# STATE OF NEW HAMPSHIRE
# SUPREME COURT

Docket No. 2017-0066

*Town of Pembroke v. Town of Allenstown*

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**RULE 7 MANDATORY APPEAL**
**MERRIMACK COUNTY SUPERIOR COURT**
**(Judge Diane M. Nicolosi)**

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## BRIEF OF APPELLANT TOWN OF PEMBROKE

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## QUESTIONS PRESENTED

1. Whether the trial court erred by misinterpreting and misapplying provisions of the Clean Water Act and regulations promulgated thereunder, including 40 C.F.R. §35.2140(f) which requires that "revenue from the project" be used to reduce all user charges proportionately.
   [Issue addressed by argument at trial, Pembroke's Post-Trial Memorandum (App, 469-500), and Trial Court's Order, 16-17.]

2. Whether the trial court erred by interpreting section 3.06 of the IMA to allow Allenstown to use all septage profits "as it sees fit."
   [Issue address by argument at trial, Pembroke's Post-Trial Memorandum (App, 469-500), and Trial Court's Order, 10-17.]

3. Whether the trial court erred by finding that Pembroke was not entitled to a portion of the increased capacity from the BioMag project, even though said project was funded by Federal grants and profit from septage haulers.
   [Issue addressed by argument at trial, Pembroke's Post-Trial Memorandum (App, 469-500), and Trial Court's Order, 19-21.]

## STATEMENT OF THE CASE

Plaintiff Town of Pembroke filed a Petition for Declaratory and Injunctive Relief, and Damages in Merrimack Superior Court in August 2014, claiming that Defendant Town of Allenstown had breached §3.06 of the Parties' 2006 Intermunicipal Agreement ("IMA"). The IMA sets forth the Towns' rights and obligations related to the Suncook waste water treatment facility ("WWTF") that Allenstown operates, but both Towns use and pay for proportionally. Pembroke specifically alleged Allenstown violated the IMA by diverting the profit the WWTF derives from septage haulers for Allenstown's exclusive use and benefit, instead of allocating the profit between Pembroke and Allenstown to proportionally reduce each Town's obligations to

pay for the WWTF. Pembroke sought damages based on the amount of septage hauler profits which Allenstown retained for its exclusive use.

Allenstown's Answer generally denied Pembroke's damages claim, but agreed with Pembroke that the gist of the parties' dispute was whether Allenstown could use the profit from septage haulers for Allenstown's sole benefit, or whether such profit had to be used for the WWTF (which would benefit both Towns proportionately).

Defendant also filed various counterclaims, including that Pembroke had breached the parties' IMA by failing to support the so-called "BioMag Project" which would increase the efficiency and capacity of the WWTF.

A bench trial was conducted in Merrimack Superior Court (Nicolosi, P.J.) on September 8 and 9 and October 11 and 13, 2016. The trial court issued an order dated January 20, 2017 ("Order") which found that Allenstown was entitled to the exclusive use and benefit of all profit generated by the septage haulers. The trial court also held that Pembroke had breached the parties' IMA by not participating in the funding for the BioMag Project and that Allenstown was therefore entitled to all increased plant capacity generated by that Project.

This Court accepted Pembroke's Rule 7 Notice of Mandatory Appeal by Order dated February 22, 2017 and issued a briefing schedule by Order dated May 31, 2017.

## STATEMENT OF FACTS

In the early 1970s, the Towns of Pembroke and Allenstown were under pressure from the Environmental Protection Agency ("EPA") and the New Hampshire Department of Environmental Services ("NHDES") to take action to provide for treatment and disposal of their wastewater and sewage. Pembroke and Allenstown executed an agreement for the construction

and operation of a WWTF designed to process wastewater from both Towns on August 6, 1974. Appendix ("App"), 1-4.

Prior to the execution of the 1974 Agreement, representatives of the two Towns discussed the possibility of Pembroke and Allenstown applying jointly for the Federal and State funds necessary to build the WWTF. Order, 2. But Federal regulations required a single municipality to be the grant applicant and the owner and operator of the WWTF. Order, 2. As the best location for the WWTF was in Allenstown, Allenstown became the grant applicant, and thus the owner and operator of the WWTF. Order, 2.

The WWTF was built with a combination of Federal, State and local funds, with the largest share (75%) coming from the EPA. Based on wastewater flow projections, Pembroke paid 65% and Allenstown 35% of the remaining costs to construct the WWTF. Order, 2. With a design capacity of 1.05 million gallons per day, the WWTF was constructed and became operational in 1977. Order, 2.

The 1974 Agreement provided for the treatment of both Towns' wastewater and sewage. It included provisions for the Towns to proportionally share the cost of financing, constructing and maintaining the required sewage treatment plant. App, 1-2. The basic concepts of the 1974 Agreement, which would be incorporated into the 2006 IMA, included the following:

- Pembroke and Allenstown would separately finance, construct, and maintain their own sewage collection systems which would connect to the WWTF;
- The WWTF would accept and treat Pembroke's and Allenstown's wastewater for the life of the WWTF;
- Operation, maintenance, and capital costs of the WWTF would be financed by the two Towns proportionately; and

- Both Pembroke and Allenstown would adopt and maintain a system of user charges, and enact and enforce a sewer ordinance meeting the requirements of the Clean Water Act ("CWA").

For over three decades, Pembroke and Allenstown proportionately financed the construction, operation, maintenance and replacement of the WWTF under the 1974 Agreement. Transcript ("Tr"), 52, 457.

Anticipating a major upgrade of the WWTF, Pembroke and Allenstown entered into a new agreement in November 2006. The 2006 IMA provided that both Towns would comply with the requirements of the CWA and its regulations. App, 8, 10, and 12-13. The IMA set forth the obligations of Pembroke and Allenstown with respect to the maintenance, operation and capital costs of the WWTF. App, 27-32.

Under the IMA, the rates paid by the Towns' users connected to the Pembroke or Allenstown sewer collection systems are based upon the amount of flowage, adjusted for "loading" parameters Biochemical Oxygen Demand ("BOD") and Total Suspended Solids ("TSS"). The IMA applies the same formula to both Pembroke and Allenstown users, which is intended to reflect the actual costs of the operation and maintenance (including replacement costs) of the WWTF. App, 11-12 and 28-32.

§4.01 of the IMA sets forth its "basic premises," which include the following:

- That Pembroke pays the cost of facilities that are solely for Pembroke's use;
- That Allenstown pays the cost of facilities that are solely for Allenstown's use; and
- That the operation and maintenance ("O&M") of, and the capital costs for, the WWTF would be paid for by the Towns proportionately.

When the Towns entered into the IMA, septage haulers were already generating substantial revenue for the WWTF. In 2005, the WWTF received septage revenue totaling $430,809 (compared to $484,400 from Pembroke users and $401,065 from Allenstown users). App, 62. In 2006, the WWTF received $1,042,344 in septage revenue, more than the revenue from Pembroke and Allenstown users combined. App, 63. Septage revenue from 2007 through 2014 ranged between a low of $1,049,184 in 2009 to a high of $1,356,714 in 2014. App, 63-70.

The charges payable by septage haulers at the WWTF do not simply recover the cost of processing their septage. Rather since 2006, there has been substantial profit or excess revenue from the fees charged to septage haulers. App, 59-70. Septage hauler charges are based upon market demand. Tr, 153; Order, 6.

The IMA addresses septage hauler revenue in §3.06 of the IMA which provides in part as follows:

> Revenue received from septage permits and fees by Allenstown shall be used to help offset the costs of septage processing and any excess revenues may be used to offset the costs of operation and maintenance of the WWTF and/or the upgrade expansion of the WWTF.

App, 15. Neither §3.06 nor any other provision of the IMA allows excess septage revenues to be used for any purpose other than the operation and maintenance, or the upgrade/expansion of, the WWTF. App, 8-32.

Between 2005 through 2011, Allenstown did not use any of the profit from septage haulers to subsidize Allenstown's own sewer rates or make improvements to the Allenstown collection system. Rather, "excess septage revenues" or profits, either paid for the operation, maintenance and replacement costs of the WWTF, or were placed into a septage surplus fund for future use at the plant. Tr, 93, 159, 303, 502; Order, 6.

Beginning in 2012, however, Allenstown began to use the profit from septage haulers to make improvements to its own collection system and to subsidize the sewer rates of Allenstown residents. Order, 6-7. Allenstown first withdrew $50,121 from the septage surplus fund in 2012 to pay for a sewer project on Oak Street in Allenstown. App, 60. In 2013, Allenstown began using septage profits to subsidize the sewer rates of Allenstown users, with no corresponding subsidies for Pembroke users. Allenstown subsidized its collection system by $610,000 for the period of 2013-15. App, 40 and 58. For 2016 and until the WWTF is no longer operational, Allenstown intends to continue to use the profit from septage haulers "as it sees fit."[1]

## SUMMARY OF THE ARGUMENT

Allenstown is required to allocate any profit generated from the Suncook WWTF proportionally between Allenstown and Pembroke to reduce each Town's costs. This includes any profit generated by selling unused capacity at the WWTF to treat septage hauler waste. The trial court erred when it held otherwise.

Allenstown is the owner of the WWTF, which has received Federal funds under the CWA. Any owner of a wastewater treatment facility which has received CWA funds must comply with its provisions and regulations. The CWA requires that any costs and revenue associated with such a facility be allocated proportionally among its users. Allenstown and Pembroke are the two users of the WWTF. The costs each Town pays to fund the WWTF are determined by a complex formula, or as coined by the CWA, a "user charge system." The user charge system is designed to ensure the Towns' costs associated with the WWTF are allocated among each proportionally based on their respective use. In the IMA, Allenstown agreed to comply with all laws and regulations that apply to the WWTF, which includes the CWA. The

[1] Under §3.07 of the IMA, the IMA continues indefinitely, presumably until the WWTF is no longer in operation, unless both parties mutually agree to terminate it.

mandates of the CWA control over any inconsistent terms or conditions of agreements among users of a wastewater treatment facility.

In 2005, Allenstown began charging septage haulers a fee to treat their waste at the WWTF. Put another way, Allenstown sells unused plant capacity necessary to treat septage haulers' waste. It is undisputed that septage haulers are charged more than the costs necessary to treat their waste. The trial court held that Allenstown was entitled to all of the profits the WWTF generates by selling its excess capacity to treat septage hauler waste. This was in error. The CWA requires that that any profit generated from a plant be used to proportionally reduce the costs of its users. Allenstown's disproportionate allocation of septage profits to itself violates the CWA, and thus the IMA.

