STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2017-0066

TOWN OF PEMBROKE

v.

TOWN OF ALLENSTOWN

BRIEF OF DEFENDANT-APPELLEE

Town of Allenstown (Sewer Commission)

RULE 7 APPEAL FROM FINAL ORDER OF
THE MERRIMACK COUNTY SUPERIOR
COURT

Merrimack County Superior Court - Case # 217-2014-CV-0424

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DEFENDANT-APPELLEE'S BRIEF
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Citation	***Text***
RSA 32:7	32:7. Lapse of Appropriations. Annual meeting appropriations shall cover anticipated expenditures for one fiscal year. All appropriations shall lapse at the end of the fiscal year and any unexpended portion thereof shall not be expended without further appropriation, unless: I. The amount has, prior to the end of that fiscal year, become encumbered by a legally-enforceable obligation, created by contract or otherwise, to any person for the expenditure of that amount; or II. The amount is legally placed in any nonlapsing fund properly created pursuant to statute, including but not limited to a capital reserve fund under RSA 35, or a town-created trust fund under RSA 31:19-a; or III. The amount is to be raised, in whole or in part, through the issuance of bonds or notes pursuant to RSA 33, in which case the appropriation, unless rescinded, shall not lapse until the fulfillment of the purpose or completion of the project being financed by the bonds or notes; or IV. The amount is appropriated from moneys anticipated to be received from a state, federal or other governmental or private grant, in which case the appropriation shall remain nonlapsing for as long as the money remains available under the rules or practice of the granting entity; or V. The amount is appropriated under a special warrant article, in which case the local governing body may, at any properly noticed meeting held prior to the end of the fiscal year for which the appropriation is made, vote to treat that appropriation as encumbered for a maximum of one additional fiscal year; or VI. The amount is appropriated under a special warrant article and is explicitly designated in the article and by vote of the meeting as

Citation	Text
	nonlapsing, in which case the meeting shall designate the time at which the appropriation shall lapse, which in no case shall be later than 5 years after the end of the fiscal year for which the appropriation is made.
RSA 38:29	38:29. Water Funds. I. The funds received from the collection of water rates shall be kept as a separate and distinct fund to be known as the water fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 38:28, or for the previous expansion or replacement of water lines or water systems. II. Except when a capital reserve fund is established pursuant to paragraph III, all water funds shall be held in the custody of the municipal treasurer. Estimates of anticipated water rate revenues and anticipated expenditures from the water fund shall be prepared and submitted to the governing body as set forth in RSA 32:4, if applicable, and shall be included either as part of the municipal operating budget or as a separate warrant article submitted to the local legislative body for approval. In a town or district that has adopted the official ballot referendum form of meeting, any such separate warrant article shall include a default amount as provided in RSA 40:13, XI-a. If the municipality has a properly established board of water commissioners, then notwithstanding RSA 41:29 or RSA 48:16, the treasurer shall pay out amounts from the water fund only upon order of the board of water commissioners. Expenditures shall be within amounts appropriated by the local legislative body. The water commission shall also remit to the municipality those costs incurred by the municipality in support of water operations, including but not limited to financial audit, facility insurance, treasurer compensation, and office support. III. At the option of the local governing body, or of the board of water commissioners, if any, all or part of any surplus in the water fund may be placed in one or more capital reserve funds held in the custody of the trustees of trust funds pursuant to RSA 35:7. If such a reserve fund is created, then the governing body, or board of water commissioners, if any, may expend such funds pursuant to RSA 35:15 without prior approval or appropriation by the local legislative body, but all such expenditures shall be reported to the municipality pursuant to RSA 38:21. This section shall not be construed to prohibit the establishment of other capital reserve funds for any lawful purpose relating to municipal water systems.

Citation	Text
RSA 149-I:8	149-I:8. Sewer Rentals. For the defraying of the cost of construction, payment of the interest on any debt incurred, management, maintenance, operation, and repair of newly constructed sewer systems, including newly constructed sewage or waste treatment and disposal works, the mayor and aldermen may establish a scale of rents to be called sewer rents, and to prescribe the manner in which and the time at which such rents are to be paid and to change such scale from time to time as may be deemed advisable. Except in the case of institutional, industrial or manufacturing use, the amount of such rents shall be based upon either the consumption of water on the premises connected with the sewer system, or the number of persons served on the premises connected with the sewer system, or whether the user is on a pressure or gravity system, or upon some other equitable basis.
RSA 149-I:10	149-I:10. Sewer Funds. I. The funds received from the collection of sewer rentals shall be kept as a separate and distinct fund to be known as the sewer fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 149-I:8, or for the previous expansion or replacement of sewage lines or sewage treatment facilities. II. Except when a capital reserve fund is established pursuant to paragraph III, all sewer funds shall be held in the custody of the municipal treasurer. Estimates of anticipated sewer rental revenues and anticipated expenditures from the sewer fund shall be submitted to the governing body as set forth in RSA 32:4 if applicable, and shall be included either as part of the municipal operating budget or as a separate warrant article submitted to the local legislative body for approval. In a town or district that has adopted the official ballot referendum form of meeting, any such separate warrant article shall include a default amount as provided in RSA 40:13, XI-a. If the municipality has a properly-established board of sewer commissioners, then notwithstanding RSA 41:29 or RSA 48:16, the treasurer shall pay out amounts from the sewer fund only upon order of the board of sewer commissioners. Expenditures shall be within amounts appropriated by the local legislative body. The sewer commission shall also remit to the municipality those costs incurred by the municipality in support of sewer operations, including but not limited to financial audit,

Citation	Text
	facility insurance, treasurer compensation, and office support. III. At the option of the local governing body, or of the board of sewer commissioners if any, all or part of any surplus in the sewer fund may be placed in one or more capital reserve funds and held in the custody of the trustees of trust funds pursuant to RSA 35:7. If such a reserve fund is created, then the governing body, or board of sewer commissioners if any, may expend such funds pursuant to RSA 35:15 without prior approval or appropriation by the local legislative body, but all such expenditures shall be reported to the municipality pursuant to RSA 149-I:25. This section shall not be construed to prohibit the establishment of other capital reserve funds for any lawful purpose relating to municipal water systems. IV. The sewer fund may be used for the repayment of the costs of design, construction, and funding provided for by contract under RSA 149-I:4-a.
RSA 485-A:5-b.	485-A:5-b. Municipal Responsibility. I. Each municipality shall either provide, or assure access to, a department of environmental services approved septage facility or a department approved alternative option for its residents. II. For the purposes of paragraph I, "provide, or assure access to" shall mean a written agreement with a recipient facility, or department approved alternative option, indicating that the recipient facility agrees to accept septage generated in that municipality. The municipality shall consider providing sufficient annual capacity equal to the number of households with septic multiplied by the average septic tank capacity of 1,000 gallons divided by the average septage pumpout frequency of 5 years.
-------	EPA - User Charge Guidance Manual for Publicly-Owned Treatment Works - Trial Exhibit JJ - Also at Defendant's Appendix - page 0037

Citation	Ordinance(s), Rules and Other - Text or location
40 C.F.R. § 35.2140	***Appendix to Plaintiff's Brief - pp 432, et. seq.***
EPA - User Charge Guidance Manual	***Trial Exhibit JJ - Also at Defendant's Appendix - page 0037***

Statement of the Case

The Pembroke Sewer Commission (PSC) sought damages and declaratory and injunctive relief purporting to arise out of an intermunicipal agreement (IMA) with ASC claiming that ASC administered funds in violation of the IMA. ASC denied and counterclaimed that PSC had breached the IMA. PSC amended to ask the trial court to apply the principles of *quantum meruit* and/or *unjust enrichment* even if PSC were determined to be in breach. The court (Nicolosi, J.), issued a 23 page decision denying the relief sought by PSC, agreeing that the revenue disposition by the ASC did not constitute a breach and expressly found that PSC was in breach by not participating in the funding of the BioMag project and, correspondingly, that the ASC was entitled to any additional plant capacity generated thereby). The trial court also declined to apply the principles of *quantum meruit* and/or *unjust enrichment*. This appeal followed.

