STATE OF NEW HAMPSHIRE

SUPREME COURT

Appeal of the Town of Lincoln

#2018-0094

BRIEF OF THE TOWN OF LINCOLN

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Table of Contents

Table of Contents 2

Table of Authorities.. 4

Questions Presented for Review.. 6

Statutory Provision 7

Statement of the Case 8

Statement of Facts 10

Summary of Argument... 15

Argument 17

I. Standard of Review 17

II. The Town did not violate RSA 428 because it is not the "owner" of the Levee within the statutory meaning of that term 18

III. The Department's Order insupportably expands *Appeal of Michele* to impart the obligations associated with ownership on easement holders 22

IV. The Water Council's Order erred by expanding the terms of the 1960 Assurance, a contract to which the Town and the USACE are parties 25

Conclusion 29

Request for Oral Argument 30

Certification of Compliance 30

Certificate of Service 31

Assurance of the Town of Lincoln, New Hampshire 32

Right-of-Entry Agreement 34

Order on Appellant's and Appellee's Cross Motions for Summary Judgment 37

Order on Appellant's Motion for Rehearing 45

Table of Authorities

Cases

Appeal of Michele, 168 N.H. 98 (2015) ....*passim*

Batchelder v. Town of Plymouth Zoning Bd. of Adjustment, 160 N.H. 253 (2010)..27

Brooks v. Trustees of Dartmouth College, 161 N.H. 685 (2011) 25

Hersh v. Plonski, 156 N.H. 511 (2007) 19, 20, 21

Lapierre v. Cabral, 122 N.H. 301 (1982) 25

Londonderry Sch. Dist. SAU #12 v. State, 157 N.H. 734 (2008) 27

State v. Canelo, 139 N.H. 376 (1995) 27

Statutes

RSA 21:2 18

RSA 21:21 14

RSA 21-O:14, III 17

RSA 39:3 11

RSA 41 21

RSA 41:14-a 14, 19, 20

RSA 41:14-a, I 11, 20, 22

RSA 41:14-c 11

RSA 482 ....*passim*

RSA 482:2 18

RSA 482:11-a ....*passim*

RSA 482:12 19

RSA 482-A 22, 23, 24

RSA 541 17

RSA 541:13 17

Flood Control Act, 33 U.S.C. §701b 6, 8, 10, 25

Rules

Env-Wr 101.21 12

Other Authorities

Ballentine's Law Dictionary (3d ed. 2010) 18

Black's Law Dictionary (4th ed. 1977) 18

Webster's Third New International Dictionary (unabridged ed. 2002) 18

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Water Council erred in determining that the Town of Lincoln is an "owner" of the flood control levee or dike at the Franconia Paper Company (the "Levee") within the meaning of RSA 482:11-a based on an "Assurance" entered into with the United States Army Corps of Engineers ("USACE") pursuant to the Flood Control Act, 33 U.S.C. §701c, and a "Right-of-Entry" granted by the Franconia Paper Company;[1]

(2) Whether the Water Council's Order insupportably expands this Court's holding in *Appeal of Michele*, 168 N.H. 98 (2015), in determining that an easement to use land imparts the obligations associated with ownership;[2] and

(3) Whether the Water Council's Order erred in expanding the terms of the Town's undertaking with USACE (the "Assurance") pursuant to the Flood Control Acts enacted by Congress, when the State is not a party to the Assurance and therefore does not have standing to enforce it.[3]

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[1] This argument was raised in the Certified Record ("CR") at 128-31, 148-51, and 164-66.
[2] This argument was raised in the CR at 131-33, 148-49, and 166-67.
[3] This argument was raised in the CR at 132-33, 151, and 167-68.

STATUTORY PROVISION

482:11-a Duty of Owner. – The owner of a dam shall maintain and repair the dam so that it shall not become a dam in disrepair. The owner shall develop an emergency action plan for any dam, the failure of which may threaten life or property.

Source. 1997, 178:3, eff. Aug. 16, 1997.

