STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2017-0066

Town of Pembroke

v.

Town of Allenstown

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

REPLY BRIEF OF APPELLANT TOWN OF PEMBROKE

Respectfully submitted by:

Mark H. Puffer (NH State Bar #2072)
Gregory L. Silverman (NH State Bar #265237)
Preti, Flaherty, Beliveau, & Pachios LLP
57 North Main Street
Concord, NH 03302
(603) 410-1500

15 Minute Oral Argument Requested
To be presented by Mark H. Puffer, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. The Clean Water Act requires Allenstown to apply excess septage revenues to proportionally reduce Pembroke's user charge.

The Town of Allenstown ("Allenstown") concedes that the Clean Water Act ("CWA") and its regulations govern the parties' 2006 Intermunicipal Agreement ("IMA") and the subject Suncook Wastewater Treatment Facility ("WWTF"). Allen. Br. at 23.[1] Allenstown also acknowledges that the WWTF's septage hauler revenue is either a "user charge," 40 CFR § 35.2140(a)[2], or as "revenue from the project," *id.* at 35.2140(f). Allen. Br. at 23-27.

Allenstown contends that septage haulers are "users, and are, therefore, subject to a 'user charge.'" Allen. Br. at 26. The facts and law, however, do not support Allenstown's position. Allenstown does not treat septage haulers as users. Users under the CWA are charged for their "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." 40 CFR § 35.2140(a). Each user's proportionate charge is accounted for by a financial system that accurately accounts for all "revenues generated" and "expenditures for operation and maintenance (including replacement) of the treatment system." *Id.* at § 35.2140(d) (emphasis added).

Unlike Allenstown and Pembroke, septage haulers are charged more than their proportionate share of costs after accounting for generated revenues. *See id.* Rather, Allenstown charges septage haulers a "market based fee" that allows for "[e]xcess septage revenues over costs." Allen. Br. at 28. Such a profit-generating fee is inconsistent with the user charge system as outlined under 40 CFR § 35.2140. "Users" under the CWA cannot be charged more than their

[1] Allenstown erroneously claims that Pembroke first argued that the CWA regulations restricted its use of excess septage revenue at trial. Both parties' experts discuss these regulations in their written reports exchanged during discovery.

[2] Both parties agree that the WWTF user charge system is not based on ad valorem taxes. *See* 40 CFR § 35.2140(b).

proportional costs. Allenstown is not treating septage waste haulers like users; it charges them more than the operation, maintenance, and replacement costs to treat their septage.

Profits from septage haulers thus fall within the guise of "revenue from the project," which must be used to reduce all user charges proportionally. *See id.* at § 35.2140(f). Indeed, Allenstown states that septage revenue "should be treated as a customary form of revenue...." Allen. Br. at 31. Allenstown cites no decision or other authority to support its legal theory that the CWA allows them to keep all septage profits. The CWA requires Allenstown to use excess septage revenues to proportionally reduce Pembroke's user charges.

A. The interpretation of the CWA and its regulations is the province of this Court, not Allenstown's experts.

Allenstown's brief attempts to evade the inescapable conclusion that the CWA requires it to use septage profits to proportionally reduce Pembroke's costs. It devotes considerable argument restating its two experts' legal interpretations of 40 CFR § 35.2140. Allen. Br. at 24-27. Its experts simply testified at trial that septage haulers were users, and the excess revenue collected was not "revenue from the project" under subsection (f). The lower court proceeded to adopt the experts' legal interpretations in its decision. Order, at 17. But if a "trial court adopt[s] an expert's opinion that advance[s] an erroneous interpretation of law, [this Court] would be compelled to correct that interpretation." *C F Investments, Inc. v. Option One Mortg. Corp.*, 163 N.H. 313, 318 (2012). The interpretation and application of the CWA to the parties' IMA is a question of law for this Court. *See id.*

B. Allenstown's contentions and conclusions with no support in the record below should be disregarded.

Many of Allenstown's arguments related to the CWA regulations rely on purported evidence absent from the record. Allenstown states, "Excess septage revenues over costs are not

shared with other contributing municipalities under most such intermunicipal agreements." Allen. Br. at 28. When Pembroke sought to introduce evidence of how other municipalities allocate septage revenue, the trial court sustained Allenstown's relevance objection. Tr., 231-239. The record contains no evidence that other CWA grantees may retain all profits generated from treating septage waste.

Allenstown next contends that its complete discretion over excess septage revenues "is sanctioned by the NHDES and the EPA." Allen. Br. at 14. No representative of the NHDES or the EPA testified at trial. Nor did Allenstown even attempt to offer any document tending to prove this conclusion at trial. The lower court's Order lacks any mention of such an approval. No citation to the record follows this contention. Such an approval would contradict the EPA's User Charge Guidance Manual's edict that the "the goal of a publicly owned wastewater utility is to recover its costs, not to make a profit." App., 452.

C. Allenstown's contention that it treats septage as "high strength waste" under the IMA is erroneous and irrelevant under the CWA.

Allenstown claims that it is entitled to retain all septage profits because it designates septage waste as "high strength waste" under the IMA. Allen. Br. at 18-19. High strength waste in the IMA refers to surcharges imposed on either Town for the extra costs of processing high strength waste. App., 31-32. Allenstown makes no effort to limit the fees charged to septage haulers based on their proportional cost of using the WWTF, which would account for such high strength waste. Allenstown charges septage haulers more than the costs of processing. It makes a profit; and claims the absolute right to retain the ensuing substantial profits.