Facts

- *The 1974 agreement* - In 1974, the ASC and PSC entered into the first IMA,[1] to construct a wastewater treatment facility ('WWTF') to process waste water from the two towns.[2] Allenstown was to own the plant and operate it through the ASC, which, correspondingly, was the licensee responsible (to the NHDES and the federal EPA),[3] for compliance with any permit requirements. The plant went on line in 1977. The plant's initial capacity (measured in daily average flow), was to be 1.05 million gallons per day, average flow,[4] which was to be apportioned between the two towns on the basis of a 65/35 percent allocation derived from 25 year population projections from

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1 *Appendix to Pembroke's Brief (hereafter 'PApp') - pp 144 - 149.*

2 *Neither the PSC nor ASC are separate municipal entities. They are an agency of the town pursuant to RSA 149-I:9.*

3 *Transcript - (hereafter 'T') - p 354, line 7.*

4 *PApp - 144 - section 1.*

the two communities.[5] 5% of the cost of construction between the two towns was apportioned on that basis as well, while 95% of the cost of the original facility was paid for by state or federal grants.[6] By contrast, the annual operation and maintenance (O&M) costs were to be apportioned between the parties on the basis of '*... flow or other loading parameter ...*'.[7]

The 2000 Manius Order - Relations between the ASC and PSC were frequently characterized by disagreements,[8] as in an earlier lawsuit by PSC asking the Court, among other things, to '*... declare the 1974 agreement void, or to reform it. ...*'.[9] The former superintendent of the WWTF (Clement), indicated that the PSC basis for the lawsuit was, in part, that Pembroke was paying the larger share for O&M as well as the capital cost and wanted management control commensurate with its share.[10] In that suit, ASC filed a counterclaim asking for the Court to direct PSC to pay disputed amounts it had refused. The Order,[11] dispensed with the notion that Pembroke should 'equitably' own an interest in the plant and rejected any attempt to rescind or reform the contract to establish that circumstance or to provide Pembroke with a level of management control of the plant which was owned by the ASC.[12] The decision admonished PSC for having engaged in 'self help' by selecting disputed charges and refusing to pay them pointing out that '*... no provision of the 1974 agreement gives Pembroke the right to pick and choose which operating costs it will pay and which it will not. ...*'.[13] Finding that PSC was guilty of '*... unclean hands ...*' in exercising self help,[14] The

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5 *PApp - 149 - addendum.*

6 *Trial Court Order - (Nicolosi, J.) - (hereafter 'Order - (Nicolosi, J.)) - 1/20/2017 - p 2, 2nd ¶.*

7 *PApp - 145, section 4.*

8 *T-326 line 17 to T-329.*

9 *Defendant's Appendix (hereafter 'DApp') - 0003. Trial Exh 3 - Order - (Manius, J.) - p. 3.*

10 *T-327 line 6.*

11 *DApp - 001.*

12 *DApp - 006-8 - Trial Exh 3 - Order - (Manius, J.) - pp 6-8.*

13 *DApp - 009 - Trial Exh 3 - Order - (Manius, J.) - p. 9.*

14 *DApp - 0010 - Trial Exh 3 - Order - (Manius, J.) - p. 10.*

Court also ruled that the 65/35 '*... cost allocation rate will expire on December 31, 2001, when the notes that funded initial construction are paid off in full. ...*'.[15]

Pembroke was entitled to 65% of the design capacity of the plant or, 0.684 million gallons per day (0.684 mgpd), while Allenstown was entitled to the balance of 0.366 mgpd. Once the plant was operational, each town allowed connections to their respective collection systems to the extent that their capacity had not been exhausted. This was not an issue in the early years of the operation of the plant, but as the two towns grew it became a problem. The operation of a WWTF requires a license and is subjected to substantial oversight and regulation by both federal (EPA) and state (NHDES) authorities. One aspect of the monitoring is the constant maintenance of daily 'flow' information, from which the average flows can be determined.

- *80 % Letter - April 19, 2002* - Using information provided by the plant, the DES calculates the average flows and when it determined that the facility was at 80% capacity, it sent a warning letter to the ASC on April 19, 2002, stating that its '*... flow rates exceeded 80% of the facility's 1,050,000 gallons per day design capacity for three consecutive months in the year 2000. ...*'.[16] This was the precursor for the moratorium. Both Clement and the ASC consulting engineer (Trainque), pointed out that the 80% letter is, essentially, a warning and it requires the licensed operator to do one of two things; either to plan to upgrade the facility (if more capacity is needed) or, to make plans to limit future extensions to the system once the remaining capacity is exhausted. Both parties wanted to grow, accordingly, they commissioned studies,[17] By 2005, the remaining capacity of the plan was exhausted and a moratorium letter was received.

- *Moratorium* - The moratorium letter admonished that, '*... DES will NOT authorize*

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15 *DApp - 0011 - Trial Exh 3 - Order - (Manius, J.) - p. 11.*

16 *Trial Exh C - p. 1.*

17 *Trial Exh K and L.*

additional wastewater connections until plant capacity is restored. ...',[18] bringing the parties to the bargaining table (again), to determine how to negotiate a new IMA.

- *Intermunicipal Agreement (IMA) - 2006* - The purpose of the IMA was to address the design, construction and operation of a completely renovated facility as well as the manner of financing both the original engineering costs as well as the necessary town meeting funding initiatives that would be necessary to bri4ng about this upgrade. The agreement provided ownership of and complete control of the operation of the WWTF to the Town of Allenstown (as was the case previously), operating through its ASC.[19] The design of the new upgrade called for a significant increase in capacity. The flow capacity of the original plant was 1,050,000 (Allentown/367,500 - Pembroke/ 682,500). The new capacity was to be a total of 2,100,000 gpd (Allenstown/ 875,000 - Pembroke/1,225,000),[20] reflecting a new allocation of 48% to 52%, respectively. The new plant, which would cost approximately $15,000,000 to build.

The IMA was signed in November of 2006, but the negotiation began in June 2004. Trainque drafted all of the iterations of the agreement. A notebook containing all of the various drafts of the agreements was admitted into evidence.[21] He testified as to the fact that he shared each draft with both commissions as he revised the documents to reflect the suggestions of the parties.[22] This was true of ***§ 3.06.***

- *IMA - Section 3.06 - Septage* - Section 3.06 addressed the issue of the manner in which, if any, the plant would deal with hauled waste ('HW'), from septic tanks brought. NH law requires

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18 ***DApp - 0029 - Trial Exh J - 3rd ¶.***

19 ***PApp - 9 - Trial Exh 2 - Article II.***

20 ***PAapp - 27 - Trial Exh 2 - Appendix B. Article II.***

21 ***PApp - 150 to 403 - Trial Exh T.***

22 ***T-577, line 9 - 16.***

municipalities to provide a means of disposing of this material,[23] so that towns without facilities must contract with a community that does to dispose of the waste, in return for the payment of a fee. From the document containing all of the versions of the agre5of ***§ 3.06*** dealing with septage which shows how the language evolved.[24]

- - *IMA - Section 3.06 - Draft 1 - June 2004* - ***§ 3.06*** as it appears in the first version of the agreement (identified as ***'Draft 1 - June 2004'***) indicates that:

> ***'... No septic waste of any kind, whether it is treated or not treated, shall be discharged into the Pembroke System that is tributary to the Allenstown System. Since the Town of Allenstown's existing wastewater treatment facility is not equipped to handle and treat septage, the Town of Allenstown cannot accept septage wastes from the Town of Pembroke at this time. ...'.***[25]

This language reflected Trainque's understanding that the parties were not interested in allowing for HW.

- - *ASC meeting note - November 2004* - However, both Trainque and Clement testified that this situation changed over the next several months when Clement disclosed that he had been experimenting with accepting septage for dewatering only, in a manner which would not impact the plant operation or interfere with available capacity and might generate some revenue.[26] A November 2004 note: '... ***presently - would like to receive septage once WWTF upgrade is complete. ...'.***[27]

- - *Increased acceptance of septage - 2005* - From November of 2004 to 2005 the amount of septage and the corresponding revenue increased as it became clear that accepting septage did not impact the capacity of the plant. In this case, Clement and Trainque both pointed out, and the trial court found, that the septage was not treated by introducing it into the full process of the

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23 ***RSA 485-A:5-b.***

24 ***DApp - 0014 - Trial Exh A.***

25 ***DApp - 0014 - Trial Exh A.***

26 ***T-394, line 19 to T-395 line 4.***

27 ***DApp - 0025 - Defendant's Exhibit U.***

plant allowing the solids to settle out of the septage and decanting the remaining water to a dewatering process for removal of more concentrated solids. The resulting solids were placed in separate roll off containers and trucked to Rochester.[28] Indeed, the presence of septage in the secondary dewatering process improved the efficiency of the product that was being delivered to Rochester due to higher ratio of solids to liquid, thus effecting savings in the cost of the plant operation that benefitted both parties, a circumstance with which the trial court agreed in her decision.[29]