The trial court also erred when it interpreted section 3.06 of the IMA to mean that Allenstown can use septage profits as it "sees fit." Section 3.06 states that Allenstown shall use septage revenue to offset the costs of septage processing, and may use "excess [septage] revenues" to "offset the costs of operation and maintenance of the WWTF and/or the upgrade/expansion of the WWTF." The plain meaning of § 3.06 does not grant Allenstown absolute discretion over septage profits, but restricts their use to the WWTF. Allowing Allenstown to retain septage profits for its own use violates other provisions of the IMA, which direct that all monies associated with the WWTF must be proportionally allotted between the two Towns. The trial court also erred in its interpretation when it placed no weight on the undisputed fact that Allenstown proportionally allocated septage profits between the Towns before the 2006 IMA was entered into, and for five years afterwards.

The trial court also held that Pembroke was not entitled to a portion of the WWTF's increased treatment capacity associated with the so-called "BioMag Project." The BioMag

Project was wholly paid for by grants awarded to Allenstown under the 2009 American Recovery and Reinvestment Act ("ARRA") and septage profits. The money awarded under ARRA to construct the BioMag Project was directly tied to the CWA and its proportionality requirements. By proportionally paying for the operation and maintenance costs of the WWTF, Pembroke was entitled to its share of the ARRA funds. It is entitled to its proportional share of septage hauler profits. Pembroke should be allowed to proportionally receive any benefits associated with the BioMag Project.

## ARGUMENT

When interpreting a written agreement, the Supreme Court gives the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole. *McDonough v. McDonough*, 169 N.H. 537, 541 (2016). The Court gives an agreement the meaning intended by the parties when they wrote it. *Id.* Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract. *Id.* The interpretation of a contract, including whether a contract term is ambiguous, is ultimately a question of law for the Court to decide. *Id.* The Court reviews a trial court's interpretation of a contract *de novo*. *Id.*

### I. THE TRIAL COURT MISCONSTRUED AND FAILED TO PROPERLY APPLY THE CLEAN WATER ACT AND ITS REGULATIONS.

#### A. Allenstown Agreed To Comply With The CWA, Which Requires That Costs And Revenue Associated With The WWTF Be Allocated Proportionately Between The Towns.

In the IMA's introductory clauses, Allenstown stipulates that it "has agreed with the applicable Federal and State Agencies to negotiate with Pembroke to receive, treat and dispose

of wastewater from the Town of Pembroke through the Allenstown System in compliance with 40 CFR 35.2107."[2] App, 8. In Section 2.06 of the IMA, Allenstown also agreed it would:

> comply with, and, strictly enforce, all Federal, State and Local laws, ordinances, rules, regulations, by-laws, permits and agreements **relating to water pollution control in Allenstown and to wastewater characteristics, collection, treatment and disposal**, as they apply to Allenstown's wastewater collection and treatment system. Allenstown shall be liable to Pembroke for any damage caused to the Pembroke System resulting from the violation of any such law, ordinance, rule, regulation, by-law, permit, or breach of this Agreement by Allenstown or any of its users.

App, 2-3 (emphasis added). Such Federal laws and regulations include §204(b)(1)(A) of the Clean Water Act. A grantee like Allenstown, as a condition of receiving Federal funding for wastewater treatment works, must:

> ...adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction...will pay its proportionate share...of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant.

(emphasis added); *see also* 40 CFR §35.2214(a) (the grantee shall implement "the user charge system under §35.2140 that will generate sufficient revenue to operate and maintain the treatment works.") User charge system requirements must be implemented for the "useful life" of a treatment facility, which is defined as the "period during which a treatment work operates." *See* 40 CFR 35.2208; 40 CFR 35.2005(b)(51).

Other CWA regulations strictly apply the concept of proportionality among the users of a wastewater treatment facility in particular scenarios. *See* 40 C.F.R. §35.2140(e) (requiring that the costs for all flowage not directly attributable to users (i.e., infiltration and inflow of water into the system) "be distributed among all users" equitably); 40 C.F.R. §35.2140(i) (allowing

[2] 40 CFR 35.2107 provides in part that, "If the project will serve two or more municipalities, the applicant shall submit the executed intermunicipal agreements, contracts or other legally binding instruments necessary for the financing, building and operation of the proposed treatment works. At a minimum they must include the basis upon which costs are allocated, the formula by which costs are allocated, and the manner in which the cost allocation system will be administered."

grantees to establish lower user charge rates for low income residential users as long as the costs of user charge reductions are "proportionately absorbed by all other user classes.")

The basic principle of cost proportionality is also imbedded in the IMA. App, 8-32 (*see* IMA at §§4.01(C), (D), (F); 4.03; 4.05; 4.08; Appendix B.) The proportional user charge system pertaining to the Towns, setting forth how each shall "pay its proportionate share" of the WWTF's costs, is detailed in Appendix B of the IMA. App, 27-32.

The proportionality obligation is likewise applied to any revenue a wastewater treatment facility may raise. 40 CFR §35.2140(f) states in full:

> 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.**

(Emphasis added.) The EPA's User Charge Guidance Manual echoes the equitable nature in which costs and revenues should be allocated amongst users: "the goal of a publicly owned wastewater utility is to recover its costs, not to make a profit." App, 452.

Allenstown conceded that it is making a profit from septage haulers, and not using "excess septage revenues" to proportionally lower Pembroke's costs. It asserts the right to do so because it "owns" the plant. The trial court appeared to accept this rationale. It pointed out that Allenstown was the owner and operator of the plant in a number of critical junctures in its Order. Order, 2, 12, 16, 19.[3] But Allenstown is not a private corporation using private funds to sell services and make a profit. It is a governmental entity, a "grantee" or "applicant" under the CWA. Allenstown received Federal funds for the WWTF on the condition that its actions concerning the WWTF would be subject to the Federal laws and regulations under which those

[3] For example, the trial court rejected Pembroke's argument that subsidizing Allenstown's sewer rates did not violate the proportionality requirements of the IMA because "Allenstown owns the excess septage revenue ...". Order, 16.

funds were disbursed. This law includes the CWA and its regulations. Allenstown also agreed to comply with the CWA and its regulations in § 2.06 of the IMA. App, 9-10. Allenstown even conceded at trial that it must comply with applicable Federal law. App, 490-91.

### B. Septage Profits Constitute "Revenue From The Project" From Which Allenstown Is Required To Proportionally Reduce Pembroke's Costs.

40 CFR §35.2140(f) provides certain examples of how a wastewater treatment facility may generate revenue. The User Charge Guidance Manual provides additional examples, such as selling "excess capacity."[4] Allenstown acknowledges that it is making a profit by selling septage haulers unused capacity of the plant. Tr, 532-33; Order, 6 ("...so Allenstown turns a profit on the septage haulers.").

In the single paragraph of the trial court's 23-page decision which discusses the user charge provisions of 40 C.F.R. §35.2140, the trial court erroneously concludes that: "There is no 'project' from which revenue is generated." Order, 16-17. It then declines to apply the provisions of subsection (f) to Allenstown's retention of septage profits. This is a fundamental misreading of the CWA regulations. "Project" is defined as "publicly owned treatment works," *see* 40 CFR §35.10005, which itself is defined as "a system used in the treatment...of municipal sewage or industrial wastes of a liquid nature which is owned by a State or municipality." The WWTF unambiguously constitutes a "project" under 40 C.F.R. §35.2140(f).

The trial court also overlooked the substantial profit generated by the "project" (i.e., by the Suncook WWTF). Fees from septage haulers from 2007 through 2014 ranged between $1,049,184 and $1,356,714. App, 63-70. Substantial profit was generated each year. The trial court found that such profit belongs solely to Allenstown, neglecting the requirements of the

[4] Approximately 90% of septage hauler waste is processed and treated through the WWTF.

CWA and its regulations which require such profit from the "project" to be shared proportionately among all users.

Allenstown, as the grantee of CWA funds, is obligated to allocate any revenue the WWTF receives to proportionally reduce its and Pembroke's WWTF costs. It agreed to comply with the CWA and its regulations. Septage profits, generated from the sale of unused plant capacity, constitute "revenue from the project." Subsection (f) requires Allenstown to allocate septage profits to reduce the Towns WWTF costs proportionately. *See* 40 CFR §35.2140(f).

### C. If Septage Revenue Is Not "Revenue From the Project," Then Allenstown Was Obligated To Charge Septage Haulers As "Users" Subject To A User Charge System.

The trial court determined that septage profits were not "revenue from the project," and thus Allenstown was not obligated to use septage profits to proportionally reduce Pembroke's costs. It then concluded that "septage haulers are users, just as Pembroke and Allenstown are users." Order, 17. But the CWA prohibits plant operators from making a profit off their users.

Users of waste treatment services must be charged proportionately based on their usage of a wastewater treatment facility. Users are required to pay the costs of operation and maintenance, including replacement costs, attributable to them. *See* CWA, §204 (b)(1)(A); 33 USC § 1284(b)(1). A grantee's user charge system:

> 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).

40 C.F.R. § 35.2140(a) (emphasis added).[5] As exemplified in Appendix B of the IMA, the WWTF's user charge system constitutes a matrix of formulas to determine each Town's proportionate costs. Septage haulers are noticeably absent from Appendix B. App, 27-32.

[5] The user charge system of the WWTF is based on actual use, not ad valorem taxes. *See* 40 CFR § 35.2140(b).

Allenstown does not charge septage haulers only the amount necessary to account for their operation, maintenance, and replacement costs. Rather than charging a proportionate fee, Allenstown invoices septage haulers what the market will bear. Allenstown acknowledges that it makes substantial profit from the septage haulers.

The trial court never explained how septage haulers could be users subject to proportional charges and simultaneously generate substantial profits. Users must be charged for their proportionate costs; Allenstown charges septage haulers more than necessary to recover the costs associated with treating their wastewater and capital costs of the WWTF. Pembroke does not dispute Allenstown's right to charge septage haulers more than the costs attributable to them. But to the extent that the fees charged the septage haulers generate a profit, revenue is being generated "from the project." *See* 40 C.F.R. 35.2140(f). This profit should be used to reduce Pembroke's WWTF costs proportionately.

### D. Allenstown's Interpretation Of §3.06 Of The IMA Is Inconsistent With Its Agreement To Comply With The CWA.

Septage haulers must be proportionally charged as users, or the profit septage haulers generate for the WWTF must be used to proportionally reduce the Towns' costs. Allenstown's interpretation of §3.06 of the IMA violates the CWA's mutually exclusive treatment of users and revenue from the project. §3.06 of the IMA states, in part, that:

> Revenue received from septage permits and fees by Allenstown shall be used to help offset the costs of septage processing and any excess revenues may be used to offset the costs of operation and maintenance of the WWTF and/or the upgrade/expansion of the WWTF.