STATEMENT OF THE CASE

The Levee was constructed at the Franconia Paper Company, along the East Branch of the Pemigewasset River in Lincoln, New Hampshire. In 1960, the Town of Lincoln entered into an "Assurance" with USACE to restore the Levee. The Assurance obligated the Town to "maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army." Also in 1960, the Franconia Paper Company executed a "Right-of-Entry" in favor of the Town and the United States, granting them the right to "enter upon the [] land to perform construction work of any nature necessary in the restoration of the dike, and to enter upon said land at any time to inspect the restored dike with a view to its proper maintenance and operation." The Right-of-Entry identifies the Franconia Paper Company as "the owner" that will result from the proposed restoration of the dike.

The USACE and the Town entered into the Assurance and Right-of-Entry pursuant to the Flood Control Act of 1936 and its successors ("1936 Flood Control Act"). The Town only has the right (and obligation) to maintain the Levee as designed and constructed by the USACE. It cannot remove the Levee or modify its design without the permission and approval of the USACE. Accordingly, the Town is not an owner for the purposes of RSA 482:11-a.

Storms in the late 1990s and early 2000s damaged the Levee. By 2013, USACE considered the Levee "inactive" due to its compromised condition. In 2014, the New Hampshire Department of Environmental Services (the "Department") classified the Levee as a "dam in disrepair."

In August 2015, the Department issued a Letter of Deficiency ("LOD") to the Town, citing RSA 482:12, which included action items for the Town to complete to bring the Levee out of disrepair. The Town responded to the Department's LOD, specifically denying that it was the owner of the Levee. The parties were unable to agree on an Administrative Order by Consent, and the Department issued an Administrative Order concerning the restoration of the Levee on May 20, 2016.

The Town appealed the Department's Administrative Order. On cross motions for summary judgment, the Water Council upheld the Department's decision, ruling that "the Town holds an easement in the dam that is sufficient for the purposes of imposing on that entity the repair and maintenance requirements of [RSA 482]." This appeal followed.

STATEMENT OF FACTS

On March 8, 1960, at its Annual Town Meeting, the Town voted to approve: "the proposed local protection project for the Restoration of the Flood Control Dike at the Franconia Paper Company, and authorize the Selectmen to enter into, and execute an Assurance or other agreement in reference thereto, and to authorize the Selectmen to acquire any real estate interests for said project." CR at 138.

Thereafter, the selectmen entered into "Assurance" with the United States Army Corps of Engineers (the "Corps"), CR at 52-53, to facilitate the receipt of funds provided by the Flood Control Act of 1936 (approved August 18, 1941) to restore the flood control dike at the Franconia Paper Company, located along the East Branch of the Pemigewasset River (the Levee). The Assurance obligated the Town to "(a) provide without cost to the United States, all lands, easements, and rights-of-ways necessary for the construction of the project; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army." CR at 52.

In July 1960, pursuant to a Right-of-Entry Agreement, the Franconia Paper Company granted certain rights to the Town of Lincoln and the United States of America: "an irrevocable right to enter upon the lands … at any time to inspect the restored dike with a view to its proper maintenance and operation." CR at 86 ¶ 2.

In 1971, Green Acre Woodlands, Inc. (formerly known as the Franconia Paper Company) in a quitclaim deed to Franconia Manufacturing Corporation, excepted and reserved the rights referenced in the Right-of-

Entry Agreement:

> Easements to the United States of America and the Town of Lincoln to enter the premises via the present access road or by whatever route is necessary and convenient at any time to inspect the restored flood control dike with a view to its proper maintenance and operation in connection with the construction project entitled "Merrimack River Flood Control, Flood Project Works, East Branch Pemigewasset River, Lincoln, New Hampshire," which was completed in December, 1960.

CR at 92 ¶ F.

On March 8, 2005, the Town adopted the provisions of RSA 41:14-a, I[4] establishing a procedure by which the Town may acquire land, buildings, or both. CR at 135 ¶ 4. The statutory procedure has not been utilized in connection with the Levee. CR at 135 ¶ 5.