- - *IMA - Section 3.06 - Draft 4 - May 2005*- Because the process was not prohibited by the moratorium, did not impact the plant in any way that would diminish capacity and generated additional revenue ASC wanted to address it in the IMA. At this time (May of 2005) the **fourth** draft of the agreement had been circulated without any changes in the septage language from the last previous draft (which allowed as how the plant might be capable of accepting septage if the new plant was built). The last part of the section in the **fourth** draft contained an oblique reference to 'fees' associated with HW: '*... Any septage haulers who may subsequently use the Suncook Wastewater Treatment Facility shall be subject to the Town of Allenstown's ... fees associated with septage hauling.. ...'.*[30] ***(Emphasis supplied).***

- - *Letter - 7/20/05 - PSC to ASC - Exhibit V* - It was this **fourth** draft (which PSC submitted to its attorney for review), and whose response caused the PSC to outline in a letter to the ASC the items which the PSC wanted the ASC (and, by extension, Mike Trainque), to address in the next draft of the IMA.[31] The letter made reference to '*... Draft 4 ...*' of the IMA, and in response

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28 *T-395, line 7 to T-398, line 11.*

29 *Order - (Nicolosi, J.)) - 1/20/2017 - p 4, generally.*

30 *DApp - 0016 - Trial Exh A - p. 3 of 7.*

31 *DApp - 0027 - Trial Exh V.*

to the phrase mentioned above (*'... fees associated with septage hauling.. ... '*),[32] the PSC, in Item 7 of that letter, requested that *'... any permit fees from the haulers and any money collected from the septage should be listed as to how these funds will be used or divided between the two Towns. ... '*.[33]

- - *IMA - Section 3.06 - first of two drafts dated August 2005* - Mike Trainque testified that he received a copy of ***Exhibit V*** by fax and this was the letter that he used to prepare the first of two drafts of the IMA that bore the date of August 2005.[34] Responding to the request in item No. 7 in that letter, Trainque amended ***§ 3.06***, to make two changes. The first change simply replaced the language prohibiting the acceptance of any septage with wording that the WWTF could *'... only accept limited quantities of septage from the Town of Pembroke for dewatering at this time ... '*,[35] which reflected the recent decision to pursue this endeavor.

The second change, of course, addressed the question of what disposition was to be made of the fees received from septage, which is the gravamen of this dispute. Mike Trainque before having any consultation with anyone from the ASC, simply added language requiring that all monies received from septage haulers be applied to the expenses of the WWTF so that the last paragraph of the section would now read as follows (new language underlined):

> *'... Any septage haulers who may subsequently use the Suncook Wastewater Treatment Facility shall be subject to the Town of Allenstown's ordinances and regulations regarding licensing, permits, use and fees associated with septage hauling. Revenue received from permits and fees by Allenstown will be used to help offset the costs of the upgrade/expansion of the WWTF and/or the operation of the WWTF. ... '*.[36]

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32 *DApp - 0016 - Trial Exh A - p. 3 of 7.*

33 *DApp - 0028 - Trial Exh V - p. 2 - Item No. '7'.*

34 *T-578, line 13.*

35 *DApp - 0016 - Trial Exh A - p. 3 of 7.*

36 *DApp - 0016 - Trial Exh A - p. 3 of 7.*

This language was clear and unambiguous. It required that all revenue from permits and fees (presumably those from septage haulers), will be required to be applied to costs associated with the WWTF. There are two significant points in this version; (1) The language not only categorically requires the expenditure of those fees on the WWTF; but, as importantly, (2) The wording did not provide that costs associated with the acceptance of septage be segregated from other costs, it simply identified the manner in which the revenue would be expended. Thus, if there were no change in this language, costs associated with HW would simply be included in the overall operating cost of the WWTF, thus being shared by both communities to the extent of their proportionate burden. While this language would appear to address the request by PSC in the July 20th letter, Mike Trainque did not discuss this language, or, for that matter, any of the other changes inspired by that letter with the ASC or Dana until late August of 2005.

- - *August 24, 2005 Meeting reviewing Exhibit V* - Trainque testified that he met with Jim Rodgers, the ASC Chair, and Clement on August 24, 2005, and wrote writing notes on a copy of ***Exhibit V,*** which annotated copy was introduced into evidence as ***Exhibit W.***[37] The discussion included a review item number '7' on the list from PSC. As to that item, part of it is circled with a notation of '***... no way ...***', a notation pertaining to an unrelated issue regarding Pembroke residents being able to discharge camper waste without paying a fee.[38] The testimony indicated that the ASC Chair, Jim Rodgers, was adamant that the language in this section needed to reflect two things: (1) That wording be put in that makes it clear that HW revenue would, in the first instance, be used to pay for costs of HW, so that no part of this cost would be included in Pembroke's share. It was noted that HW revenue and cost for this process was never considered in the IMA, either under the

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37 *DApp - 0029 - Trial Exh W.*

38 *DApp - 0030 - Trial Exh W - page 2 - Item No. 7..*

old agreement or the new one and, as such, it was important to segregate any costs related to that process from the expenses that were to be considered when calculating the respective portions of the WWTF expenses under the new IMA; and, (2) to identify that any excess revenue from septage fees could be used on the WWTF but would not be required to be spent as indicated, as this revenue, as far as the ASC was concerned, was ASC sewer revenue that the ASC could expend as it saw fit.[39]

- - *September 6, 2005 Meeting of ASC Chair and Dana reviewing Exhibit V* - After the meeting on August 24th, Dana and Mike both testified that they met with the entire ASC at a regular meeting that took place on September 6, 2005, as demonstrated by the minutes of that meeting.[40] Both Mike and Dana testified that they recalled this meeting and that the notation in the minutes addressing the amendments to the IMA draft accurately indicated what took place:

> ***'... Commissioners, Superintendent and Mike Trainque of HTA reviewed and edited the twelve comments submitted by Pembroke Sewer Commission (PSC) for suggestions made by their Attorney on Draft # 4 of the Intermunicipal Agreement. Mike Trainque will be submitting edited changes on Draft # 5 to PSC for review. ...'.***[41]

- - *IMA - Section 3.06 - **second** of two drafts dated August 2005* - Following this meeting, he revised the 5th draft that was dated August 2005, and, as was his customary practice, forwarded copies to the staff of both commissions.[42] The version he sent incorporated the changes requested by the ASC and showed the changes by strikeout and underlining which have been highlighted in ***Trial Exh A.*** This version is the current wording in the IMA and there were several important changes: (1) In the first and second paragraphs the wording was changed to delete the references to Pembroke as the sole source of the septage, making it clear that the HW operation was

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39 *T-406, lines 3-8 and T-581, line 21-25.*

40 *DApp - 0031 - Trial Exh GG.*

41 *DApp - 0032 - Trial Exh GG - ASC Minutes - 9/6/05 - page 2 of 2 - 2nd ¶.*

42 *T-585, line 21 to T-586, line 1.*

to be available to all and not a function limited to the towns that were to be party to the IMA; (2) the HW operation was to be entirely within the control of the ASC and its superintendent; (3) the limited nature of the processing the HW was noted ('dewatering'); (4) septage hauling revenue would be required, in the first instance, to cover the cost of the septage operation; and, (5) through the use of the word 'may', wold allow (but not require), excess revenue to be applied to expenses at the WWTF.[43] This version was sent to PSC and they never objected or otherwise responded.

- *BioMag Plant Upgrade* - The IMA has two significant sections that deal with funding upgrades in the plant. They are *§ 4.03* and *§ 4.01 (F)*. ***§ 4.03*** provides that, at the same time that Allenstown approves and appropriates bonding costs for upgrades, '*... **Pembroke shall also raise and appropriate** its proportionate share ...*'.[44] ***§ 4.01 (F)*** provides that each town '*... **shall pay its proportional share ...***' of any expansion or modification in future years.[45] The trial court expressly found that '*... **by refusing to participate in the funding for the BioMag project, Pembroke breached the 2006 IMA §§ 4.01 (F) and 4.03.** ...*'. As the trial court indicated in its Order, by 2008, funding initiatives for the full upgrade (which was the only one contemplated in the IMA) had failed twice in Allenstown and were never even presented in Pembroke. Both towns were under the moratorium so there could be no growth in either town. As a consequence, the ASC considered a project known as BioMag, which would add a new process that might add capacity to the plant sufficient to lift the moratorium. The project's estimated cost ($1,550,000), while considerably less than the full upgrade, was still considerable and required voter approval. In preparation for approaching the voters, the ASC, at a meeting with the PSC on November 12, 2008, tried to get them to support a

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43 *DApp - 0016 & 0017 - Trial Exh A - p 3 & 4 of 7 - second draft dated August 2005.*