Allenstown interprets §3.06 of the IMA, and specifically the word "may," to assert that it has unfettered discretion as to how to use the excess revenues from septage haulers. The CWA forecloses such a conclusion: "The user charge system shall take precedence over any terms or

conditions of agreements or contracts which are inconsistent with the requirements of section 204(b)(1)(A) of the Act and this section." 40 C.F.R. 35.2140(h). The trial court properly acknowledged subsection (h)'s precedence: "[i]f any provision of the 2006 IMA did violate 40 C.F.R. §35.2140(d) or any Federal regulation, the Federal regulation would govern and override any inconsistent provision of the IMA." *See* Order, 16-17 (citing 40 C.F.R. §35.2140(h)). But the court failed to see that allowing Allenstown to "own" all of the profits from septage haulers violated the CWA and the applicable CFRs.

Allenstown's interpretation of §3.06, which the trial court adopted, is incongruous with both the proportionate user charge requirements of the CWA and 40 C.F.R. §35.2140(f) that revenue from the project (i.e., from the WWTF) must be used by the "grantee [to] proportionately reduce all user charges." Even if Allenstown's interpretation of §3.06 of the IMA were the more reasonable of the two Towns' interpretations of that section (which Pembroke disagrees with, as set forth more fully, *infra*), Allenstown's interpretation must be rejected. 40 C.F.R. §35.2140(h).

Allenstown advances a number of reasons why it can nevertheless charge septage haulers more than the cost attributable to their usage without proportionally reducing Pembroke's costs. Each of Allenstown's reasons is unpersuasive.

Allenstown first argued below that it can charge septage haulers differently from Pembroke and Allenstown because the waste from haulers is processed differently. But this difference would be accounted for in Allenstown's calculation of the "costs of septage processing." *See* §3.06. App, 8. Mathematical equivalency in user charge systems is not required. *Hotel Employer Association of San Francisco v. Gorsuch*, 669 F.2d 1305, 1308 (9th Cir. 1982). There may be reasons to calculate the user charges for septage haulers differently

from the user charges applicable to Pembroke and Allenstown users.[6] But Allenstown makes no pretense about charging septage haulers proportionately, and claims the right to make a substantial profit from them.

Appendix B of the IMA applies only to the user charges for Pembroke and Allenstown. Septage haulers are only mentioned in §3.06 of the IMA, nowhere else. Allenstown's interpretation of §3.06 is that it can make a profit from septage haulers but not share that profit with other users. This is contrary to the requirements of 40 C.F.R. §35.2140. Once septage costs are paid, any additional monies Allenstown receives constitutes "revenue from the project" which should benefit the Towns proportionately.

Both of Allenstown's expert witnesses at trial testified that the mention of "high-strength wastes" in Appendix B of the IMA somehow indicated that Pembroke was not to share in excess revenues or profit generated by septage haulers. Both references to "high-strength wastes" in Appendix B of the IMA refer to year-end adjustments in the amounts that Pembroke has to pay for its proportionate obligation for operation and maintenance of the WWTF. See App, 29, 31. These references in Appendix B to "high-strength wastes" have nothing to do with waste from septage haulers, but refer only to the waste from Pembroke and Allenstown. Appendix B does not mention septage haulers.

Allenstown next argued that although septage haulers were users they could be charged a "minimum proportionate" amount. In other words, Allenstown could charge them more than a proportionate user fee. There is nothing in the CWA or its regulations which state or suggest that proportionate user charges are a minimum amount to be charged to users. Indeed, a "minimum proportionate" rate is an oxymoron. If septage haulers are users, as Allenstown claims they are,

[6] One must question the need to charge septage haulers differently from Pembroke and Allenstown users at all, since the user charge formulas for both Towns take loading parameters such as BOD and TSS into consideration.

they must be charged proportionately. To the extent they are charged more than that, the excess revenue is "revenue from the project" which must be used to reduce other user charges proportionately. 40 C.F.R. §35.2140(f), (h).

One of Allenstown's experts, Michael Trainque, attempted to use the EPA's "User Charge Guidance Manual for Publicly-Owned Treatment Works" to support Allenstown's position that although septage haulers were users of the WWTF, Allenstown did not have to charge them proportionately. Trainque pointed to page 10 of the Guidance Manual (App, 453), which specifically refers to "septage treatment costs" as part of "other service charges" which may be used to recover operation, maintenance and replacement costs for a waste treatment facility. The full paragraph referred to provides as follows:

> Other service charges may be used to recover the remaining non-O,M&R costs for which the user charge rate structure is not appropriate. Such costs might include: late payment penalties; septage treatment costs; connection costs (i.e. turn on/turn off); and other costs of general management and administrative activities not directly associated with O,M&R.

The entire section cited by Mr. Trainque refers to various methods of "cost recovery." But Allenstown is doing much more than recovering its costs; it is making a substantial profit. Further, "septage treatment costs" in the paragraph Trainque cited refers to minor or incidental costs such as rate payment penalties "and other costs of general management and administrative activities not directly associated with O,M&R."[7] The "costs of septage processing" are hardly minor or incidental. They are related to operation, maintenance and replacement of the WWTF. There is no reason why the costs of septage processing could not be recovered using a user charge rate structure.

The User Charge Guidance Manual also allows a grantee to generate "secondary revenue offsets," which "are generated by a wastewater utility from activities other than the provision of

[7] "OM&R representing respectfully operation, maintenance, and replacement."

wastewater treatment services." App, 453. This section provides that "secondary revenues would include: ... **sales of excess capacity** and by-products such as sludge, processed wastewater, excess oxygen or power generation capacity, and other types of credits" (emphasis added). App, 453. When Allenstown accepts septage from haulers for a fee, it is selling excess capacity of the WWTF. (Trainque attempted to argue that Allenstown is selling unused capacity, not excess capacity. This is a distinction without a difference). The User Charge Guidance Manual demonstrates that septage haulers are not users in the same way as Pembroke and Allenstown residents are users. Instead, they are sources of "secondary revenues" which must be used to benefit users proportionately. 40 C.F.R. §35.2140(f).

The immediate preceding page of the User Charge Guidance Manual (App, 452) provides that "the goal of a publicly owned wastewater utility is to recover its costs, not to make a profit." This is hardly surprising: the user charge provisions of the CWA and the applicable regulations are replete with the principles of proportionality and cost sharing among all users. See 40 C.F.R.§35.2140(a)-(f). Yet Allenstown claims that it can make a profit from septage haulers to subsidize its own users, but not those of Pembroke. The trial court found that Allenstown's profit from septage haulers was like any other revenue which the Town of Allenstown might receive from any source (e.g., revenue raised through general taxation). The CWA and its regulations provide otherwise.

Allenstown contended that it can retain all profits from septage haulers because it is the owner and operator of the plant. However, it was undisputed, and the court below found, that the CWA required that a single municipality ("grantee") be the owner and operator of a WWTF, and that Allenstown was the owner and operator of the WWTF only because its best location for the plant was in Allenstown, not Pembroke. Order, 2.

Allenstown's authority over the operation and maintenance of the plant does not mean that it alone may profit from septage haulers. From the beginning of the plant in the 1970s, Pembroke paid proportionately for the operation, maintenance, and capital costs of the WWTF. Under the 2006 IMA, Pembroke will continue to pay proportionately for all expenses for the WWTF. Allenstown specifically acknowledged that any and all increased costs resulting from the acceptance of septage from haulers are paid for proportionately by Pembroke. Tr, 508-10. Allenstown's status as "owner and operator" does not entitle it to retain all profits from a plant built with CWA funds and paid for proportionately by the two Towns.

The trial court proceeded to find that Allenstown's interpretation of §3.06 is not inconsistent with 40 C.F.R. §35.2140(f) because septage haulers as "users" do not generate "revenue from the project." Yet it is undisputed that septage haulers are not charged proportionate user rates subject to the IMA's user charge system. The only way to interpret §3.06 consistent with the CWA and the applicable regulations is that septage haulers generate "revenue from the project." Allenstown should be required to use any septage profit to proportionally reduce both Pembroke's and Allenstown's WWTF costs.

## II. THE TRIAL COURT ERRED BY INTERPRETING SECTION 3.06 TO ALLOW ALLENSTOWN TO USE ALL SEPTAGE PROFITS "AS IT SEES FIT."

### A. The Plain Meaning Of §3.06 Of The IMA Does Not Allow Allenstown To Use Excess Septage Revenues "As It Sees Fit."

Both Section 3.06 and the IMA as a whole limit Allenstown's use of excess septage revenue. When interpreting a contract, a court gives the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated. *McDonough*, 169 N.H. at 541. Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract. *Id.* Section 3.06 of the IMA provides:

> Revenue received from septage permits and fees by Allenstown shall be used to help offset the costs of septage processing and any excess revenues may be used to offset the costs of operation and maintenance of the WWTF and/or the upgrade/expansion of the WWTF.

Significantly, §3.06 does not list any other way Allenstown may use excess septage revenues except the operation and maintenance or upgrade/expansion of the WWTF.

The last paragraph of §3.06 contrasts markedly with language in the immediately preceding paragraph. The middle paragraph of §3.06 provides, in relevant part, as follows:

> The Chief Operator/Superintendent of the Suncook WWTF shall have final approval authority over the types of, volumes of, and manner by which septage wastes may be accepted at the Suncook WWTF and the times at which such wastes may be delivered to the WWTF.

This language leaves no doubt that Allenstown has absolute authority as to how to manage the septage haulers and their waste. Such explicit language is noticeably absent in the language of §3.06 relating to the **expenditure** of septage revenues. §3.06 does not provide that Allenstown has "final approval authority" or absolute discretion with respect to the use of septage revenues.

The Towns proportionately paid for the original construction of the WWTF. Both proportionally paid for the operation, maintenance, and capital costs of the WWTF for three decades. In 2006, under the current IMA, the Towns again agreed to proportionally pay for the WWTF's costs. The Towns entered into the 2006 IMA on November 20, 2006. At that time, both Towns understood septage haulers were providing substantial revenue towards the WWTF: $430,809 in 2005 and $1,042,344 in 2006. It is unreasonable to conclude Pembroke would totally disclaim any right to such significant sums without an express waiver.

Prior to 2006, Pembroke had raised the question of how septage profits would be used and allocated. App, 130 (item 7). The right Allenstown now asserts – complete discretion over septage profits – could have been explicitly stated. But §3.06 contains no such language.

Instead, §3.06 should be interpreted to mean exactly what it says: that Allenstown may use excess septage revenues for the operation and maintenance or for the upgrade/expansion of the WWTF. Section 3.06 does not provide that Allenstown may use such profit in its sole discretion, as it sees fit, or to subsidize Allenstown's collection system.

### B. The Trial Court's Interpretation Of §3.06 Is Inconsistent With Other Provisions of The IMA.

Allowing Allenstown to use septage profits "as it sees fit" contradicts the parties' intent as demonstrated throughout the IMA. Provisions to a contract should be construed consistently with each other to effectuate the parties' intent. *McDonough*, 169 N.H. at 541 (court should examine contract as a whole). Allenstown's interpretation of §3.06 is inconsistent with a number of other provisions of the IMA.