Allenstown states that its designation of septage waste as "high strength waste" under the IMA means that septage revenue "was not intended to be incorporated into the charges applicable to Pembroke." Allen. Br. at 18-19. Pembroke makes no claim that Allenstown is

forcing Pembroke to pay for the costs of treating septage. The parties stipulated at trial that septage revenue was at least covering the costs to treat septage. Pembroke only claims that Allenstown, as a grantee under the CWA, is not entitled to retain 100% of excess septage revenue.

II. Allenstown acknowledges that municipal appropriations generally lapse at the end of the fiscal year, which supports Pembroke's assertion that the change from "will" to "may" in § 3.06 was to avoid excess septage revenue from lapsing.

Allenstown's maintains an absolute right over excess septage revenues because a draft version of §3.06 of the IMA once read that Allenstown "will" spend excess septage revenues on the WWTF, but the parties later changed that language to read that Allenstown "may" spend excess septage revenues on the WWTF. Allen. Br. at 9, 19-22. Pembroke's Sewer Commissioners testified that they agreed to the will-to-may change because if the IMA stated that Allenstown "will" spend excess septage revenues, this could be construed as requiring all excess septage revenue to be expended on the plant in a given year, or else risk lapsing. Tr, 61-62, 125, 132-33.

The trial court erred by concluding that Pembroke's interpretation of the will-to-may change was "not logical." Order, 14. Allenstown acknowledges that "[e]very town administrator or official charged with any financial duties in NH municipalities lives by [RSA 32] which makes it clear that appropriated revenue can only be used in a specific fiscal year." Allen. Br. at 21-22. Allenstown even identifies septage revenue as a "customary form of revenue." *Id.* at 31. Its expert Michael Trainque, who assisted in the drafting of the IMA, agreed. He testified that § 3.06's prior iteration that all septage revenues "will" be used at the WWTF could be interpreted to mean that if not spent during a specific period of time, excess septage revenues would lapse. Tr, 614. Indeed, the IMA requires an accounting at the end of each fiscal year to account for

each Town's subsequent year's operation, maintenance, and replacement costs. App, 28; Allen. Br. at 19. Further, RSA 149-I:8 and :10 provide another basis to conclude that revenues from septage haulers are not "sewer rentals," and could lapse if not spent in the fiscal year.

To reasonably secure Pembroke's agreement to waive its right to millions of dollars of septage profits over time, Allenstown would have negotiated explicit language. Rather, it now relies on a tenuous change from will-to-may to argue that Pembroke surrendered such a considerable entitlement. Even Allenstown's counsel speculated at trial that had the will-to-may change meant what Allenstown claims it does, Pembroke would not have signed the IMA. Tr, 36.

III. Pembroke proportionally contributed to the costs of conception, development, and implementation of the BioMag Project.

From the WWTF's construction in the 1970s, Pembroke and Allenstown have each proportionally contributed to the construction, operation, maintenance, and replacement costs of the WWTF. Before the 2006 IMA was fully executed, Pembroke's commensurate investments in the WWTF allowed it to receive septage hauler waste and generate excess revenues. While Allenstown manages the WWTF, Pembroke proportionally pays for operation and management of the plant, which includes overhead expenses like personnel, supplies, consulting, and legal fees of the WWTF. *See, e.g.,* App, 23 at ¶ 13.

Allenstown contends that "no part" of the BioMag project, which allowed the WWTF to receive a greater amount of septage waste, "was paid for by Pembroke." Allen. Br. at 30, 34 ("To date, Pembroke has not paid anything for this project.") This conclusion is at odds with the record. Allenstown would be in no position to accept "excess septage revenues" without Pembroke's contributions to the WWTF over the past four decades. Pembroke proportionally paid for the WWTF personnel to apply for and obtain the ARRA funds used to construct the

BioMag project. The remainder of the BioMag project was paid for by septage profits, which Pembroke is entitled to share in.

Allenstown next declares that because Pembroke paid nothing for the BioMag project, it solely owns the additional capacity of the WWTF it generated. Allen. Br. at 33. This conclusion is squarely rebutted by a 2011 report prepared at Allenstown's direction. App., 111-119. The report acknowledges the WWTF increased its treatment capacity in part through the BioMag project. App., 115. The report's conclusion identifies the cost for each Town to establish new sewer connections to the WWTF based on the additional capacity established by the BioMag project. App., 119. The record belies any conclusion that Pembroke should be barred from proportionally sharing in the BioMag project's benefits to the WWTF.

CONCLUSION

Pembroke's four decades of investments in the WWTF allowed Allenstown to receive septage profits in the first instance. Pembroke is simply asking for a return of its fair share of excess septage revenues Allenstown has used for its own purposes, and that Allenstown be required to allocate such revenues for Pembroke's proportional benefit in the future. The trial court's decision holding that Allenstown has unfettered discretion over the use of excess septage revenues should be reversed.

Respectfully submitted,

TOWN OF PEMBROKE

By its attorneys:

Date: October 23, 2017

Mark H. Puffer (NH Bar # 2072)
mpuffer@preti.com
PRETI FLAHERTY BELIVEAU
& PACHIOS LLP
57 North Main Street
Concord, NH 03302
(603) 410-1500

Gregory L. Silverman (NH Bar # 265237)
gsilverman@preti.com
PRETI FLAHERTY BELIVEAU
& PACHIOS LLP
57 North Main Street
Concord, NH 03302
(603) 410-1500

CERTIFICATE OF SERVICE

I hereby certify that two copies of this Brief have this day, the 23rd day of October, 2017, been forwarded via email and first-class mail to William R. Drescher, Esq., counsel for Appellees and that this Brief conforms to the requirements of Supreme Court Rule 16.

Dated: October 23, 2017

By: _____
Gregory L. Silverman (NH Bar # 265237)