44 *PApp - 16 & 17 - Trial Exh 2 -Section 4.03 - 8th full paragraph - p. 10 (Emphasis supplied).*

45 *PApp - 16 - Trial Exh 2 -Section 4.01 (F) - p. 9.*

straightforward initiative in which each town would simply pay 50% of the cost and, thereby, be entitled to ½ of any resulting increase in capacity, (approximately 600 connections each),[46] but, as Clement testified,[47] and trial court found,[48] Pembroke declined. Clearly, under ***§ 4.03,*** if the ASC determined that an upgrade was needed, Pembroke would be legally obligated to pay its share, but they were also obligated to conduct a voters initiative to secure their share. After the November 12, 2008 joint meeting, Dana met with the ASC board on December 2, 2008, expressed the concern about how to get a '***... written agreement with Pembroke Sewer Commission for the 50/50 payment option for the Bio-Mag process. ...***'.[49] The ASC presented an article to the Allenstown voters which was defeated 289-Y, to 337-N.[50] For its part, the PSC did nothing. There was nothing on the Pembroke town warrant for 2009 that related to this project. Shortly after the 2009 regular annual meeting, the federal stimulus funding known as ARRA, materialized so that the two towns were in a position to take advantage of the stimulus package. Again, the ASC presented a proposal to the PSC in which they would each go to their respective towns for funding. The ASC would raise the money necessary to fund the entire project and the PSC would raise its share. The ASC was concerned that the voters in Allenstown would simply not approve anything that required their taxes to go up and, even the ARRA funding was not a full 100% grant. It constituted a matching grant for ½ the cost of the project. The actual mechanism required that the town appropriate the full amount of the project and it could 'borrow' ½ of that from a DES fund, repayment of which was 'forgiven' by the ARRA funding, but not until completion of the project. The town, ultimately, would only be required to pay ½ of the cost which the ASC intended to pay from the ARRA funds using

46 ***DApp -0033 - Trial Exh 22.***

47 ***T-441, line 24.***

48 ***Order - (Nicolosi, J.)) - 1/20/2017 - pp 20 and 21, generally.***

49 ***DApp - 0034 - Trial Exh Y.***

50 ***PApp - 97 - Trial Exh 23.***

Pembroke's share for the other. PSC declined this offer, as the minutes reflect,[51] but Dana testified that his recollection of that meeting was that, even though the sparsely worded minutes do not reflect it, that the ASC then asked the PSC to suggest an alternative that was acceptable to them but, instead of responding, they simply indicated that they did not want any part of the project and left the meeting without any counter proposal.[52] Consequently, the ASC went forward on its own and did, indeed, raise the full amount necessary without raising Allenstown taxes by utilizing the ARRA funding for ½ of the project cost and HW excess revenue for the balance. The Allenstown voters authorized their Board of Selectmen to borrow the full amount for this project, pursuant to which they entered into an agreement obligating the Town of Allenstown to pay the entire amount.[53] ½ of the cost of the project was paid by ARRA funds and the ASC paid the other ½ using funds from HW. To date, Pembroke has not paid anything for this project. The result of the implementation of the Bio-Mag project was the lifting of the moratorium and the increase in the capacity of the plant by ½ million gallons per day in capacity. In the trial we urged that the PSC should have participated in this project upgrade in the manner required in *§ 4.03* and the trial court so held. The holding by the trial court was well supported by the evidence in the Record outlined above.

Summary of Town's Argument

I The findings and rulings of the trial court are entitled, under the applicable Standard of Review, to a presumption of rectitude.

II The findings and rulings of the trial court are supported by evidence in the Record.

A. The plain language of § 3.06 is not ambiguous and a reasonable reading of it is consistent with the defendant Town's interpretation of the language, as the trial court found. We contend that

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51 *DApp - 0035 - Trial Exh 24.*

52 *T-447, line 3-6.*

53 *PApp - 407 - Trial Exh Z.*

it was never the purpose nor intent of *§ 3.06* to limit the revenues which the sewer commissioners were to receive from septage haulers to any particular purpose or fund, other than to insure that they were used, in the first instance, to offset the cost of septage processing so that any costs associated with that process would not, inadvertently, be included in Pembroke's share of the operational costs of the WWTF. Further, that interpretation is supported when considering that this language was part of the continuing negotiations in this agreement and that the word 'will' in an earlier draft was expressly deleted and replaced with the word 'may', without objection, to support Allenstown's view of this phrase. Pembroke has adopted a myopic view of this section which ignores the significant evolution of the language. Even if determined to be ambiguous, when read in conjunction with the circumstances and events surrounding the negotiation and drafting of the section, the other language in the contract and the manner in which the HW component evolved, the section still supports the defendant's view. The funds to support the HW operation came entirely from the income received from the haulers and none of it was ever included in any share or contribution collected from the plaintiff Town of Pembroke. The only impact on the plant is a limited amount of 'dewatering' which has a minimal impact on the process. The DES, which has been aware of the HW experience from the outset, has not only made it clear that the process did not impact the plant's capacity, but encouraged the ASC in their efforts to conduct that part of the operation.

B. The trial court was correct when it held that the plaintiff was unable to demonstrate the applicable EPA regulations require that excess HW revenue to be spent 'inside the fence'. The evidence presented by the plaintiff regarding the rule in question does not demonstrate that the rule mandates that excess HW revenue be spent only on the WWTF. By contrast, the rule, both on its face and, particularly when considered in connection with the EPA guidelines contained in a manual

produced by the EPA to assist operators in establishing rate structures, makes it clear that revenues from HW and septage are different than the ordinary O,M&R charges and that the operator of a WWTF has considerable flexibility in establishing rates for this element of its services. The revenue derived from HW, is not revenue 'from the project', to which the rule applies, as the HW revenue is derived from an operation that was not part of the original WWTF, was not funded by any grant from the federal or state government and, particularly not from Pembroke.

C. The trial court was correct when it held that the HW operation did not adversely impact Pembroke or otherwise impact the plant capacity. The unique manner in which the ASC disposes of its HW does not have any significant impact on the balance of the operation of the WWTF, does not interfere with or impede with the receipt of any service or availability of any capacity owed to Pembroke and is not funded by Pembroke. The manner in which the ASC is dealing with HW revenues is sanctioned by the NHDES and the EPA who have permitted this process without complaint, as it violates no rule and is consistent with the common practice to the effect that operators almost never split HW revenue between other users. Moreover, the evidence demonstrates that the manner in which this operation is conducted benefits Pembroke financially and that curtailing this practice would increase costs to both communities.

D. The trial court was correct when it held that the disposition of the HW revenues were governed by RSA 149-I:8 and 10 and that they belonged to Allenstown. Revenue from HW constitutes 'sewer rents' or 'sewer money' as contemplated by the applicable statute and can be expended on any aspect of sewer operation, maintenance or replacement that is not inconsistent with that statute.

E. Finally, the trial court was correct when it held that the added capacity in the plant from the

BioMag process belonged to Allenstown. All the risk associated with the BioMag project was carried by the ASC and the design and construction conducted entirely by the ASC without support or help from PSC. When requested to participate in the funding of this project by the simple expedient of having each of the two towns raise ½ of the cost, the PSC made it clear that they wanted no part of the project in spite of express language in the IMA requiring them to participate. Also, following the successful completion of the BioMag project the PSC claimed that it would be obligated under the agreement to pay for their share of the project cost. This argument is unavailing as it begs the question as to why they did not participate.

Argument

I The findings and rulings of the trial court are entitled, under the applicable Standard of Review, to a presumption of rectitude.

The NH Supreme Court has articulated the standard of review applicable to appeals from a trial such as this:

> *'... We will uphold the trial court's findings and rulings unless they lack evidentiary support or are legally erroneous. Cook v. Sullivan, 149 N.H. 774, 780, 829 A.2d 1059 (2003). ``It is within the province of the trial court to accept or reject, in whole or in part, whatever evidence was presented, including that of the expert witnesses.'' Id. ``Our standard of review is not whether we would rule differently than the trial court, but whether a reasonable person could have reached the same decision as the trial court based upon the same evidence.'' Id. ``Thus, we defer to the trial court's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence.'' Id. ...'.*[54] *(Emphasis supplied).*

Judge Nicolosi, following four days of trial testimony and the submission of many exhibits, made numerous findings of fact, resolved conflicts in testimony, measured the credibility of witnesses and determined the weight to be given to evidence in a 23 page Order which, we contend, is well supported by the evidence, contains no errors of law, and contains decisions that a reasonable

[54] *NH Fish and Game Dept v. Edward Bacon, 167 NH 591, 596; 116 A3d 1060, 1065; (2015).*

person could reach based on the same evidence.