#### 1. Allowing Allenstown To Retain The Septage Profits Would Contradict Its Agreement To Abide By The CWA.

The trial court placed undue emphasis on the fact that Allenstown was the owner and operator of the WWTF. The trial court stated in relevant part as follows:

> ... the word "may" was chosen, indicating a difference in the nature of Allentown's (sic) obligation **as the operator and owner of the WWTF** and that Allentown (sic) was permitted to use excess septage revenue for any lawful purposes, including for the sole benefit of Allenstown ... the language of the contract provides **Allenstown as owner**, the control over the operation of the WWTF which is consistent with being allowed to use **its property** to generate money for its citizens.

(Emphasis added.) The trial court misconstrued the significance of Allenstown being the "owner" of the WWTF. The IMA sets forth that as owner and operator, Allenstown does have control over the operation of the WWTF. But its status as the WWTF's "owner" does not give Allenstown unfettered discretion over excess revenues or profit from the WWTF.

Under the CWA and its regulations, the grantee of CWA funds is not supposed to benefit disproportionately as compared to other municipalities with whom it may contract in an intermunicipal arrangement. The grantee is not supposed to make a profit; excess revenues from a project are supposed to benefit all users proportionately.

This plain meaning of §3.06 is also consistent with the CWA and its regulations. Those regulations make it clear that all users of the WWTF are to be charged proportionately, based upon their usage of the waste treatment works. The "grantee" of CWA funds, though of necessity the owner and operator of the plant, is prohibited from profiting from revenue generated by the plant. 40 CFR 35.2140(f); App, 452 (User Charge Guidance Manual, p. 9 ("...the goal of a publicly owned wastewater utility is to recover its costs, not to make a profit."). If Allenstown is only required to use septage revenues to offset the costs of processing, but not for "operation and maintenance of the WWTF and/or the upgrade/expansion of the WWTF," then Allenstown could pay for the entire cost of its own collection system with septage profits. Allenstown proposed exactly that for 2015. App, 52. Such an outcome is precluded by the CWA.

**2. Allenstown's Interpretation Of §3.06 Violates The Dictates Of Proportionality Occurring Throughout The IMA.**

Allowing Allenstown to retain septage profits is inconsistent with the basic principle that runs throughout the IMA (and its incorporation of the CWA): that users of a wastewater treatment facility pay proportionately for the facilities that they use. Both Towns agree that Allenstown users are supposed to pay for Allenstown's sewer collection system; that Pembroke users are supposed to pay for Pembroke's sewer collection system; and that Allenstown and Pembroke users should pay proportionately for the WWTF. This basic principle is violated if

Allenstown can use the profit from septage haulers to pay for its own collection system or its obligations for its use of the WWTF.

By the same token, if septage haulers are users of the WWTF, they should not be paying for the Allenstown collection system. Septage haulers do not use the Allenstown collection system; they use only the WWTF. This principle is illustrated in an exhibit introduced through the testimony of Allenstown's Business Manager. The chart created by the Business Manager (App, 34-36) shows that there are three sets of users (Allenstown, Pembroke and waste haulers), and that they each pay for the facilities that they use. The chart indicates that septage revenues are to be used only to offset septage expenses and for WWTF expenses. They are not to be used for the Allenstown collection system or for Allenstown's WWTF costs.

§4.03, §4.05, and Appendix B of the IMA contain detailed provisions regarding the allocation of operation, maintenance, and capital costs between Pembroke and Allenstown. If Allenstown's interpretation of §3.06 of the IMA is accepted, Allenstown could use septage profits to subsidize only its portion of WWTF costs and upgrades. §4.05 of the IMA (App, 18) specifically precludes such an arrangement:

> Pembroke shall pay a user charge identical to the Allenstown rate structure in terms of methodology and equivalency of costs in order to pay for its share of operation and maintenance costs.

If Allenstown can use the profit from septage haulers to pay for its share of operation and maintenance costs, the Towns' user charges would not be identical in terms of methodology and equivalency of costs. Indeed, they would be vastly different: Allenstown could use virtually all of the septage profits to subsidize its sewer rates. Even Allenstown's highly paid[8] expert,

[8] Michael Trainque is a principal in Hoyle Tanner and Associates which has been paid by Allenstown close to $2,000,000 since 2004 for its engineering services.

Michael Trainque, acknowledged that if Allenstown could subsidize its users' obligations, the two Towns would "probably not" have identical methodology and equivalency of costs. Tr, 630.

The trial court erroneously held that Allenstown's use of the profit from septage haulers to fund only its share of operational costs and subsidize only Allenstown users did not violate any of the proportionality and equivalency of cost provisions of the IMA. The trial court held that neither the amount to be paid by the two Towns for their own collection systems nor the amount assessed for each Towns' proportionate share of capital costs "is affected by the source of the money used to pay those amounts," stating that:

> **If Allenstown owns excess septage revenue**, it is simply another source of funds from which Allenstown can pay for its collection system and/or its proportional share of the WWTF's capital costs.

Order, 16 (emphasis added). The trial court's circular logic is premised on Allenstown owning all excess septage revenue. This premise is inconsistent with the history of the Towns' obligations towards the WWTF, the CWA, and the specific provisions throughout the IMA which incorporate the principles of proportionality into the costs of operating the WWTF. Allenstown should be required to use septage profits to proportionally decrease the WWTF costs of both Towns.

### C. The Trial Court Erred By Placing No Weight On The Parties' Conduct During The First Five Years After Executing The IMA.

After executing a contract, the parties' course of conduct and dealing is particularly relevant to a determination of the parties' intent at the time the contract was made. *See Appeal of Londonderry School District*, 142 N.H. 677, 681 (1998); *C&M Realty Trust v. Wiedenkeller*, 133 N.H. 470, 475 (1990).

The parties entered into the IMA in November 2006. From then until 2012, Allenstown did not use any excess septage revenues to pay for improvements to its own collection system, to

subsidize Allenstown user rates, or to pay for its proportionate financial obligations at the WWTF. Instead, excess septage revenues were either placed in a septage surplus fund (for future use at the WWTF) or were used for the cost of operating and maintaining the WWTF. Tr, 62, 93, 303, 502. The funds were directly expended during the first five years of the IMA precisely as Pembroke contends they should be: for the operation and maintenance of, or for the upgrade or expansion of, the WWTF.

The three Allenstown sewer commissioners who signed the 2006 IMA remained in office until 2012. In 2012, two new Allenstown commissioners were elected or appointed. Only afterwards were funds first taken from the septage surplus fund and used to pay for improvements to the Allenstown sewer collection system (withdrawals for the Oak Street Project of $33,241 and $16,880, respectively). App, 60. Then Allenstown proposed a budget for 2013 that indicated that it would use excess septage funds to subsidize Allenstown's own collection system, in the amount of $206,056. App, 39. The actual subsidy for 2013 would turn out to be greater than that: $235,023. App, 40. Allenstown would then subsidize its own collection system from hauled waste funds in 2014, 2015 and 2016.

At a meeting of the two Sewer Commissions on April 8, 2009, Allenstown Commissioners asserted that they had the right to use excess septage revenues as they saw fit. App, 109. At that meeting, however, a Pembroke Sewer Commissioner stated that septage revenue should only be used for plant improvements "and not for Allenstown improvements." App, 109. For over more than three more years after that meeting, Allenstown continued to use excess septage revenues to proportionally reduce the Town's WWTF costs.

Allenstown's five-year delay before using excess septage revenues for its own purposes is conduct that the trial court should have considered in interpreting the parties' intent regarding

the use of excess septage revenues. If §3.06 meant what Allenstown now claims, it is inconceivable that it would have used excess septage revenues only for the WWTF from 2005 through 2011. During that period, Allenstown's sewer rates were higher than those in Pembroke App, 134; and Allenstown's voters were rejecting any proposals for improvements to the WWTF if they had to pay for them. App, 109 ("...the only way Allenstown voters will pass a warrant article is if they don't have to pay for it."). If the Allenstown Sewer Commissioners had in 2006 negotiated an agreement under which they could use excess septage revenues in a way that benefited only Allenstown, it is inconceivable that they would not have done so earlier. That five-year period of conduct is a strong indication that §3.06 was not intended to allow Allenstown to use excess septage revenues as it sees fit.

Yet the court wholly dismissed the parties' conduct during the 2006-11 period as evidence of the parties' intent, stating:

> While the ASC chose not to use any of the excess septage revenue for anything other than maintenance, operation or upgrades to the WWTF between 2006 and 2012, their actions do not modify the terms of a contract or evidence the parties' intent at the time of the contract's execution. The failure to exercise discretion does not imply a lack of belief that one is vested with discretion. The change from a saving plan to a spending plan in 2012 may have been as much the result of new commissioners joining the ASC and does not reflect on the parties' intent in 2006 in light of the clear language of the final provision and the various iterations that led to it.

Order, 17-18. First, no evidence was introduced showing that Allenstown consciously exercised discretion during this period to only expend septage revenues "inside the fence" on the WWTF instead of using such funds as its own. Second, the court's description of Allenstown's expenditures beginning in 2012 as being a "change from a saving plan to a spending plan" was in error. The change in 2012 was not from a saving plan to a spending plan. The change in 2012

was from spending excess septage revenues for the WWTF to spending such funds for Allenstown's sole benefit.

The trial court's basic rationale was that the parties' conduct during the 2006-11 period was to be given no weight because Allenstown was merely exercising its discretion. This rationale would eviscerate the well-established principle of using the conduct of parties to interpret a contract. It could almost always be claimed, by the party seeking to disavow the significance of its conduct, that it was merely exercising discretion not to assent its rights under the contract.

*Appeal of Londonderry School District* is illustrative of this point. In that case, the issue was whether occupational therapists were members of the bargaining unit represented by the Londonderry Education Association ("LEA"). This Court found it significant that the bargaining unit had not been modified to include therapists; and that the LEA had not considered therapists to be in the bargaining unit. 142 N.H. at 681. This Court found that "had the LEA believed therapists were members of the bargaining unit, they would have attempted to negotiate these contracts on behalf of therapists." *Id.* This Court further noted that "the LEA waited until 1993 to grieve the disparate compensation of the therapists, more than five years after the second therapist was hired." *Id.* The trial court's rationale which was applied in the present case, however, would have dismissed the significance of the LEA's prior hiring practices and negotiations, on the ground that the LEA had simply exercised its discretion not to include the therapists in the bargaining unit, and not to negotiate contracts on their behalf.

In sum, the trial court's cavalier dismissal of Allenstown's continuous five-year use of septage profits to proportionally reduce each Town's WWTF costs was in error. That prior conduct strongly supports Pembroke's interpretation of §3.06 of the IMA.