During the June 13, 2014 inspection of the Levee, the Department observed and documented the Levee's many defects, causing it to classify the Levee as a "dam in disrepair." CR at 104 ¶ 13. Additionally, the Department re-categorized the Levee as a *high hazard structure*, under

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[4] "**Acquisition or Sale of Land, Buildings, or Both. –**
I. If adopted in accordance with RSA 41:14-c, the selectmen shall have the authority to acquire or sell land, buildings, or both; provided, however, they shall first submit any such proposed acquisition or sale to the planning board and to the conservation commission for review and recommendation by those bodies, where a board or commission or both, exist. After the selectmen receive the recommendation of the planning board and the conservation commission, where a board or commission or both exist, they shall hold 2 public hearings at least 10 but not more than 14 days apart on the proposed acquisition or sale; provided, however, upon the written petition of 50 registered voters presented to the selectmen, prior to the selectmen's vote, according to the provisions of RSA 39:3, the proposed acquisition or sale shall be inserted as an article in the warrant for the town meeting. The selectmen's vote shall take place no sooner then (sic) 7 days nor later than 14 days after the second public hearing which is held."

Env-Wr 101.21. *Id*. ¶ 14.

The Town tried unsuccessfully in 2014 and 2015 to appropriate funds to conduct the necessary repairs and maintenance on the Levee. *Id*. ¶ 15.

On May 28, 2015, the Department located a copy of the 1971 Deed from Green Acre Woodlands, Inc. (formerly Franconia Paper Company) that referenced the Right-of-Entry Agreement. *Id*. ¶ 17; CR at 92 ¶ F.

Shortly thereafter, the Town provided the Department's counsel with the Right-of-Entry Agreement issued by the Franconia Paper Company granting the Town and the Corps "an irrevocable right to enter upon … said lands at any time to inspect the restored dike with a view to its proper maintenance and operation." CR at 104 ¶ 18; CR at 86 ¶ 2.

In August 2015, the Department issued the LOD, including six action items that, if the Town completed, would bring the Levee out of disrepair. CR at 105 ¶ 20; *see also* CR at 110-12, Letter of Deficiency. The LOD also included dates by which the repairs were to be completed. *Id*.

On October 1, 2015, the Town responded to the Department's LOD, specifically denying that it was the owner of the Levee. CR at 116-17. The Town returned the Intent to Complete Repairs form which was signed by the town manager. CR at 105 ¶ 21; CR at 116-17. Also in its response, the Town returned the LOD with the Department's completion dates crossed out and replaced with "TBDs," initialed by the town manager. DR at 118-19. This communication contained a series of dates in which the Town indicated it would meet certain deadlines. *Id.* at 116-17. The deadlines did not correspond with the specific categories outlined in the Department's

LOD, but it did include commencement and completion of work deadlines. CR at 105 ¶ 21.

The parties diligently attempted to negotiate the terms of an Administrative Order by Consent in order that the Department have an enforcement mechanism in place for the previously issued LOD, but the parties were unable to agree upon its terms. CR at 105-06 ¶ 24. When the parties could not agree upon the terms of the Administrative Order by Consent, the Department issued the Order on May 20, 2016, incorporating the deadlines proposed by the Town for completion of the maintenance and repairs on the Levee. *Id*. ¶ 25. The Town appealed that Order to the Water Council. CR at 1-3.

The Town received bonding authority from the Annual Town Meeting in 2016 to undertake and complete the repairs to the Levee, and a construction contract for the work has been executed. CR at 127 ¶ 15.

The Town appealed the Department's Administrative Order to the Water Council and the parties filed cross motions for summary judgment. *See* CR at 18; 26; 32-122; 123-38. The Water Council upheld the Department's Administrative Order. CR at 153-61. In its Administrative Order, the Water Council ruled that under *Appeal of Michele*, 168 N.H. 98 (2015), the Town's easement was sufficient to render it an "owner" for the purposes of RSA 482:11-a.

On December 7, 2017, the Town moved for rehearing, CR at 162-68, and the Water Council denied this on January 23, 2018, CR at 180-83. This appeal followed.

To this date, other than the Assurance, the Town has never voted to acquire an ownership interest in the Levee. CR at 135 ¶ 3. Further, the

Town has never voted, pursuant to RSA 41:14-a, to acquire the Levee, or any interest in or related to it. *See* RSA 21:21 (definition of "land"); *id*. ¶ 5.