II The findings and rulings of the trial court are supported by the evidence in the Record.

A. The interpretation of the trial court as to § 3.06 of the IMA is reasonable, consistent with the evidence in the Record and not erroneous.

The trial court found that the ASC's interpretation of the language in this section was correct and we contend that the evidence and the Record support that finding. ***§ 3.06*** was revised in a number of ways other than just addressing the revenue issue, as noted above on page 10 of the 'Facts' section, the changes presented to PSC in the final revision of that section included language which demonstrated an intention to conduct HW for haulers in the general market place, thereby continuing the process which Dana and the ASC had begun and expanded, without ever using any money from Pembroke or any property funded by the original grant. The changes acknowledged the limited impact on the existing operation ('dewatering') but also made it clear that, in the first instance, HW revenue would be required, in the first instance, to pay the cost of HW. Finally, however, through the use of the word 'may', when considered in the context of the word 'will' that it replaced, made it clear that excess revenue was to be spent at the discretion of the ASC.[55] We submit that these changes are consistent with and support the notion that the HW receiving function was to be an ASC function and not intended to be part of the general operation of the WWTF. The juxtaposition of the words 'will' and 'shall' are significant and we discuss this below. The plaintiff concedes that this wording does not require the ASC to spend excess revenue on the WWTF as they have the option of not spending the money at all. However, their claim that when and if the ASC does decide to expend this revenue, it may only be spent on the WWTF we submit is simply not plausible, when considering the trial evidence.

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[55] *DApp - 0016 & 0017 - Trial Exh A - p 3 & 4 of 7 - second draft dated August 2005.*

- *Change from 'will' to 'may'*

There is no doubt that the draft, in which the word 'will' was used, would have required that the revenue to be restricted in precisely the manner that the plaintiff urges. However, the amendment to this section which uses the word 'may' (defined in Appendix A of the IMA as intending to connote 'permissive'), clearly alters the intention of the prior draft. There simply is no reasonable basis on which a party whose intention was to limit the expenditure of these funds to the WWTF would have agreed to this change or would not have perceived its intent. The testimony and evidence made it clear that the PSC had access to both drafts which were submitted in close proximity. The change directly altered language that would have given them what they now say they wanted, and they brooked no objection nor responded to the change in any way.

- *Similar use of 'shall' for mandatory requirements* - The language in this draft also expressly made use of the word 'shall' (also defined in Appendix A of the IMA, but connoting a mandate), to require that these funds be used in the first instance to cover costs of the HW component of the operation. By the time this change was being considered, as testified to by Dana[56] and Andrea (and found by the trial Court),[57] the ASC had already established accounting protocols to clearly segregate costs that were exclusively attributable to HW as well as attributing an arguably excessive share of other shared costs to HW in an obvious attempt to insure that PSC would not have to bear any part of this expense. It is reasonable to assume that PSC was aware of this and, accordingly, when the wording in the critical draft was proffered they should reasonably have concluded that HW and its revenue were to be a separate operation, under the control of the ASC as if HW were a completely separate customer.

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[56] *T-410, line 19 to T-412, line 1, inclusive.*

[57] *Order - (Nicolosi, J.) - p 19, 1st full ¶.*

- *Septage Revenue and Flow expressly excluded from O&M calculation*

Moreover, as testified to by both Mike Trainque[58] and Craig Musselman[59] (both acknowledged experts in the field with abundant credentials, particularly in areas dealing with intermunicipal contracts relating to shared costs for wastewater plants), the section of the IMA that established the manner in which the shared costs for O&M were calculated, was worded in a manner to expressly exclude the costs associated with 'high strength wastes', one such being septage.

§ 4.05 indicates that O&M Costs are:

> ***'... are all costs incurred to provide continuous treatment service, which include, but are not limited to, such items as labor (including all benefits and related costs), utilities, chemicals, supplies, replacement of equipment, parts and other costs in accordance with the definition in APPENDIX A. ...'.***[60]

This section, while identifying O&M costs, does not provide the manner in which these costs are to be allocated between the two municipalities. The actual protocol for that process is contained in more detail in a section of Appendix B of the IMA. In that section (***Section III on page B-2***), the process for apportioning the costs and manner of payment is set forth in detail. The section provides (in the second paragraph), that the O&M component of the annual budget prepared by Allenstown will be divided by 12 to identify the estimated monthly amount that needs to be paid by the two municipalities to cover the O&M component of operation. The share that each town must pay, of course, differs as it is based on the ***'... annual average daily flow being contributed by each Town at the time the annual budget is approved by the Allenstown Sewer Commission. ...'.***[61] The cited flow data is then used to arrive at an estimated payment for the coming year for Pembroke, which will then remit that amount to ASC as its share of the O&M costs on a monthly basis.

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58 *T-569, lines 18 to 24.*

59 *T-275, lines 12 to T-276, line 18, inclusive.*

60 *PApp - 18 - Trial Exh 2 - § 4.05 - 1ST ¶ - p. 11.*

61 *PApp - 28 - Trial Exh 2 - Appendix B - Section III - 2nd ¶ - p. B-2.*

However, this monthly payment is based on a budget estimate and the prior annual average flow, which does not account for actual costs that cannot be calculated until the end of the budget year or increases or decreases in the actual flow. Thus, the contract provides that '*... adjustments will then be made at the end of each fiscal year ...*',[62] in which it will be determined if Pembroke paid too little or is entitled to a refund. The significance of this section is that the '*... ACTUAL total O & M cost for the WWTF ...*' is determined in a manner that is '*... exclusive of and separate from any surcharges applied for high-strength wastes. ...*'.[63] The testimony of Mike Trainque, Craig Musselman and Dana Clement all confirmed (and no evidence disputed), that septage is a form of 'high strength waste' and both Mike Trainque[64] and Craig Musselman[65] pointed out that this language made it clear that revenue from the receipt of such high strength wastes as septage was not intended to be incorporated in the calculation of charges applicable to Pembroke. This is particularly significant when considering, as testified to by Dana Clement, that by the time the IMA was signed in November of 2006, the ASC had accepted over 6 million gallons of septage in 2005 and was 11 months into 2006 during which it accepted over 13 million gallons of septage.[66]

- *Plaintiff's Claim regarding reason for acquiescence in § 3.06 wording change* - The trial court found,[67] and it is evident from the uncontradicted evidence in this matter, that the plaintiff was unable to produce any minutes, correspondence or other documentation in which they addressed the changes made in *§ 3.06*, following their July 20, 2005 letter. The evidence demonstrated that the language contained in the second draft dated August 2005 remained unchanged for more than a year

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62 *PApp - 28 - Trial Exh 2 - Appendix B - Section III - 3rd ¶ - p. B-2.*

63 *PApp - 28 - Trial Exh 2 - Appendix B - Section III - 3rd ¶ - p. B-2.*

64 *T-569, lines 18 to 24.*

65 *T-275, lines 12 to T-276, line 18, inclusive.*

66 *T-410, lines 13 to 18.*

67 *Order - (Nicolosi, J.) - p 11, 1st full ¶.*

as other iterations of the IMA in which other changes were made, came and went, the final version being signed in November of 2006 with that section intact.

However, for the first time at the trial of this matter, the plaintiff advanced a theory (to explain their acquiescence and silence regarding this language amendment), claiming, incredibly, that their satisfaction with this change related to the fact that they believed the first August 2005 version (the one that contained 'will'), would not only compel the ASC to expend this revenue on the WWTF, but would require it to occur on an annual basis. The plaintiff at trial asserted that the reason they were willing to tolerate an amendment that moved from one in which the requirement to expend the revenue on the plant was crystal clear and unambiguous, to one which allows for an interpretation that the ASC can expend such revenue in the same manner as other sewer rents, was to prevent 'tying the hands of the ASC' (referring to the notion that all such revenue had to be expended each year). Indeed, both Paulette Malo and Harold Thompson from the PSC testified that they remember a specific meeting or meetings at which this was discussed between both commissions. We submit that this assertion is completely unsupported and, furthermore, the theory makes no sense. The trial court found that this notion was simply '*... not convincing ...*',[68] and pointed out that proof of a purported 'meeting' at which the PSC claimed to have suggested this theory to the ASC (which meeting the ASC denies ever took place), was '*... not logical and is presented without corroborating evidence. ...*'.[69] The Record more than adequately supports this holding. First, there is absolutely no proof that any such meetings ever occurred. In a case which pre trial discovery generated over 20,000 pages of minutes, letters, notes, and other written data, there is not a scintilla of evidence that supports this claim. Each witness presented by the defendant

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68 *Order - (Nicolosi, J.) - p 13, 1st full ¶, 3rd line..*

69 *Order - (Nicolosi, J.) - p 14, 1st full ¶, 1st sentence.*

expressly denied having had any recollection of their ever being such a meeting or of that notion ever being discussed. Dana Clement,[70] Mike Trainque,[71] and ASC Commissioner Jeffrey McNamara,[72] (the latter having continually been on the ASC from that time until now), testified that they were intimately involved in every meeting and familiar with all correspondence relative to the IMA, generally, and ***§ 3.06,*** particularly, and this subject was never raised in the context of a need to prevent the ASC from being compelled to fully expend all revenue by the end of each fiscal year and the plaintiff's completely uncorroborated recollection of meeting(s) where that supposedly occurred is simply not credible.