**D. The Trial Court Erred By Failing To Give The Proper Weight To The IMA's Surrounding Circumstances And Context To Interpret §3.06, Including That "Sewer Rentals" Are Generally Non-Lapsing Under New Hampshire Law.**

When interpreting a contract, a court gives the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated. *McDonough*, 169 N.H. at 541. The trial court improperly used the rules of statutory interpretation to construe §3.06's change from "shall" to "may." When "shall" is injected into laws, its use is an unescapable statutory requirement. *See City of Rochester v. Corpening*, 153 N.H. 571, 574 (2006). The goal of statutory interpretation, however, differs from the goal of contract interpretation. In the latter, the object is to determine the parties' intent. *McDonough*, 169 N.H. at 541. That intent is not evinced from looking at certain clauses in isolation, but "manifested in the language of the *entire* contract." *Glick v. Chocorua Forestlands Ltd. P'ship*, 157 N.H. 240, 247 (2008).

Pembroke's Commissioners testified that they understood the use of the word "may" in §3.06 was intended to give Allenstown flexibility to spend excess septage revenues in subsequent years (i.e., to allow such funds to accumulate for future use at the WWTF). It was not intended to allow Allenstown to spend all of such revenues "as it sees fit." The Pembroke Commissioners would not have signed the IMA if that had been the effect of §3.06. Tr, 61-62, 125, 132-33.

The trial court dismissed the Pembroke Commissioners' testimony on the basis that no minutes or documents supported their position. Order, 13-14. Yet the trial court failed to acknowledge that no minutes or other documents supported Allenstown's interpretation of §3.06.

The trial court also dismissed Pembroke's argument on the ground that "sewer rentals" are allowed by statute to accumulate from year to year, citing RSA 149-I:8 and :10, and therefore

that "no language would have been needed in the 2006 IMA to allow the accumulation from year to year." Order, 14-15. Revenues from septage haulers are not "sewer rentals" within the meaning of RSA Ch. 149-I. RSA 149-I:8 provides for sewer rentals based upon the consumption of water or number of persons served "on the premises connected with the sewer system." Septage haulers are not connected to the sewer system. Septage haulers do not, therefore, pay "sewer rentals" which are allowed to accumulate from year to year under RSA 149-I.

In support of its view, the trial court stated that "no provision, including the 2006 IMA §3.06 or any previous version, speaks to the timing of the spending of the funds." Order, 14. This overlooks that the financial obligations of the IMA and the calculation of the Towns' respective rates are based upon annual computations. Appendix B, for example, provides that at the end of each fiscal year, operation and maintenance costs for the WWTF are recalculated based upon the actual flows contributed by each Town. And in regard to §3.06, it was undisputed at trial that deducting the cost of septage processing from gross septage revenues, to arrive at excess septage revenues, is done on an annual basis. Thus while §3.06 itself does not explicitly speak "to the timing of the spending of the [septage] funds," the parties' respective financial obligations are calculated on an annual basis.

Moreover, even if septage revenues were to be deemed "sewer rentals" and thus allowed to accumulate from year to year under RSA Ch. 149-I, this would not prohibit two municipalities from agreeing that a specific source of funds (e.g., septage revenues) not be allowed to accumulate from year to year. It would be reasonable for the parties to ensure that the funds do not have to be used in the year in which they were received. If §3.06 had provided that excess septage revenues "will" be expended for the WWTF, it would be a reasonable interpretation that the septage revenues must be spent within the fiscal year. Even Michael Trainque, Allenstown's

expert and engineer who was the primary drafter of the IMA, admitted that if the word "will" was used in §3.06 with respect to excess septage revenues, it could be interpreted to mean that the Allenstown Sewer Commissioners were required to use all of such revenues during a given period of time. Tr, 614.

Pembroke's interpretation of §3.06 is not inconsistent with the proposition that "sewer rents" are generally non-lapsing under New Hampshire law. The trial court should have interpreted §3.06 to require Allenstown to use any excess septage revenues to proportionally reduce the Towns' WWTF costs.

## III. THE TRIAL COURT ERRED IN FINDING THAT PEMBROKE WAS NOT ENTITLED TO A PORTION OF THE INCREASED CAPACITY FROM THE BIOMAG PROJECT.

The trial court accurately set forth Pembroke's position that it should be entitled to the increase in WWTF capacity resulting from the BioMag Project, stating as follows:

> ... Pembroke argues that both ARRA funding and the excess septage revenue should be used for the benefit of both towns, and therefore, the increase in capacity resulting from the BioMag Project paid for by those sources should be divided between the two towns.

Order, 20. The trial court erred, however, in finding that Pembroke was not entitled to receive any benefit from the ARRA funds or from the excess septage revenue.

First, as to the ARRA funding, the court points out that:

> .... Pembroke did not apply for the ARRA funds, which required a loan until the project was completed at which point Allenstown would be reimbursed. Therefore, Pembroke is not entitled to any grant funds. Pembroke accepted no risk or obligation.

Order, 20. The trial court's finding was plain error. Pembroke could not have applied for the ARRA funds. Pembroke does not own a WWTF and could not have been the grantee of ARRA funds. The conclusion that Pembroke "accepted no risk obligation" is also in error. If for some

reason Allenstown was not reimbursed by the ARRA funds, Pembroke would have been required to pay its proportionate share of the costs that were not reimbursed. The amount would simply have been part of the cost of a capital project and paid for proportionately by Pembroke, pursuant to Appendix B of the IMA.

The trial court's ARRA-related finding also contradicts the financial scenarios produced by Allenstown's own engineer, Michael Trainque, when the two Towns were considering the $15,000,000 project for improvements to the WWTF in 2007. Those financial scenarios clearly indicated that Pembroke and Allenstown would benefit proportionately from Federal funding. For example, where a Federal grant was anticipated to be $7,200,000, Allenstown's benefit would be $3,456,000 (48%) and Pembroke's benefit would be $3,744,000 (52%), based upon the percentage obligations of the two Towns for capital costs at that point in time. App, 127-28. Neither the trial court nor Allenstown has advanced any reason why ARRA funds would be any different from the Federal funding that Allenstown's engineer contemplated in 2007.

Allenstown applied for the ARRA funds through RSA 486:14-A, I(a)'s Clean Water State Revolving Fund Program, which permits New Hampshire to "participate in the federally funded state water pollution control and drinking water revolving loan funds or grants as may be provided under the Clean Water Act." The funds Allenstown ultimately received through ARRA originated under the Clean Water Act, and were thus subject to that Act's proportionality requirements. *See* ARRA, Public Law 111-5 (123 Stat. 169) (February 17, 2009).

The trial court erred in finding that Pembroke "contributed no funds to the upgrade of the facility to increase the capacity." Order, 20. This finding was premised upon the court's giving Allenstown the sole benefit of the ARRA funds and upon the court's mistaken view, discussed more fully, *supra*, that Pembroke was not entitled to any of the excess septage revenue (Order,

20: "The Court has already determined that Pembroke is not entitled to the excess septage revenue. In addition, Pembroke did not apply for the ARRA funds ..."). If Pembroke is entitled to a proportionate share of the ARRA funds and entitled to benefit proportionately from excess septage revenues, then Pembroke contributed proportionately to the costs of the BioMag Project.

The trial court further found that Pembroke had "declined to contribute to the costs of the BioMag Project." Order, 21. The only proposal that Pembroke rejected was that Allenstown use the ARRA funds to fully fund its share of the BioMag Project, and that Pembroke pay the entire remaining cost of the BioMag Project. App, 109. If both Towns should share in the ARRA funding, Pembroke properly rejected that proposal.

The trial court also indicated that Pembroke "chose not to come to the table" with Allenstown, that Allenstown therefore took the risk that the BioMag Project would not be completed, and that Pembroke never indicated that it was able and willing to contribute to the BioMag Project "as it was obligated to do under the IMA." Order, 21. These findings reflect a fundamental misunderstanding of the respective roles of Allenstown as the grantee municipality, and Pembroke as a participating municipality in a water treatment works project. The decision whether to proceed with the BioMag Project was Allenstown's. Allenstown, as the owner and operator of the WWTF and as the grantee of Federal funding, has sole discretion under the CWA and the 2006 IMA to decide what capital projects are needed to operate, maintain and improve the WWTF. When Allenstown makes such a decision, Pembroke is obligated by contract to pay. Indeed, with the 2007 and 2008 warrant articles for the $15,000,000 project, and with the 2009 BioMag Project, Allenstown assured its voters that Pembroke was obligated under the IMA to pay its proportionate share of all costs. App, 71-72 (Warrant Article 6: "Pembroke will pay for their share of the costs under the terms and conditions of the Inter-Municipal Agreement..."); 97

(Warrant Article 4: "...Pembroke will reimburse Allenstown for Pembroke's share of the cost..."). Allenstown was right in making that assurance to its voters. Pembroke would have to pay its proportionate share of any costs not funded with Federal grants or with profit from septage haulers.

The trial court held that "by refusing to participate in the funding of the BioMag Project Pembroke breached the provisions of the IMA requiring Pembroke to pay proportionately for capital costs for improvements to the WWTF." Order, 20-21. No such breach occurred. As Allenstown officials assured their residents, Pembroke was required to pay proportionately for capital costs for improvements to the WWTF. Had Allenstown not used Federal funding and profit from septage revenues, both of which Pembroke was entitled to proportionately, Pembroke would have had to reimburse Allenstown for its share. But Allenstown did not do that: it used funds which Pembroke had a right to proportionately. Pembroke did not refuse "to participate in the funding of the BioMag project." It participated in the funding through its right to share in the benefit of ARRA funds and the profit from septage haulers.

## CONCLUSION

For the above reasons, Pembroke respectfully requests this court to reverse the trial court's decision, and hold that the profit from septage haulers should have been used by Allenstown not "as it sees fit," but for the WWTF to benefit Pembroke and Allenstown residents proportionately. This Court is also requested to find that Pembroke did not breach the IMA by refusing to participate in the BioMag project, and that Pembroke is entitled to a proportionate share of the capacity generated by that Project.

## STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Appellant Town of Pembroke requests oral argument in this case. Mark H. Puffer, Esq. will present oral argument on behalf of the Town of Pembroke.

Date: August 1, 2017

Mark H. Puffer

## CERTIFICATION

I hereby certify pursuant to Supreme Court Rule 16 (1)(i) that I have attached a copy of the appealed decision in writing to this Brief.

Date: August 1, 2017

Mark H. Puffer

Respectfully submitted,

TOWN OF PEMBROKE

By its attorneys:

Date: August 1, 2017

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## CERTIFICATION

I hereby certify pursuant to Supreme Court Rule 16(10) that today, I caused to be sent by first-class mail two copies of this Brief to each counsel of record for all other parties in this case.

