fragments of the evidence. *Davis v. Walent*, 16 Mass. App. Ct. 83, 95 (1983). What she was required to do was give the substance of a requested instruction if it was reasonably supported by the evidence. *Investment Property Corp. of New Eng. v. Whit-*

ten, 356 Mass. 491, 493-494 (1969). *Holbrook v. Seagrave*, 228 Mass. 26, 30 (1917).

The trial court's jury instructions did just that. Read as a whole, they faithfully reflect the substance of the evidence adduced at trial by the Landowners that LWSC could be found strictly liable under G.L.c. 253, § 48B, or for negligence or for committing a nuisance. The instructions also allowed the jury to find---consistent with LWSC's claim---that the storm's unanticipated severity could amount to "some other cause," i.e., a supervening event, which excused LWSC from liability for the harm caused the Landowners. The instructions therefore gave the substance of LWSC's request and was proper in all respects. *Investment Property Corp. of New Eng. v. Whitten*, *supra*. *Holbrook v. Seagrave*, *supra*.

LWSC's insistence on this record that Judge Fahey use the exact "Act of God" language it wanted is unsupported by decisional law in any event. An "Act of God" is defined as an "irresistible physical force, or the violence of natural phenomenon, *not attributable to the conduct of man*, not referable to participation by man *through unreasonable failure to anticipate danger* or to

put forth protective instrumentalities, and overpowering all preventive measures exacted by the wisdom and foresight of prudent men....” *Bratton v. Rudnick*, 283 Mass. 556, 561 (1933) (emphasis supplied). In this regard, LWSC needed to show that the Landowners’ injuries were *wholly* caused by the storm and not in any way preventable by its reasonable foresight or other such prophylactic conduct. *Hecht v. Boston Wharf*, 220 Mass. 397, 405-406 (1915). It must have demonstrated with positive proof that there was *nothing* it could have done to prevent the injuries which resulted from the storm. *Id*.

Yet here the evidence was overwhelming that this storm was a predictable event and that instead of filling its reservoirs to the maximum, as it did, LWSC could have prevented the harm through reasonable regulation and maintenance of its water storage system before and after the storm. In the face of these man-made hazards created by LWSC, completely undermining its claim that the harm was the result of an “Act of God,” it was not open to LWSC to demand the jury be instructed with the exact wording of this defense and then claim reversible error because the trial judge wisely refused to do so. See

Hecht, *supra*. See also *OneBeacon Insurance Group v. RSC Corporation*, 69 Mass. App. Ct. 409, 411 (2006); *L.G. Balfour Company v. Ablondi & Boynton Corporation*, 3 Mass. App. Ct. 658, 660-661 (1975).

4. 302 CMR 10.11, Obligating LWSC To Have An Emergency Action Plan In Place For Its Maintenance Of Its Dam, Was In Effect On May 12, 2006, When The Events Of This Case Transpired.

LWSC argues on appeal that the trial judge erred in charging the jury that its violation of 302 CMR 10.11 could be evidence of negligence since it was not proven that this regulation was in effect on May 12-17, 2006. The short answer to this argument is that the Landowners' research from two sources establishes that this regulation was effective as of November 4, 2005, at the latest (See Statutory and Rule Addendum, *post*); that Richard Dawe, LWSC's superintendent of water treatment and supply, admitted to this date of November 4, 2005, during his testimony (Tr.II:7-8;12-13), which testimony binds LWSC now; and that LWSC has adduced no proof that this regulation was not in effect, even though it has had ample opportunity to do so.

5. The Parties' Agreement For Judgment In Reliance On The Jury's Justified Verdicts In Favor Of The Landowners Was Proper In All Respects.

For all of the reasons identified herein, the jury was justified in returning the verdicts they did in favor of the Landowners. This Court should therefore affirm in all respects the Agreement for Judgment reached by the parties which addressed the last count of the Landowners' complaints seeking injunctive relief.

Conclusion.

For all the reasons identified herein, this Court should exercise its discretion under Appeals Court Rule 1:28 and summarily affirm the judgments entered below. In addition, because LWSC ignores its own testimonial admissions as well as the Landowners' overwhelming proof which establish its liability, this appeal is frivolous. *Avery v. Steele*, 414 Mass. 450, 455(1993); *VMS Realty Investments, Ltd. v. Keezer*, 34 Mass. App. Ct. 119, 130 (1993). A further order should accordingly enter under Mass. R. App. P. 25 awarding the Landowners their single or double costs including the attorney's fees which they incurred in responding to this appeal; or provide them with such other relief as is fair and just in the circumstances. See *Katz v. Savitsky*, 10 Mass. App. Ct. 792, 798(1980).

Respectfully submitted,

George O. Gregson
BBO # 210940
George O. Gregson, P.C.
325 Central Street
Saugus, MA 01906
Tel:(781)233-1133

Dennis P. Derrick
BBO # 121160
7 Winthrop Street
P.O. Box 37
Essex, MA 01929-1203
Tel:(978)768-6610