Furthermore, it simply cannot be urged that the original version of ***§ 3.06*** containing the word 'will' imposed a 'spend it all in one year' requirement. The wording of that phrase simply provided '***... [r]evenue received from permits and fees by Allenstown will be used to help offset the costs of the upgrade/expansion of the WWTF and/or the operation of the WWTF. ...***'.[73] The requirement was that the funds would be used to 'help' offset costs of both 'upgrade/expansion' and/or 'operation' of the plant. There is no mention of when the payments had to be made. Nor, as the trial court observed, does NH law support the PSC claim that funds be expended annually.[74] Certainly, such a requirement does, indeed, exist in the law applicable to conventional municipal revenues and appropriations. ***RSA 32,*** The Municipal Budget Law, governs most, but not all, municipalities and their respective departments and has a section which expressly provides that all appropriations shall cover only '***... one fiscal year. ...***'. The section goes on to indicate that, subject to a short list of exceptions, '***... [a]ll appropriations shall lapse at the end of the fiscal year and any unexpended***

70 *T-407, lines 4 to 14.*

71 *T-586, line 2 to T-587, line 9.*

72 *T-293, line 10 to 24.*

73 *DApp - 0016 - Trial Exh A - p. 3 of 7 - First of two drafts dated August 2005.*

74 *Order - (Nicolosi, J.) - p 14, 2nd & 3rd full ¶¶.*

portion thereof shall not be expended without further appropriation, ...'.[75] Every town administrator or official charged with any financial duties in NH municipalities lives by this section which makes it clear that appropriated revenue can only be used in a specific fiscal year.

However, the situation is different for municipal utility departments that provide services to users for a fee, such as municipally provided water and sewer. In the case of a sewer commission, the governing statute expressly departs from this requirement:

> *'... I. The funds received from the collection of sewer rentals shall be kept as a separate and distinct fund to be known as the sewer fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 149-I:8, or for the previous expansion or replacement of sewage lines or sewage treatment facilities. ...'.*[76] ***(Emphasis supplied).***

Indeed, this is a common feature of the laws that relate to municipal utility departments as a corresponding statute contains the same language as it applies to municipal water departments.[77] This aspect of sewer system financing is well known to virtually every official at the ASC as was testified to by Dana Clement,[78] and Jeffrey McNamara.[79] It is simply not credible that anyone involved with the ASC or PSC in 2005 was not aware of the fact that revenue received from any source did not have to be expended within any given period of time, unless some contractual provision so required. Clearly, as the trial court found, the contractual provision at issue did not so provide and, therefore, the notion advanced by the plaintiff that a concern for such a requirement was the motivating factor in them acquiescing to the amended language in ***§ 3.06*** which resulted in them accepting, without objection, an amendment that moved them from wording that would have given

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75 *RSA 32:7.*

76 *RSA 149-I:10.*

77 *RSA 38:29.*

78 *T-408, lines 2 to 14.*

79 *T-298, line 22 to T-299, line 1.*

them precisely what they wanted, to the language we have today, is not credible and the trial court so found.

B. The trial court was correct when it held that the plaintiff was unable to demonstrate that EPA regulations require that this excess HW revenue be spent 'inside the fence'.

This element of the plaintiff's claim (never raised in any of the pleadings and first heard at trial) suggests that because the IMA requires the parties to follow applicable EPA regulations, a regulation which they contend requires this type of revenue to be expended 'inside the fence' renders our view of the wording in ***§ 3.06*** of the IMA invalid, even if it is determined it means what we say it does. That argument (first raised at the trial), was originally advanced through its expert, Keith Pratt, who cited ***40 C.F.R. § 35.2140,*** a section that governs the ***User Charge System*** employed by WWTF plant officials. We concede that these rules do, indeed, govern the ASC WWTF. We do not concede, however, that they apply to the ASC in the manner advanced by the plaintiff.

The general pronouncement of the objective of this section is stated in its preamble:

> ***'... The user charge system (see §§ 35.2122 and 35.2208) must be designed to produce adequate revenues required for operation and maintenance (including replacement). It shall provide that each user which discharges pollutants that cause an increase in the cost of managing the effluent or sludge from the treatment works shall pay for such increased cost. The user charge system shall be based on either actual use under paragraph (a) of this section, ad valorem taxes under paragraph (b) of this section, or a combination of the two. ...'.***[80]

The specific section cited by the plaintiff's witness and relied upon for their contention was section (f), which is set forth:

> ***'... (f) After completion of building a project, revenue from the project (e.g., sale of a treatment-related by-product; lease of the land; or sale of crops grown on the land purchased under the grant agreement) shall be used to offset the costs of operation and maintenance. The grantee shall proportionately reduce all user charges ...'.***[81]

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80 *40 C.F.R. § 35.2140*

81 *40 C.F.R. § 35.2140 (f).*

As this section indicates, *'... revenue from a project ...'* is required to be used to offset the costs of operation and maintenance 'from a project'. If, therefore, the revenue being received was, indeed, *'... revenue from a project ...'*, the plaintiff's argument would have merit.

Both of the defendant's two expert witnesses addressed this issue. Musselman, president of CMA Engineers, with 42 years of experience as an environmental engineer, drafting and administering intermunicipal agreements in Maine, Massachusetts, as well as work involving more than 60 NH communities, and negotiating *'... design, building, and operate contracts with teams of lawyers and financial advisors for facilities with a value of up to $60,000, 000. ...'*.[82] Correspondingly, Trainque, part owner and vice president of the engineering firm Hoyle, Tanner & Associates, with 37 years of experience as a civil engineer, 80% of which dealt with wastewater projects (also in NH, MA and ME), which included negotiating and helping draft *'... municipal agreements for waste water service. ...'*.[83]

Addressing the plaintiff's claim regarding *§ (f)* of *40 C.F.R. § 35.2140* (the federal EPA rule cited above), Musselman directly contradicted Pratt's opinion of the operation of the rule to the circumstances of the HW excess revenue, pointing out, at the outset, that the plaintiff's discussion of the rule neglected to consider the language in the rule which provided *'...E.g., for example, sale of a treatment-related byproduct, lease of the land, or a sale of crops grown on the land purchased under the grantor deed. ...'*.[84] As Musselman pointed out, the examples were of circumstances in which the rule was intended to apply, the common element of each being that the revenue was generated directly from the 'project' that was paid for by the federal funds. Musselman pointed out that in his experience he has never seen a situation in which the rule identified above was applied

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82 *T-262, line 14 to T-263, line 22, inclusive.*

83 *T-560, line 6 to T-561, line 8, inclusive.*

84 *T-266, lines 18-20.*

to revenue from septage and, indeed, pointed out that:

> *'... I would note that if septage was included under the provisions of paragraph f, every wastewater treatment plant in America would need to be keeping track of how much revenue they get from septage and how much it costs them in applying excess revenue back to user charges. And that, just simply, isn't done. ...'.*[85]

When questioned further regarding this, Musselman explained:

> *'... I think you'd find that in municipalities in general that their charge structures for hauled waste, whether it be hauled industrial waste or hauled residential holding tank waste or septage are set on a market basis and are generally, in my experience, not subject to a rigorous cost calculation as to the cost to treat, generally set on the market basis. And in Allenstown, the market cost is lower than is what is charged in many other facilities which is why this facility receives so much septage. ...'.*[86]

Similarly, Trainque, when testifying as to the applicability of *§ (f)* of *40 C.F.R. § 35.2140*, expressly indicated that it was his opinion that this provision *'... does not apply to septage at all ...'*,[87] pointing out that both he and Musselman agreed that the revenue stream in question is not *'... revenue from a project ...'*, it is revenue from a 'user', in particular a user who is dumping septage and that the section of this rule that governs this circumstance is section *(a)*:

> *'... (a) User charge system based on actual use. A grantee's user charge system based on actual use (or estimated use) of wastewater treatment services shall provide that each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total wastewater loading from all users (or user classes). ...'.*[88] ***(Emphasis supplied).***

Trainque introduced a guidance manual published by the EPA,[89] the purpose of which was to *'... provide guidance in how [treatment works] establish a user charged system. ...'*,[90] and the next

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85 *T-267, lines 18 to 25.*

86 *T-284, lines 14 to 22.*

87 *T-565, line 14.*

88 *40 C.F.R. § 35.2140 (a).*

89 *DApp - 0037 - Trial Ex JJ.*

90 *T-566, lines 22-25.*

portion of Trainque's testimony addressed the manner in which this manual made it clear that the EPA allowed a plant operator to adopt a more flexible approach to HW charges than that applicable under the other section of the rule which argument we paraphrase here.