Date: August 1, 2017

Mark H. Puffer

# THE STATE OF NEW HAMPSHIRE
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## NOTICE OF DECISION

**File Copy**

Case Name: **Town of Pembroke v Town of Allenstown**
Case Number: **217-2014-CV-00424**

Enclosed please find a copy of the court's order of January 20, 2017 relative to:

ORDER

January 23, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Mark H. Puffer, ESQ; Sharon Cuddy Somers, ESQ; William R. Drescher, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Town of Pembroke

v.

Town of Allenstown

Docket No. 217-2014-CV-424

**ORDER**

The Plaintiff, the Town of Pembroke, New Hampshire ("Pembroke"), brought this action against the Defendant, the Town of Allenstown, New Hampshire ("Allenstown") alleging several claims under the 2006 Intermunicipal Agreement ("2006 IMA") that governs the relationship between the two towns related to the Suncook Wastewater Treatment Facility ("WWTF"). Pembroke alleges that revenues from septage haulers collected by Allenstown are the property of both towns and Allenstown cannot use the revenue for projects or subsidies that only benefit Allenstown users. Pembroke seeks a declaration as to the ownership of the revenue and damages from Allenstown for the excess septage revenue that has already been spent by Allenstown on Allenstown projects. Pembroke also seeks a declaration that the WWTF's increased capacity resulting from the BioMag Project upgrade be divided between Pembroke and Allenstown, instead of being entirely allocated to Allenstown. Allenstown denies that Pembroke is entitled to any benefit from the BioMag Project because it claims that Pembroke materially breached the 2006 IMA by failing to propose several warrant articles to fund the WWTF upgrades and/or modifications anticipated by the 2006 IMA,

including the BioMag Project, and by acting in an unfair manner by asking the New Hampshire Department of Environmental Services ("NH-DES") to allocate the remaining WWTF capacity to Pembroke after NH-DES issued several letters to Allenstown regarding approaching maximum capacity for the WWTF and issuing permits that used up that remaining capacity without consulting Allenstown. A bench trial was held on September 8–9, 2016 and October 11 and 13, 2016. The Court finds and rules as follows.

Facts

After the passage of the federal Clean Water Act, Pembroke and Allenstown were required to develop a plan for wastewater treatment to comply with the new federal laws and regulations. In 1974, Pembroke and Allenstown signed an agreement with the purpose of setting out the rights and obligations of the two towns related to the construction of a new wastewater treatment plant, the Suncook Wastewater Treatment Facility ("WWTF"). Because of landscape and location considerations, the site chosen for the WWTF was in Allenstown, and because of federal regulations requiring a single town apply for federal funding and be the owner of the plant, Allenstown became the owner-operator of the WWTF.[1] Pembroke and Allenstown finished construction on the WWTF in 1977. The WWTF had a capacity of 1.05 million gallons per day ("MGD"), 65% of which was allocated to Pembroke and 35% to Allenstown, based on population projections for the two towns. The two towns paid for the WWTF with a combination of federal funds, state funds, and a small amount of funding (approximately 5% of the total cost) from the towns. The town portion of the funding was split 65%-35% along the

[1] After an action brought by Pembroke in the late 1990s, both Towns now agree that Allenstown owns the WWTF.

same lines as the allocation of the WWTF's capacity. The operation and maintenance costs were to be split based on the actual flow and loading of the untreated sewage coming from each town. The split varied over the years between 49%–52% and 68%–32% for Pembroke and Allenstown, respectively. The operation of the WWTF was governed by the original 1974 agreement until 2006.

On April 19, 2002, the New Hampshire Department of Environmental Services ("NH-DES") notified the Allenstown Sewer Commission ("ASC") that the WWTF had exceeded 80% of its flow capacity and was, in fact, within 100,000 gallons per day of the WWTF's total capacity, based on a three-month average from the three wettest months of the year, March, April, and May. In a letter dated August 26, 2005, the NH-DES notified the Towns that a moratorium on new permits for connections to either Town's collection system would begin because the WWTF had reached capacity. The Pembroke Sewer Commission ("PSC") and the ASC started to discuss possible ways to increase the WWTF's capacity and fund any new projects. To that end, in November 2006, Pembroke and Allenstown signed a new Inter-Municipal Agreement ("2006 IMA") related to the WWTF, which superceded the 1974 contract. The 2006 IMA anticipated upgrading the WWTF from 1,050,000 MGD of capacity to 2,100,000 MGD of capacity with 875,000 for Allenstown and 1,225,000 for Pembroke. The upgrade was anticipated to cost approximately $15,000,000.

Before reaching the final version, the 2006 IMA went through several drafts, including several versions of § 3.06. In its final version, §3.06 read as follows.

> Revenue received from septage permits and fees by Allenstown shall be used to help offset the costs of septage processing. Any excess revenues may be used to offset the costs of operation and maintenance of the WWTF and/or the upgrade expansion of the WWTF.

(2006 IMA, § 3.06.) The first draft of § 3.06 was completed by Michael Trainque in June 2004 and read as follows.

> No septic waste of any kind, whether it is treated or not treated shall be discharged in 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.

(2006 IMA, § 3.06, draft 1 – June 2004.)

Over the following few months, Allenstown decided that it was going to start experimenting with if and how it would accept septage waste from commercial septage haulers. Because of the design of the WWTF and the moratorium, the septage could not be fed through the WWTF in the same way as waste coming from the Pembroke and Allenstown collection systems. Instead, Allenstown began accepting septage and only dewatering it, which did not negatively effect the capacity or efficiency of the plant. The resulting water passed through the WWTF but the resulting solid sludge was trucked off site with the solid waste from the collection system waste from Allenstown and Pembroke. To some extent, the additional solids that were trucked off site improved the overall efficiency of the process due to the higher ratio of solid to water and concomitantly reduced the plant operation costs. Also, Allenstown carefully created a method by which it could allocate the costs of the septage processing only against the revenue generated so that Pembroke and Allenstown users would not bear those costs. When the responsibility for the payment of a shared cost was gray, Allenstown's allocation method made the cut in Pembroke's favor and against the hauled waste account. Pembroke benefitted from this accounting, such that hauled waste funds pay

some of the costs for which Pembroke would have been responsible. In addition, the upgrades to the WWTF to facilitate the dewatering process came from the excess septage revenue and, therefore, to some extent benefitted all of the WWTF users.

After determining that it could accept hauled septage without affecting the plant or violating the moratorium, Allenstown decided it wished to change the language of § 3.06 to allow for septage acceptance. The following language was added.

> 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.

(2006 IMA § 3.06, draft 4 – May 2005.) After generating Draft 4, Trainque sent it to the PSC. In July 2005, the PSC sent a letter to the ASC that indicated that the PSC wanted to describe how the funds collected from septage haulers would be used and/or how those funds would be divided between Pembroke and Allenstown.

Partially in response to the PSC's letter, Trainque drafted a new version of the IMA in August 2005. In the next draft, the first of two from August 2005, § 3.06 was edited to acknowledge that the WWTF could accept limited quantities of septage from Pembroke for dewatering only and added "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." (2006 IMA § 3.06, draft 5 – August 2005 (emphasis added)). After discussion with the ASC and Clement, Trainque further edited § 3.06 before submitting it to the PSC. In the second August 2005 draft, it was made clear that septage would be accepted from all haulers, not just Pembroke haulers, and the pertinent section now read: "Revenue received from permits and fees by Allenstown may be used to help offset the costs of septage processing, operation, or maintenance

of the WWTF and/or the upgrade/expansion of the WWTF." (2006 IMA § 3.06, draft 6 – August 2005 (emphasis added)). The next draft changed the language again, and limited Allenstown discretion so what, as follows: "Revenue received from septage permits and fees by Allenstown shall be used to help offset the costs of septage processing and any excess revenues may be used to offset the costs of operation and maintenance and/or the upgrade/expansion of the WWTF." (2006 IMA § 3.06, draft 7 – October 2005 (emphasis added). Although other changes were made to the agreement thereafter, the October 2005 version of section 3.06 remained in the final version, which was signed in late 2006.

Allenstown has since charged the septage haulers a fee to dispose of their waste at the WWTF and used those funds to pay for the cost of dewatering the septage, trucking it off site, and any administrative costs associated with the septage. The septage haulers are charged a market rate that exceeds the pure cost of processing the septage, so Allenstown turns a profit on the septage haulers. This excess septage revenue is placed into a fund separate from the revenues from fees from Pembroke and the Allenstown collection system users.

From approximately 2005 until 2012, Allenstown did not use the excess septage revenue to subsidize its own users or to make improvements to the Allenstown collection system. In 2012, a sewer main needed repair on Oak Street in Allenstown. The ASC decided to use excess septage revenue funds to pay for those repairs. It also decided that it would begin using excess septage revenue to subsidize the rates of Allenstown collection system users. Pembroke objected to both of these decisions, arguing that Allenstown could not use the excess septage revenue to benefit Allenstown

users without also benefitting Pembroke users. Allenstown does not contest that it paid for the Oak Street project and subsidized Allenstown sewer users' fees from the excess septage fund.

After the 2006 IMA was signed, the ASC and PSC also began discussing how to actually deal with the increasing water-treatment needs of both towns through upgrade or replacement of the WWTF. Under the new IMA, funding of such upgrades or replacement was governed, partially, by § 4.03 which reads as follows.

> At the same time the Town of Allenstown approves and appropriates the bonding of the costs for construction of expansions or modifications to the wastewater facilities, that were designed for, or which will be utilized by the Town of Pembroke, Pembroke should also raise and appropriate it's [sic] proportionate share of the estimated Capital Costs of the facilities, less than the previous payments made during the design phase. Payment of Pembroke's proportionate share of the bond repayment shall be made to Allenstown not less than thirty (30) days prior to the date that Allenstown's payment to the bondholder is due.

2006 IMA § 4.03.

In 2007 and 2008, Allenstown proposed warrant articles at its Town Meeting to bond for $15,000,000 in WWTF upgrades. Pembroke did not bond for their portion of the bond amount. On January 10, 2007, the PSC, through Malo, emailed the Allenstown Plant Superintendent, Dana Clement, and informed him that Pembroke would not need to propose a warrant article at the 2007 Town Meeting in order to be able to pay Allenstown for Pembroke's portion of the bond amount. Clement testified that he and the ASC were surprised by Malo's email because both understood § 4.03 to mean that Pembroke would have to propose a warrant article at the same time as Allenstown. Allenstown, however, did not respond to Pembroke or express any concern about Pembroke's position. Malo testified that Pembroke would have been able to pay

Allenstown for any financial obligations Pembroke had under the bond in 2007, and then could raise the additional money at the 2008 Town Meeting and at future town meetings for the future payments. Allenstown, through Dana Clement, expressed the view at Town Meeting that, should the project be bonded by Allenstown, Pembroke was contractually bound to pay its share. Both the 2007 and 2008 Allenstown warrant articles failed.