SUMMARY OF ARGUMENT

By misconstruing the Town to be an owner of the Levee for the purposes of RSA 482:11-a, the Water Council fundamentally expanded and altered the limited maintenance responsibility to the United States that the Town assumed under the Assurance, resulting in substantial and irreparable injury to the Town and its citizens. If the Town is deemed an owner within the meaning of the statute, it will be forever obligated to the State to design, construct, and improve the Levee, when it never assumed those obligations under the terms of the Assurance and Right-of-Entry.

Second, the Water Council's Order ruled that because the Town held an easement to enter land "to inspect the restored dike with a view to its proper maintenance and operation," it was obligated as an owner under RSA 482:11-a. The Water Council cited *Appeal of Michele*, 168 N.H. 98 (2015) in support of its decision. However, in *Appeal of Michele,* this Court ruled that an easement holder "takes by implication whatever ***rights*** are reasonably necessary to enable it to enjoy the easement beneficially." *Id.* at 100 (emphasis added). The Water Council incorrectly expanded *Appeal of Michele* to stand for the reverse: an easement holder takes by implication whatever ***obligations*** are reasonably associated with fee ownership.

Third, the State does not have standing to enforce the Assurance. The Town is obligated to the United States to repair and maintain the Levee pursuant to the Assurance. The State is not a party to the Assurance and therefore has no standing to enforce it. Further, the Town has already secured funding for, agreed to undertake, and is in the process of

undertaking the reparations set forth in the Department's Order in accordance with its obligations under the Assurance. Any further action is unnecessary and unwarranted, and therefore unlawful and unreasonable.

ARGUMENT

The Department's Order, and the Water Council's decision upholding it, are unreasonable and unlawful for the following reasons: (1) the Order rules that the Town violated RSA 482:11-a, but the Town's only possible obligations arose from the Agreement with the USACE, not because it was an owner of the Levee within the meaning of RSA 482; (2) the Order insupportably expands *Appeal of Michele*; and (3) the Order insupportably expands the terms of the Assurance by ruling that it creates rights for the State, when the State does not have standing to enforce it.

I. Standard of Review

When a Water Council decision is appealed to this Court pursuant to RSA 21-O:14, III, the Court applies the standard of review set forth in RSA 541. *Id.* ("Persons aggrieved by the disposition of administrative appeals before any council established by this chapter may appeal such results in accordance with RSA 541"). This standard, set forth in RSA 541:13, places "the burden of proof … upon the party seeking to set aside any order … to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." As demonstrated in this brief, the Town meets this burden.

II. The Town did not violate RSA 482 because it is not the "owner" of the Levee within the statutory meaning of that term.

When interpreting New Hampshire statutes, "[w]ords and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning." RSA 21:2. RSA 482:11-a, provides:

> The owner of a dam shall maintain and repair the dam so that it shall not become a dam in disrepair. The owner shall develop an emergency action plan for any dam, the failure of which may threaten life or property.

RSA 482 does not define "owner." *See* RSA 482:2 (definitions section).

Ballentine's Law Dictionary defines "owner" as: "One who has complete dominion over particular property. The person in whom the legal or equitable title rests. In common understanding, the person who, in case of the destruction of property, must sustain the loss." BALLENTINE'S LAW DICTIONARY (3d ed. 2010), available at LexisAdvance (citations omitted). Black's Law Dictionary defines "owner" as: "The person in whom is vested the ownership, dominion, or title of property; proprietor." BLACK'S LAW DICTIONARY (4th ed. 1977). Another dictionary defines "owner" as: "one that has legal or rightful title whether possessor or not." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 2002) 1612.[5] Thus, one holding a "right-of-entry" is not thereby an "owner" under the plain language of the statute, because the right-of-entry does not give the Town

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[5] In *Appeal of Michele*, the Court cited this definition of "owner." 168 N.H. at 102-03.

"complete dominion" over the Levee, nor does legal, rightful, or equitable title to the Levee rest with the Town.

The Town's only interest in the Levee is the Right-of-Entry (CR 86-87). The Right-of-Entry provides: "The owner hereby grants to the [United States and the Town of Lincoln] an irrevocable right to . . . enter upon the above lands to perform construction work of any nature necessary in the restoration of the dike, and to enter upon said lands at any time to inspect the restored dike with a view to its proper maintenance and operation." CR at 86. That interest is insufficient to render the Town an "owner" of the Levee under RSA 482 as discussed, *infra* at 18.