We maintain that the septage haulers are 'users' and are, therefore, subject to a 'user charge'. While the provision may impose a requirement that the related fees insure that a user will pay, at a minimum, its '*... proportionate share of operation and maintenance ...*', the provision does not stand for the proposition that revenue from the user may only be expended on the facility. The EPA promulgated handbook ***(Exhibit JJ)***, in the *Introduction* announces its objective:

> '*... A user charge system, which is an important aspect of financial management, should be designed to assist the wastewater utility in achieving financial self-sufficiency, place the costs of pollution abatement directly on the sources of pollution (proportionately), and ensure the conservation of potable water. ...*'.[91]

In the second paragraph of the *Introduction*, it states:

> '*... User charges represent, however, only one element in the total revenue strategy. The overall revenue strategy should be capable recovering all of the utility's operation costs. Recouping all costs is sound financial management and essential if a wastewater utility is to become financially self-sufficient. ...*'.[92]

The manual contains a section advising an '*... Overall Revenue Strategy for Total Operating Cost Recovery ...*', where it stresses that in most instances, the purpose of a user charge is to identify and recover '*... the O,M&R costs associated with the levels of service. ...*'.[93] However, as the section points out, '*... There are numerous approaches to offsetting costs (other than O,M&R) which will allow management to generate sufficient revenues to support self-sustaining operations, while remaining responsive to the economic and related concerns of the communities they serve ...*'.[94]

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91 *DApp - 0042 - Trial Exh JJ - Introduction - 1st ¶.*

92 *DApp - 0042 - Trial Exh JJ - Introduction - 2nd ¶.*

93 *DApp - 0051 - Trial Exh JJ - page 9, 1st ¶.*

94 *DApp - 0051 - Trial Exh JJ - page 9, 1st ¶.*

The very next page in this section of the manual identifies some examples of cost recovery that do not require strict adherence to a determination of the O,M&R costs related to the specific service being provided, expressly sanctioning '... ***other service charges.*** ...', and points out that '... ***management generally has considerable flexibility in selecting cost recovery methods which best suit their unique circumstances.*** ...'.[95]

Allenstown's user charge system is entirely consistent with the user charge requirements of ***40 CFR Part 35***. Septage haulers are users, as the Town of Pembroke is a user. The significant differences as users are that the manner in which ASC deals with septage has a minimal impact on the operation of the plant and septage is delivered in trucks rather than in pipes. Septage (as mentioned above and as is reflected in the IMA), has higher concentrations of a variety of contaminants than municipal wastewater and, therefore, is considered 'high strength waste'. As required by ***40 C.F.R. § 35.2140***, Pembroke and Allenstown are charged their proportionate shares of the cost of operation, maintenance and repair (OM&R) of the treatment facility. However, those proportionate shares are calculated so that neither Pembroke nor Allenstown is charged any of the OM&R costs of processing septage. The manner in which the ASC charges septage haulers insures that HW is charged its proportionate share of OM&R costs, as required by ***40 C.F.R. § 35.2140***. It is not denied that septage haulers are also charged more than their related OM&R costs, but this is not uncommon, nor is it precluded by the Federal Regulations, as both Musselman and Trainque confirmed. The manual even goes on to point out that the operator may utilize '... ***other services charges*** ...', to recover non O,M&R costs, including, by example, '... ***septage treatment costs and other costs of general management and administrative activities not directly associated with***

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[95] *DApp - 0052 - Trial Exh JJ - page 10, 1st ¶.*

O,M&R. ...'.[96] Allenstown's charges for processing septage cover both the proportionate share of O,M&R costs and additional payments to Allenstown in compensation to Allenstown for having taken the risk in constructing capital improvements to allow for the processing of septage, without Pembroke's concurrence and financial participation; for Allenstown's continued operational risk related to septage processing; and for its general management and administrative activities. EPA recognized in its guidance for user charges that wastewater treatment facility owners would charge for septage deliveries a fee to offset a proportionate share of OM&R costs related to processing septage, AND additional service charges related to septage treatment commensurate with the owner's "non-OM&R costs". That is precisely what Allenstown does, appropriately, with its user charge structure.

This method of calculating intermunicipal wastewater charges, and of accounting for septage treatment revenues and costs, is common among New Hampshire municipalities. The testimony in this case on behalf of both Pembroke and Allenstown noted that most intermunicipal agreements for wastewater disposal in New Hampshire do not reference septage revenues or cost, but rather set forth calculation procedures to proportionately share treatment facility OM&R costs among the municipal users, without reference to septage. Under most such agreements in New Hampshire, municipal owners of treatment facilities are free to charge a market based fee for septage and other truck-delivered wastewater. Excess septage revenues over costs are not shared with other contributing municipalities under most such intermunicipal agreements. This is because the Federal Regulations under 40 CFR 35 do not require such sharing.

In its appeal, Pembroke also contends that net septage revenue might be construed to be a "secondary revenue" pertaining to sales of excess capacity. Such secondary revenues are mentioned

[96] *DApp - 0052 - Defendant's Exhibit JJ - page 10, 5th ¶.*

by EPA in its guidance manual for user charges. The secondary revenues described are not applicable to Allenstown's circumstance. A "sale" of excess capacity implies that such capacity is provided to another entity in an on-going fashion in the future. Not only are Allenstown's business arrangements with septage haulers and other municipalities interruptible, temporarily or permanently, with little notice, but the uncontroverted testimony in the Record made it clear that the HW operation as conceived and implemented by the ASC did not result in the diminution of any existing capacity in the plant. The notion that the HW operation amounted to a 'sale of excess capacity' was expressly denied by Trainque.[97] Moreover, Clement testified that the HW operation was in place for years during the moratorium and, despite the fact that they were monitoring the plant closely throughout that time, neither the DES nor EPA had any complaint with the operation and, indeed, encouraged it.[98] The testimony and findings of the trial court made it clear that Pembroke was insulated from the costs of the HW operation, did not sacrifice any benefit it was entitled to under the IMA and, indeed, benefitted from the manner in which fixed costs were shared by the HW component.

The rule that the plaintiff contends is dispositive of this matter (raised only at the time of trial), is a rule promulgated by a federal agency. Plaintiff presented no evidence to address the manner in which this rule was administered by the agency that adopted it. By contrast, the defendant presented competent and credible expert testimony to demonstrate that the rule is not typically or normally utilized in a manner that would inhibit imposing charges on HW in a manner that was different than that imposed on other contractual and permanent users of the plant. Accordingly, we contend that there is ample evidence in the Record to support the trial court's interpretation of the applicability of the rule.

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97 *T-594, lines 22.*

98 *T-452, line 14 to T-453, line 23.*

C. ***The trial court was correct when it held that the HW operation did not adversely impact Pembroke or otherwise impact the plant capacity.***

Trainque and Clement testified that the septage receiving/processing operation was conceived by, tested by, developed by and is operated and maintained by the staff of the Allenstown Sewer Department and no part of it was paid for by Pembroke. Moreover, Trainque presented a schematic of the plant operation,[99] along with testimony indicating that the only part of the WWTF being used for septage processing that was partially paid for by Pembroke (originally) are the blend tanks in which septage is mixed with waste sludge from the wastewater treatment process. Virtually the entirety of the rest of the solids processing facilities were paid for by the excess revenues from hauled wastes processing and Pembroke did not pay for any of these solids processing facilities. Filtrate/pressate from dewatering does go through the treatment process but it is a relatively small portion of the wastewater flow and Pembroke has derived significant benefit from septage revenue both in terms of lower O & M (usage) costs at the WWTF as well as the fact that they have not paid for capital upgrades of the WWTF, some of which benefit them.