After the failure of its 2007 and 2008 warrant articles, Allenstown began looking into other, less expensive options for increasing the existing WWTF's treatment capacity. Allenstown decided to pursue a biological system called the "BioMag Project" that would increase the capacity of the WWTF by approximately 1200 connections. On November 12, 2008, the PSC and ASC met and discussed the BioMag Project. It was proposed that Allenstown and Pembroke would pay for the BioMag Project equally and share the new connections equally.

Allenstown proposed a warrant article at its 2009 Town Meeting to raise $775,000, half of the total $1,550,000 required, and stated to its taxpayers that Pembroke would be paying for the other half of the BioMag Project. Pembroke did not propose a warrant article to its 2009 Town Meeting. The Allenstown warrant article failed.

At a joint meeting of the PSC and ASC after the 2009 Town Meetings, the ASC told the PSC that Allenstown voters would likely only pass a warrant article "if they don't have to pay for it." (Pl.'s Ex. 24.) The ASC proposed that it use funds from the American Recovery and Reinvestment Act ("ARRA") to pay for its half-share. The PSC rejected this proposal. PSC did not propose an alternative funding scheme and stated

that it did not want any part of the BioMag Project. Although this statement is not reflected in any meeting minutes, given the course of events and no proof of any counter-proposal or later action, the Court accepts it as true and finds a reasonable inference can be drawn that Pembroke declined to participate in the BioMag Project.

After the joint meeting, Allenstown held a Special Town Meeting on June 13, 2009 and proposed that ARRA funds be used for half of the BioMag Project costs and excess septage revenue be used for the other half. That warrant article passed and the BioMag Project was installed without any contribution by Pembroke.

Analysis

Two main questions are presented: (1) whether 2006 IMA § 3.06 allows Allenstown to spend excess septage revenue however it likes, and (2) whether Pembroke is entitled to any portion of the increased capacity that resulted from the BioMag Project upgrade. The Court considers each in turn.

Pembroke claims that Allenstown has been improperly using excess septage revenue to subsidize its own collection system instead of using those funds "inside the fence" on the WWTF itself. Allenstown argues that it is permitted to use the excess septage revenue, over and above the amount needed to pay for the costs of processing the septage, however it wants, under § 3.06 of the 2006 IMA. Pembroke construes the contract provision in a more restrictive way and also argues that it is entitled to the excess septage revenue under the doctrine of unjust enrichment.

Both towns seek a declaration on how much of the capacity added by the installation of the BioMag system is allocated to Pembroke and how much is allocated to Allenstown. Pembroke argues that it is entitled to some of the capacity because

either it has a right to some of the septage fund and/or ARRA funds used to pay for it and therefore contributed to the cost of the BioMag Project or alternatively is entitled under the doctrine of *quantum meruit*. Allenstown contends Pembroke did not contribute and is not entitled to equitable relief, because it comes to the table with unclean hands due to its failure to put forth warrant articles to their voters for WWTF upgrades and/or for the BioMag Project and other contract breaches. Pembroke counters that, with regard to the WWTF upgrades, it was not required seek a warrant article for its share of the funds at the same time as Allenstown, because it had the funds available to pay Allenstown for its first year's obligation had the upgrades been bonded and Pembroke would seek additional funding year by year.

**2006 IMA § 3.06**

The first dispute concerns the meaning of § 3.06 of the 2006 IMA between Allenstown and Pembroke. The final version of § 3.06 reads, in relevant part, as follows:

> Revenue received from septage permits and fees by Allenstown shall be used to help offset the costs of septage processing. Any excess revenues may be used to offset the costs of operation and maintenance of the WWTF and/or the upgrade expansion of the WWTF.

2006 IMA § 3.06.

"[The Court] give[s] an agreement the meaning intended by the parties when they wrote it." Birch Broad., Inc. v. Capitol Broad. Corp., 161 N.H. 192, 196 (2010). "Absent ambiguity, however, the parties' intent will be determined from the plain meaning of the language used in the contract." Id. "The language of a contract is ambiguous if the

parties to the contract could reasonably disagree as to the meaning of that language." Id. The Court "give[s] the language used by the parties its reasonable meaning, considering the circumstances and the context in which the agreement was negotiated, and reading the document as a whole." Found. for Seacoast Health v. Hosp. Corp. of Am., 165 N.H. 168, 172 (2013).

The Court looks first to the plain language of the 2006 IMA § 3.06 and to the meaning of the word "may." Black's Law Dictionary defines "may" first as "[t]o be permitted to" and second as "to be a possibility." Black's Law Dictionary (10th Ed. 2014). Black's also recognizes a secondary definition of "may" that has a more mandatory quality -- meaning "[l]oosely, is required to; shall; must." Id. Here, however, the parties used both "shall" and "may" in the same provision, drawing a distinction between the revenues required to offset the costs of processing the septage and the profit made by charging septage haulers a market value rate to dispose of septage. In the first sentence of § 3.06, the 2006 IMA states that "revenue received from septage permits and fees by Allenstown shall be used to help offset the costs of septage processing." 2006 IMA § 3.06. (Emphasis added). The parties do not dispute that by using "shall," the 2006 IMA required that septage revenue must first go to "offset" the costs to the WWTF of processing the septage. In contrast, in the second sentence of § 3.06, the 2006 IMA states, "Any excess revenues may be used to offset the costs of operation and maintenance of the WWTF and/or the upgrade expansion of the WWTF." (Emphasis added). The parties did not use "shall" to indicate that Allenstown was required to use the excess septage revenue for operation and maintenance of the WWTF and/or for upgrades to the WWTF, as they could have done and as they did in

the first sentence. Instead, the word "may" was chosen, indicating a difference in the nature of Allentown's obligation as the operator and owner of the WWTF and that Allenstown was permitted to use excess septage revenue for any lawful purposes, including for the sole benefit of Allentown. There is nothing to suggest this choice of wording was not intentional. "In construing a contract or other written instrument, we must assume that the words used were used advisedly and for the purpose of conveying some meaning." McGinley v. John Hancock Mut. Life Ins. Co., 88 N.H. 108, 111 (1936).

Further, looking at the contract as a whole, the Court does not find that other provisions in the contract, including the preceding paragraph of 2006 IMA § 3.06, are in conflict or suggest a different meaning for the word "may." To the contrary the language of the contract provides Allenstown, as owner, the control over the operation of the WWTF, which is consistent with being allowed to use its property to generate money for its citizens.

In deciding that the word "may" was intended to be permissive, the Court looked to the rules of statutory construction. As in contracts, "[w]ords and phrases in a statute are construed according to the common and approved usage of the language unless [] it appears that a different meaning was intended." New Hampshire Resident Ltd. Partners of Lyme Timber Co. v. New Hampshire Dept. of Revenue Admin., 162 N.H. 98, 101 (2011) (citing RSA 21:1, : 2 (2000)). "It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates [the intent] to convey a different meaning for those words." S.E.C. v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003) (citing Russello v. United States, 464 U.S. 16, 23 (1983);

Persinger v. Islamic Republic of Iran, 729 F.2d 835, 843 (D.C.Cir.1984)). Whether statutory language is intended to be mandatory or directive in nature "is determined primarily by the language" used. City of Rochester v. Corpening, 153 N.H. 571, 574 (2006) (quoting Appeal of Rowan, 142 N.H. 67, 71 (1997) (quotation and citation omitted). Most importantly, "[t]he general rule of statutory construction is that 'the word 'may' makes enforcement of a statute permissive and that the word "shall" requires mandatory enforcement.'" Id. (quoting Town of Nottingham v. Harvey, 120 N.H. 889, 895 (1980). Applying these rules, the Court concludes that Allentown's interpretation of 2006 IMA § 3.06 is correct given the drafter's word choice in two closely connected sentences.

Even looking beyond the plain language and considering the exhibits and testimony of the witnesses as to what led to the final provision, the Court arrives at the same conclusion. First, Pembroke's witnesses' explanation of their intent in signing the IMA with "may" in § 3.06 was not convincing. Paulette Malo, current Operations Director for the PSC and a PSC member from 1991-94 and 1995-2014, testified extensively about her understanding of § 3.06. She testified that she understood the section to mean that septage revenue would first pay for the related costs and then Allenstown could keep the excess revenue in a "rainy day fund" for future use for the two towns' benefit. She explained that the use of "may" in the second sentence, rather than "will" or "shall," was because PSC did not want to tie the hands of the ASC by requiring ASC to spend the funds in the year they were collected, and that the change of wording accomplished this end. The testimony of Jules Andy Pellerin and Harold Thompson, two other PSC members, essentially mirrored Mayo's explanation. All three

testified that the language choice of "may" versus "will" was discussed at a joint meeting of the ASC and PSC; however, no minutes or other documents were produced showing that such a meeting took place.

Pembroke's explanation is not logical and is presented without corroborating evidence. Allentown witnesses credibly testified that there was never any requirement that sewer funds had to be spent in the first year of collection, which view finds support in the law. Although generally municipal governments are not allowed to carry funds from year to year, see RSA 32:1, et seq, municipal utility departments, like the ASC and PSC, are allowed to accumulate "sewer rentals" from year to year in a "sewer fund" separate from the municipality's "general fund." See RSA 149-I:10.[2]

Allenstown contends that the excess septage revenues are and have been treated as "sewer rentals," and thus can be accumulated by statute. It follows then that no language would have been needed in the 2006 IMA to allow the accumulation from year to year. And, in fact, consistent with this view, no provision, including the 2006 IMA § 3.06 or any previous version, speaks to the timing of the spending of the funds. Pembroke's contention that somehow the use of the word "will" could have led to an interpretation of the 2006 IMA that modified the statutory scheme as to these parties, resulting in the lapsing of the funds, was unconvincing. The only reasonable explanation for the change from "will" to "shall" and "may" is Allenstown's – that Allenstown was unwilling to have its use of the excess septage revenue restricted and

[2] "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." RSA 149-I:8, I (emphasis added).

modified the contract language accordingly. The Court found the testimony of Dana Clement, the then plant superintendent, and Mike Trainque, a neutral party in the contract negotiations, most compelling.

The Court also considered Mayo, Pellerin and Thompson's testimony that they would not have signed the IMA if they believed "may" allowed Allenstown the discretion to use the funds as it wished. However, the language change was not hidden from these witnesses, and in fact should have been obvious given the various versions considered and the tracked changes. The issue of specifying how funds should be used or divided by the towns was raised in fact by Pembroke's lawyer in July 2005, so they certainly should have been on the lookout for the address to the issue Pembroke raised. It is unreasonable for the witnesses to have assumed that the change had no meaning. Finally, contrary to Mayo's suggestions, the fact that the towns shared the benefits of joint funding in the past and that ASC kept the funds in a septage surplus fund between 2006 and 2011 provides little support for Pembroke's position, particularly since new commissioners joined the ASC in 2012.