The Town has never acquired an interest in the Levee other than the Right-of-Entry.[6] There are only two methods by which the Town could have done so: dedication and acceptance, or, after 2005, by following the procedure in RSA 41:14-a. There is no dispute that the Town never accepted a dedication or voted to acquire the Levee, and that the only interest in the property the Town has acquired is a right-of-entry pursuant to the Right-of-Entry Agreement.

In order for a town to acquire an ownership interest in property under the dedication and acceptance method, "there must be both an offer

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[6] Before the Water Council, the Department argued that "[t]he Town has not identified anything in the regulatory structure under RSA 482 that would prohibit the finding that the town has sufficient ownership interest in the Levee to be subject to RSA 482:11-a or RSA 482:12." CR at 142. This argument improperly shifts the burden to the Town to prove that it is not the owner. That burden shifting is inconsistent with the reasoning in *Hersh v. Plonski*, 156 N.H. 511, 515 (2007) ("The acceptance requirement generally protects the public from having an undesirable dedication thrust upon it, as where the concomitant burdens of maintaining a street, park, or other public service outweigh the public benefits.").

of dedication and acceptance: that is, the landowner 'offers' up its property to the municipality and the municipality 'accepts' it." *Hersh v. Plonski*, 156 N.H. 511, 515 (2007) (internal quotation marks and citation omitted). "The acceptance requirement generally protects the public from having an undesirable dedication thrust upon it, as where the concomitant burdens of maintaining a street, park, or other public service outweigh the public benefits." *Id.* "[A]cceptance may be by express acts that include adopting an offer of dedication by ordinance or formal resolution, or implied by acts such as opening up or improving a street, repairing it, removing snow from it, or assigning police patrols to it. Proof of acceptance by the public must be unequivocal, clear, and satisfactory, and inconsistent with any other construction." *Id.* at 516 (internal quotation marks and alteration omitted). The Department has argued that the Court's holding in *Hersh* is inapplicable to easements, presumably because easements do not subject a town to "having an undesirable dedication thrust upon it." CR at 170-71. That argument is at odds with the Department's interpretation of *Appeal of Michele*. *See infra* at 22.

In 2005, the Town of Lincoln adopted the procedure set forth in RSA 41:14-a, I, by which the Town may acquire land and/or buildings. Here, the landowner never offered an ownership interest in the Levee to the Town, and the Town never accepted ownership, either by dedication and acceptance or the procedure set forth in RSA 41:14-a.

With respect to the acceptance and dedication method, there is no evidence in the record that the landowner offered the Town ownership of the Levee. In 1960, the Franconia Paper Company, the *owner* of the Levee, granted the Town and the United States of America "an irrevocable right to

enter upon the lands ... at any time to inspect the restored dike with a view to its proper maintenance and operation." CR at 86-87. This action granted the Town an easement to *access* the Levee. There is no evidence that the landowner ever offered the Town any ownership interest in the Levee.[7]

In addition to the lack of evidence of an offer from the landowner, the Town never accepted ownership of the Levee. *See supra* at 13. The Department argues that the Town has implicitly accepted a dedication of the Levee for the purposes of maintaining it because it has previously sought funding to restore the Levee, acknowledged the Assurance in a town meeting presentation (CR at 54-85), and paid the annual dam registration fee once.[8] These actions do not amount to an acceptance of ownership of the Levee. "Proof of acceptance by the public must be unequivocal, clear, and satisfactory, and inconsistent with any other construction." *Hersh*, 156 N.H. at 515. The Town's actions are not unequivocal and inconsistent with any other construction because the Assurance obligates the Town to "maintain and operate the [Levee] after completion in accordance with regulations prescribed by the Secretary of the Army." CR at 52-53. The Town's actions evidence its compliance with the Assurance. Therefore, these actions cannot form the basis of the Town's acceptance of an ownership interest under *Hersh*.

With respect to the RSA 41 method of obtaining an ownership interest, the Town has never voted to acquire an ownership interest in the

[7] In fact, the 1971 deed (CR at 89-97) excepting and reserving this easement specifically identifies Green Acre Woodlands as the owner.
[8] The Levee was included on the Town's 2016 Water Division, Dam Bureau invoice, which the Town paid. CR at 121-22. Immediately before paying the invoice, the Town notified the Department that it disputed the Town's designation as an "owner" of the Levee. CR at 116-20.