Clement and Andrea Martel made it clear that all costs attributable to HW are paid for by HW revenue (consistently with ***§ 3.06***), and that the accounting protocol developed by them clearly insures that none of the shared administrative costs of the plant are included in the calculation of Pembroke (or, for that matter, Allenstown's) portion of those costs. The trial court acknowledged the '*... **conservative accounting method used by Allenstown in allocating responsibility for shared costs between the three users, the septage haulers, Allenstown and Pembroke. ...***'.[100] This finding reflects testimony by both Dana and Andrea Martel as to the lengths that the ASC went to in order to insure that <u>all</u> costs associated with the handling of septage were paid for by the septage revenue,

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[99] *DApp - 0067 - Trial Exh KK.*

[100] *Order - (Nicolosi, J.) - p 19, 1st full ¶.*

even to the extent of attributing a larger than normal share of individual administrative costs (secretarial, electric, telephone, etc.) to the septage operation. A separate column was included in the accounting protocol that was attributed to this activity and identified as the 'hauled waste' (HW) account. HW soon became a separate and, in some cases, the largest contributor to the groups of expenses that the two municipalities would otherwise have shared and, to that extent, as testified to by Dana, Andrea and Mike Trainque, both communities, including Pembroke, benefitted from this additional revenue stream, which evidence supported the decision of the trial court to the same effect.[101]

D. The trial court was correct when it held that the disposition of the HW revenues were governed by RSA 149-I:8 and 10.

We submit that neither the federal law nor related rules contain any provision which compels the revenue from HW to be applied strictly to WWTF related costs. Likewise, we submit that the manner in which ***§ 3.06*** came to be worded does not require the ASC to limit the use of HW excess revenue exclusively to WWTF related costs. There is nothing in any part of this agreement that expressly precludes this revenue from being spent elsewhere than on the WWTF. While the plaintiff will argue that there is, correspondingly, nothing that allows it to be spent elsewhere, the other sections of the IMA referenced above which address the calculation of the municipalities share of O&M support our interpretation. Accordingly, the HW revenue is not specially treated by either the law or the contract and, as such, it should be treated as a customary form of revenue, indistinguishable from any other user of the system. If that is so, the use of this revenue is governed by the NH law that governs the use of all sewer revenue generally, ***RSA 149-I:8 & 10.*** The first of those two sections is set forth:

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[101] *Order - (Nicolosi, J.) - p 19, 1st full ¶.*

'... For the defraying of the cost of construction, payment of the interest on any debt incurred, management, maintenance, operation, and repair of newly constructed sewer systems, including newly constructed sewage or waste treatment and disposal works, the mayor and aldermen [selectmen or sewer commission] may establish a scale of rents to be called sewer rents, and to prescribe the manner in which and the time at which such rents are to be paid and to change such scale from time to time as may be deemed advisable. Except in the case of institutional, industrial or manufacturing use, the amount of such rents shall be based upon either the consumption of water on the premises connected with the sewer system, or the number of persons served on the premises connected with the sewer system, or whether the user is on a pressure or gravity system, or upon some other equitable basis. ...'.[102]

The above section is entitled 'Sewer Rentals', a term which is not defined in the statute. Plaintiff sought to distinguish this term as limited to customers on the collection system receiving sewer services. However, that argument falls short when one considers that there is no other section of this statute that identifies any other form of revenue stream. Moreover, the scope of the statute is very broad, applying, as it does, to the construction of new systems, the repair of old systems including both treatment works and sewer systems, that it would seem to be capable of applying to virtually any and all revenue that the municipality receives.

Additionally, the section mentioned earlier in connection with the inapplicability of an appropriation lapse clause also bears on this subject:

'... RSA 149-I:10. Sewer Funds.

I. The funds received from the collection of sewer rentals shall be kept as a separate and distinct fund to be known as the sewer fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 149-I:8, or for the previous expansion or replacement of sewage lines or sewage treatment facilities. ...'. (Emphasis supplied).

This section of the statute is entitled 'Sewer Funds' so that a cursory glance might suggest that there is some distinction between 'Sewer Funds' and 'Sewer Rentals'. The first line of the

[102] *RSA 149-I:8.*

statute, however, dispels that notion as it refers expressly to the monies collected from 'sewer rentals'. Indeed, when one reads the entire statute, it would appear that there are no other types or categories of revenue cited or mentioned in any way, so that, we contend, it is reasonable to consider that the legislature intended that any and all revenues received for the use of any part of the sewer system or plant would be considered 'rentals' and that those funds had to be handled in the manner referenced in section 10 of the statute, which simply requires them to be placed into an account called the sewer fund and expended only for the purposes set forth in section 8.

E. The trial court was correct when it held that the added capacity in the plant from the BioMag process belonged to Allenstown.

Plaintiff claims that the trial court erred when it determined that the IMA required Pembroke to participate in any funding initiative and declining to accept the plaintiff's notion that since it was obligated under the agreement to pay its share and, therefore, Allenstown was free to raise the funds and then bill Pembroke and any refusal by Pembroke to participate did not constitute a breach. This view of IMA ignores the plain language of the agreement and, moreover, the considerable difficulty that both towns have had in attempting to raise funds for these types of projects. We cited ***§ 4.03*** earlier which expressly requires that:

> ***'... [a]t the same time the Town of Allenstown approves and appropriates the bonding of the costs for construction of expansion or modifications ... Pembroke shall also raise and appropriate its proportionate share ...'.***[103] ***(Emphasis supplied).***

As the Record clearly showed, Allenstown pursued the initial bonding to complete the full upgrade at two successive annual meetings, in which they failed to get the approval of its voters. As the trial court pointed out, Pembroke did not bring any proposal to its town meeting, but the fact that the initiatives in Allenstown failed, makes the issue as to Pembroke's failure to act in those

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[103] *Trial Exh 2 -Section 4.03 - 8th full paragraph - p. 10.*

instances, moot.

When the full project initiatives failed, the ASC and its engineers explored a lesser alternative referenced above as the BioMag project. As the Record reveals and the trial court found, Pembroke took no action to attempt to assist in the funding of this project so that Allenstown had to go forward on its own. As a result, the project was eventually approved as an ARRA, matching fund initiative, in which Allenstown was obligated, under the ARRA procedure to pay the matching share. To date, Pembroke has not paid anything for this project. The result of the implementation of the Bio-Mag project was the lifting of the moratorium and the increase in the capacity of the plant by ½ million gallons per day in capacity. The additional capacity of the plant is the result of efforts by the ASC and the voters of Allenstown. Pembroke did not participate in the process nor did it obligate itself in any way to the payment of the cost of this upgrade. Clearly, if the ASC moves to collect a portion of the upgrade cost from Pembroke under ***§ 4.03,*** then Pembroke would be entitled to a commensurate share of the additional capacity, as was contemplated by the first proposal which ASC made to PSC (when it suggested a 50/50 split of cost and capacity), an offer which the PSC never accepted. Pembroke is clearly entitled to 65% of the original capacity of the previous plant as it unquestionably participated in that project and it receives that now. However, the only increase in plant capacity from that time to now is attributable entirely to the BioMag upgrade which was an ASC initiative and supported entirely by Allenstown voters.

Conclusion

The plaintiff has failed to prove that the intent of ***§ 3.06*** was to limit the application of revenues which the sewer commissioners were to receive from septage haulers to any particular purpose or fund. The evidence supports the trial court's finding in this regard. Perhaps in response

to its paucity of evidence on this issue, the plaintiff turns to an argument (never raised in its pleadings), that arcane EPA regulations somehow invalidate the otherwise clear (and bargained for), wording of ***§3.06,*** but competent and credible expert testimony demonstrated that those regulations simply do not mean what the plaintiff claims. Through the careful management of the WWTF by the ASC, the revenue from 'septage' was used to upgrade the hauled waste receiving facilities in a manner that allowed revenue to increase (but not at Pembroke's expense), which, helped facilitate the BioMag upgrade which ended the moratorium. This was done without Pembroke's help or participation. It is simply disingenuous of them to now demand benefits from the efforts of the ASC and the risks taken by the Allenstown voters. The trial court's rulings are supported by the evidence and should be upheld.

Respectfully submitted,
Defendant-Appellee,
TOWN OF ALLENSTOWN *(SEWER COMMISSION)*
By Its Attorneys,
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Date: ***October 2, 2017***

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Request for Oral Argument

The undersigned requests 15 minutes of oral argument to be made by William R. Drescher.

Certificate of Service

I hereby certify that on the above date two (2) copies of the within Brief and corresponding Appendix, were forwarded via first class mail to Attorney Mark H. Puffer and Attorney Sharon Cuddy Somers.

_____
William R. Drescher