Pembroke next argues that the 2006 IMA requires Allenstown to reduce the Pembroke sewer users' rates in the same way it reduces the Allenstown sewer users' rates. To support this proposition, Pembroke cites to several sections of the 2006 IMA: § 4.01, § 4.03, and § 4.05. Pembroke argues that each of these sections is violated if Allenstown's interpretation of § 3.06 is adopted. The Court disagrees.

The 2006 IMA § 4.01 requires that each town pays the total cost of facilities that are for each's sole use. The 2006 IMA § 4.03 contains a detailed allocation of the capital costs proportionately between Pembroke and Allenstown based on average daily

flow between the two towns. Neither provision dictates that Pembroke and Allenstown have to pay for their share of the costs from any particular source of funds. Neither the amount to be paid by Allenstown and Pembroke for their individual collection systems (§ 4.01) nor the amount assessed for each's proportional share of the capital costs (§ 4.03) is affected by the source of the money used to pay those amounts. If Allenstown owns the excess septage revenue, it is simply another source of funds from which Allenstown can pay for its collection system and/or its proportional share of the WWTF's capital costs.

The 2006 IMA § 4.05 reads as follows.

> Pembroke shall pay a user charge identical to the Allenstown rate structure in terms of methodology and equivalency of costs in order to pay for its share of operation and maintenance costs.

(2006 IMA, § 4.05.) Nothing in Allenstown's interpretation of § 3.06 affects the structure of the user charge rate by which Allenstown and Pembroke are assessed. Pembroke sewer users pay their bills based on Pembroke's flow rate, loading, and other variables. Allenstown sewer users' bills would be determined using the same "methodology and equivalency of costs." The only difference is that Allenstown, as a town government, decided to pay its users' bills using the excess septage revenue. Theoretically, Pembroke could decide to pay for its users' bills in the same way, from a source of town money, instead of billing individual residents. The methodology for determining the rates to be paid does not differ between the towns. As such, Allenstown's interpretation of § 3.06 does not violate § 4.05.

Allenstown's interpretation of § 3.06 also does not violate 40 CFR § 35.2140(f), as Pembroke contends. If any provision of the 2006 IMA did violate 40 CFR §

35.2140(d), or any federal regulation, the federal regulation would govern and override any inconsistent provision of the IMA. See 40 CFR 35.2140(h). 40 CFR § 35.2140 states as follows.

> 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.

Id. Pembroke argues that excess septage revenue is "revenue from [a] project" similar to those listed explicitly, and therefore Allenstown is required to use the revenue to offset operation and maintenance costs and proportionately reduce all user charges. However, septage haulers are users, just as Pembroke and Allenstown are users. As users, septage haulers bring untreated material to the WWTF and are charged a fee, similarly to how Allenstown and Pembroke bring untreated material to the WWTF via their respective collection systems and are charged a fee for disposal of the material at the WWTF. There is no "project" from which revenue is generated. Septage haulers are not renting land or purchasing a product, or providing fees in connection with a "project" comparable to the examples in 40 CFR § 35.2140(f). The Court is not persuaded that 40 CFR § 35.2140(f) applies.

Pembroke also argues that Allenstown's actions before 2012 indicate that Allenstown believed it had to spend the excess septage revenue on WWTF maintenance, operation, or upgrades. The Court does not ascribe much weight to this fact. While the ASC chose not to use any of the excess septage revenue for anything other than maintenance, operation, or upgrades to the WWTF between 2006 and 2012, their actions do not modify the terms of a contract or evidence the parties' intent at the

time of the contract's execution. The failure to exercise discretion does not imply a lack of belief that one is vested with discretion. The change from a saving plan to a spending plan in 2012 may have been as much the result of new commissioners joining the ASC and does not reflect on the parties' intent in 2006 in light of the clear language of the final provision and the various iterations that led to it.

Finally, Pembroke argues that, even if the Court does not construe 2006 IMA § 3.06 in its favor, it should nonetheless be entitled to its proportionate share of excess septage revenues based on an unjust enrichment theory. "A plaintiff is entitled to restitution for unjust enrichment if the defendant received a benefit and it would be unconscionable for the defendant to retain that benefit." General Insulation Co. v. Eckman Constr., 159 N.H. 601, 620 (2010) (quoting Nat'l Emp't Serv. Corp. v. Olsten Staffing Serv., 145 N.H. 158, 163 (2000)). "Legal obligations may arise from the receipt of any benefit the retention of which is unjust." Cohen v. Frank Developers, Inc., 118 N.H. 512, 518 (1978). "'The doctrine of unjust enrichment is that one shall not be allowed to profit or enrich himself at the expense of another contrary to equity. While it is said that a defendant is liable if 'equity and good conscience' requires, this does not mean that a moral duty meets the demands of equity. There must be some specific legal principal or situation which equity has established or recognized, to bring a case within the scope of the doctrine.'" Id. (quoting American University v. Forbes, 88 N.H. 17, 19-20 (1936)). The defendant does not have to act fraudulently in order for the doctrine to apply; unjust enrichment "may follow from wrongful acts or where one innocently receives a benefit and passively accepts it." Clapp v. Goffstown School District, 159

N.H. 206, 210 (2009). One general limitation, however, is it cannot supplant the terms of an agreement in order to shift the risk that one previously agreed to in a contract. Id.

Here, Allenstown has not received a benefit that would be unconscionable for it to retain. To the contrary, Allenstown was entitled to the excess septic revenues by an express contract term via an agreement that was carefully negotiated by parties with equal sophistication and bargaining power. Allenstown is the owner of the plant, and its receipt of the excess septage revenue does not reduce any benefit to Pembroke based on the capacity of the plant and the 2006 IMA. Pembroke has contributed nothing to the dewatering operations that resulted in the revenue. In fact, Pembroke has received an indirect benefit from the related plant improvements and the conservative accounting method used by Allenstown in allocating responsibility for shared costs between the three users, the septage haulers, Allenstown and Pembroke.

Accordingly, the Court finds in Allenstown's favor, and rules that Allenstown is entitled to use excess septage revenue for any use allowed by law, and Pembroke is not entitled to any share of the excess septage revenues. Pembroke therefore is not entitled to any compensation for Allentown's past use of the excess septage revenues used for Allenton's sole benefit.

**BioMag Capacity**

Pembroke argues that, even if it is not contractually entitled to the excess septage revenue, it is entitled to a portion of the increased capacity that came from installing the BioMag Project. Pembroke does not dispute the appropriateness of Allenstown's use of the excess septage revenue and ARRA funding to install the

BioMag Project. However, Pembroke argues that both ARRA funding and the excess septage revenue should be used for the benefit of both towns, and, therefore, the increase in capacity resulting from the BioMag Project paid for by those sources should be divided between the two towns.

Allentown contends that Pembroke breached the 2006 IMA by failing to obtain funding for the defeated upgrade, by commandeering the last available hook ups prior to the BioMag Project and thereby exhausting the plant capacity without notice to Allenstown, and by refusing to participate in the BioMag Project. The Court finds no merit to the first claims, and will turn to the claim of breach relating to the BioMag project.

First, the Court has already determined that Pembroke is not entitled to the excess septage revenue. In addition, Pembroke did not apply for the ARRA funds, which required a loan until the project was completed at which point Allenstown would be reimbursed. Therefore, Pembroke is not entitled to any grant funds. Pembroke accepted no risk or obligation. And it contributed no funds to the upgrade of the facility to increase the capacity.

By refusing to participate in the funding for the BioMag project, Pembroke breached the 2006 IMA §§ 4.01 (F) and 4.03. Section 4.01 (F) reads:

> If or when the wastewater treatment plant is expanded or modified in future years, each Town shall pay its proportional share of the capital costs of such expansion or modification. Capital costs shall be allocated between the towns as provided for in Section 4.03, and described in Appendix B herein, irrespective of the actual contribution (usage) by each Town at the time of expansion or modification.

Section 4.03 then describes the payment obligation. The contract read as a whole clearly requires each town to bear its proportional cost for financing, planning, design and upgrades.

Pembroke declined to contribute to the costs of the BioMag project. It claims that it did not refuse to do so, but simply rejected an unacceptable proposal. The evidence does not support this contention. First, Allenstown proposed that the towns share the costs for the project equally. Allenstown presented a warrant for town funds for its share to move forward with the BioMag Project. Pembroke did not. When the warrant was defeated, Allenstown came up with a new plan to satisfy its voters and move the project forward. Allenstown's proposal was rejected by Pembroke. Pembroke made no counterproposal, and indicated in words and actions that it would not participate.

Thereafter, Allenstown moved forward on its own and a new plan for the BioMag Project was put before the Allenstown voters. Allenstown then fully funded the project, because Pembroke chose not to come to the table. In doing so, only Allenstown took the risk that the project would not be completed, which would have resulted in no reimbursement from the ARRA money. At any point during this process of plant improvement, Pembroke could have put forth a warrant article to raise its share, or confirmed to Allenstown that it already had the funds, or in some other way indicated that it was able and willing to contribute to the BioMag Project as it was obligated to do under the IMA. It did not.

Nonetheless, Pembroke contends that it should still benefit based on the doctrine of *quantum meruit*. A claim in *quantum meruit* refers to "contracts implied in fact or to obligations imposed by law without regard to the intention or assent of the parties

bound, for reasons dictated by reason and justice." State v. Haley, 94 N.H. 69, 72 (1946). "Quantum meruit does not contemplate an expressed bargain." Id. Rather, "[a] valid claim in quantum meruit requires that (1) services were rendered to the defendant by the plaintiff; (2) with the knowledge and consent of the defendant; and (3) under circumstances that make it reasonable for the plaintiff to expect payment." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 612 (2010) (internal quotation marks and citations omitted). A party in breach of a contract can prevail on a *quantum meruit* claim if the equities dictate. R.J. Berke & Co. v. J.P Griffin, Inc. 116 N.H. 760, 764 (1976) (citing J. Calamari & J. Perillo, Contracts s 159). If successful on a *quantum meruit* claim, the measure of damages is the value of the services provided by the Plaintiff to the Defendant. Gen. Insulation Co. v. Eckman Constr.,159 N.H. at 612 (quoting Paffhausen v. Balano, 708 A.2d 269, 271 (Me. 1998)).

The equities in this case do not warrant the relief Pembroke seeks. First, Pembroke has provided no service or value to the project. Without evidence that Pembroke was involved at any stage of the funding, design, and implementation of the BioMag Project or suffered any loss as a result of the project, it would be unfair for it to benefit from a project wholly accomplished by Allenstown.

Conclusion

For the reasons stated, the Court declares that Allenstown is allowed to spend excess septage revenues however it sees fit pursuant to 2006 IMA § 3.06, and Pembroke is not entitled to a portion of the increased capacity resulting from the BioMag Project. All submitted findings of fact and/or rulings of law consistent with this

order are GRANTED and all inconsistent are DENIED.

**SO ORDERED.**

Date: 1/20/2017

Diane M. Nicolosi
Presiding Justice