Levee, or, after it was adopted, used the provision of RSA 41:14-a, I to acquire an ownership interest in the Levee. CR at 135. Thus, the Town's only property interest in the Levee is the right-of-entry, and, as discussed in section 3, *infra*, that is insufficient to render the Town an owner of the Levee for the purposes of RSA 482.

III. The Department's Order insupportably expands *Appeal of Michele* to impart the obligations associated with ownership on easement holders.

The Water Council ruled that this Court's interpretation of "owner" in *Appeal of Michele*, 168 N.H. 98 (2015), a case interpreting RSA 482-A, Fill and Dredge of Wetlands, renders easement holders "owners" for the purposes of RSA 482. However, *Appeal of Michele* does not stand for that proposition for the following reasons: (1) *Appeal of Michele* involved the "owner's" use of the land, not its obligations with respect to the land, and the easement at issue in *Appeal of Michele* is far more expansive than the easement at issue here; and (2) the regulatory structure that this Court relied on, in part, for its interpretation of "owner," is not present in RSA 482 or its implementing regulations.

The Court's reasoning in *Appeal of Michele* is inapplicable to RSA 482 because that case examined what *rights* an easement holder has with respect to land, rather than its *obligations*. There, the respondents, the Bremners, held an easement over a certain piece of waterfront property. The easement provided that the Bremners "shall have the right under this easement to the exclusive use of said parcel of shore frontage for whatever purposes they may desire." The Bremners filed an application to install a

dock in the water adjacent to the land over which they held the easement. Michele, the owner of the land, objected, arguing that only an owner may apply for a dock. *Id.* at 100-01.

The Court noted that "an easement is a nonpossessory right to *use* of another's land," *id.* at 103 (emphasis added), and held that the term "owner," as used in RSA 482-A, encompasses property other than fee ownership. *Id*. The Court went on to explain that "[w]hen there is an express grant of an easement, a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially. This includes the right to make improvements that are reasonably necessary to enjoy the easement." *Id.* The Court thus interpreted the definition of the term "owner" to encompass an easement holder whose possessory interest included the ability to apply to install a dock where a dock is an "improvement[] that [is] reasonably necessary to the enjoyment of the easement." *Id.*

The Court's reasoning in *Appeal of Michele* is inapplicable here because "ownership" of the Levee is not "reasonably necessary to the enjoyment of" the Town's right to "enter the premises . . . by whatever the route is necessary and convenient at any time to inspect [the Levee] with a view to its proper maintenance and operation." CR at 86-87.

Also, as noted above, the easement in *Appeal of Michele* is far broader than the easement at issue here. In *Appeal of Michele*, the easement at issue gave the holder "the exclusive use of said parcel of shore frontage for whatever purposes they may desire." *Id.* at 100. The easement at issue here is much narrower: to "enter the premises . . . by whatever the

route is necessary and convenient at any time to inspect [the Levee] with a view to its proper maintenance and operation." CR at 86-87.

Second, the regulatory structure the Court relied upon, in part, is not present in RSA 482. In *Appeal of Michele*, the Court noted that it "construe[s] all parts of the statute together to effectuate its purpose." *Id.* at 102. The Court then looked to the structure of the regulations the Department issued interpreting RSA 482-A for aid in interpreting the meaning of an "owner." The Court noted that the regulations specified that "an applicant for a shoreline structure defined as major shall be the owner in fee," implying that for projects that are not major, such as a dock, some lesser form of ownership is permissible. *Id.* at 104. There is no such statutory structure present in RSA 482:11-a or its regulations.

If *Michele* was expanded as the Department has argued, it would render the *United States* an owner of the Levee because the Right-of-Entry grants the same rights to the United States as it does the Town. CR at 86 ("the Franconia Paper Company herein after referred to as the 'owner', that will result from the proposed restoration of the dike, the Franconia Paper Company grants to the Town of Lincoln and the United States of America, hereinafter called the "Government . . . an irrevocable right to enter upon the lands"). This cannot be the case, another reason the Water Council's interpretation and application of *Michele* to this case is error.

IV. The Water Council's Order erred by expanding the terms of the Assurance, a contract to which the Town and the USACE are parties.

The Town is obligated to the United States to repair and maintain the Levee pursuant to the Assurance. But the State is not a party to that agreement, and as such may not enforce it. CR at 52-53 (1960 Assurance); *see Brooks v. Trustees of Dartmouth College*, 161 N.H. 685, 697 (2011) ("a non-party to a contract has no remedy for a breach of contract"); Flood Control Act of 1936, 33 U.S.C. § 701b ("Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers . . . except as otherwise provided by Act of Congress"). Further, the State has not argued or offered any evidence that it has obtained jurisdiction or authority from the United States to enforce the Assurance. Thus, while the Town has an obligation to the United States to maintain and repair the Levee, the Town has no such obligation to the State, and the State does not have standing to enforce the Town's obligation to the United States.

In its Order, the Water Council mistakenly conceived the import of a 2016 presentation the Town made to its taxpayers as evidence that, even though the State is not a party to the Assurance, it has standing to enforce it. CR at 158-59. "In the absence of an ambiguity, the plain meaning rule prohibits the admission of parol evidence that would contradict the plain meaning of the terms of the contract." *Lapierre v. Cabral*, 122 N.H. 301, 305 (1982) (internal quotation marks omitted). The Assurance is clear: it is

a contract between the Town of Lincoln and the United States. CR at 52-53. The State of New Hampshire is not a party to the contract. *Id.* The Water Council's interpretation of the presentation contradicts the plain meaning of the Assurance and as such it is prohibited parol evidence.

Finally, even if the Water Council could properly consider the 2016 presentation, its Order mistakenly conceives its. The presentation summarized the history of the Levee, the Levee's current condition, and DES's LOD, issued December 1, 2016. The presentation also states that:

- The "Town signed [an] agreement to maintain [the] levee to USACE standards in perpetuity." CR at 57;
- "NH DES, by state law, has jurisdiction over [the] levee which the state classifies as a 'Dam.'" CR at 66;
- "NH DES has determined [that] legal responsibility for the levee lies with the Town due to our signing of the 1960 Maintenance and Operating Agreement with the ACE. In this agreement the Town took full responsibility for maintaining the levee in perpetuity." CR at 78;
- "Failure to repair the levee could result in fines and the State could decide to repair without Town involvement. A State-led repair could be done to a higher standard and at a higher cost." CR at 79;
- The "AG has [the] right to take [the] Town to court to enforce action or demand payment." CR at 79; and
- "DES will have enforcement authority to make repairs to levee with or without Town cooperation. . . . Courts will have

> authority to determine the Town's financial responsibility for the repairs." CR at 85.

Nowhere in the presentation does the Town admit that it is an owner of the Levee, or that it is obligated to the State to repair and maintain the Levee.

Since the presentation, the Town has secured funding for, agreed to undertake, and is in the process of undertaking the reparations set forth in the Department's Order in accordance with its obligation to the United States. Any further action by the State is unsupported, unnecessary, and unwarranted, and therefore unlawful and unreasonable. *Batchelder v. Town of Plymouth Zoning Bd. of Adjustment*, 160 N.H. 253, 255-56 (2010) ("The doctrine of mootness is designed to avoid deciding issues that have become academic or dead. However, the question of mootness is not subject to rigid rules, but is regarded as one of convenience and discretion. A decision upon the merits may be justified where there is a pressing public interest involved, or future litigation may be avoided").

The Department argues that the Town's voluntary efforts may cease at any time and notes that New Hampshire courts are "hesitant to dismiss a dispute as moot simply because one party voluntarily ceases the challenged practice or attempts to remedy its failure to act." *Londonderry Sch. Dist. SAU #12 v. State*, 157 N.H. 734, 736 (2008). Although the Department lacks authority to enforce the Assurance, the Town is obligated by the Assurance to maintain the Levee: its efforts are not voluntary. New Hampshire courts are "not bound by rigid rules in determining whether an appeal is moot; rather, the question of mootness is a matter of convenience and discretion." *State v. Canelo*, 139 N.H. 376, 378 (1995) (internal quotation marks and citation omitted). Here, the Department's Order is

unnecessary and unreasonable because the Town is fulfilling its obligation to the United States and the State does not have standing to enforce that obligation. As such the Water Council's Order should be vacated as a matter of discretion.

CONCLUSION

The Town's duties and responsibilities relating to the Levee were created, and are limited by, the Assurance. Green Acre Woodlands, and its current successors and assigns, are the owner of the Levee. The Town is not the owner, and therefore has not violated RSA 482. The Town is complying with its obligations to USACE pursuant to the Assurance, and accordingly the Order should be vacated.

REQUEST FOR ORAL ARGUMENT

The Town of Lincoln requests the opportunity for oral argument, through its undersigned counsel, before the full Court.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 5,497 words, excluding the cover page, table of contents, table of authorities, statutes, rules, and appendix.

Respectfully submitted,

Town of Lincoln,

By its Counsel,

UPTON & HATFIELD, LLP

Date: August 13, 2018   By: /s/ Russell F. Hilliard

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to Mary E. Maloney, Esq. Counsel for the Department of Environmental Services.

/s/ Russell F. Hilliard
Russell F. Hilliard

ASSURANCE OF THE TOWN OF LINCOLN, NEW HAMPSHIRE

WHEREAS, the Congress of the United States, under the Flood Control Act approved August 18, 1941, as amended, has provided for "an emergency fund in the amount of $15,000,000.00 to be expended in flood emergency preparation; in flood fighting and rescue operations, or in the repair or restoration of any flood control work threatened or destroyed by flood, including the strengthening, raising, extending, or other modifications thereof as may be necessary in the discretion of the Chief of Engineers for the adequate functioning of the work for flood control"; and

WHEREAS, the flood control dike at Franconia Paper Company situated along the East Branch of the Pemigewasset River, Town of Lincoln, Grafton County, New Hampshire, requires restoration; and

WHEREAS, the Chief of Engineers has authorized the work consisting of dike restoration along the west bank of the East Branch of the Pemigewasset River by means of rock fill and heavy cover stone, channel clearing, construction of a flank dike to close off a ground saddle to the rear of the existing dike works and protective stone covering along the west abutment of the existing diversion dam; and

WHEREAS, said project is subject to the provisions of Section 3 of the Flood Control Act of 1936 that no money appropriated under authority of said act shall be expended on the construction of any project until states, political subdivisions thereof, or other responsible local agencies have given assurances to the Secretary of the Army that they will (a) provide without cost to the United States, all lands, easements, and rights-of-way necessary for the construction of the project; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army; and

WHEREAS, the Town of Lincoln voted to approve the proposed local protection project for the Restoration of the Flood Control Dike at the Franconia Paper Company, and authorized the Selectmen to enter into, and execute an Assurance or other agreement in reference thereto, and to authorize the Selectmen to acquire any real estate interests for said project; and

WHEREAS, the Franconia Paper Company has undertaken and completed certain

repairs which will be utilized in part in the final restoration of the dike.

NOW, THEREFORE, the Town of Lincoln through its Board of Selectmen as heretofore authorized, hereby assures the United States of America that the Town of Lincoln will:

a. Provide without cost to the United States, all lands, easements, and rights-of-way necessary for the construction of the project.

b. Hold and save the United States of America free from damages due to the construction works.

c. Maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army.

IN WITNESS WHEREOF, we, James L. MacDonald, Edward Levasseur, George M. McGee, Sr. ___,

the Board of Selectmen of the Town of Lincoln, under authority granted at a Town meeting held March 8, 1960, have executed the within Assurance and caused the corporate seal of said Town of Lincoln to be affixed hereto this 3rd day of June, 1960.

TOWN OF LINCOLN

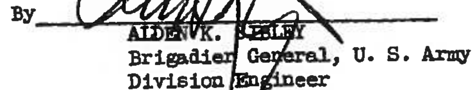
By James L. MacDonald
Edward Levasseur
George M. McGee Sr.

Board of Selectmen

ACCEPTANCE

June 14, 1960

The within Assurance is hereby accepted for and on behalf of the United States of America.



By ___
ALDEN K. SIBLEY
Brigadier General, U. S. Army
Division Engineer

PENGAD 800-631-6989
EXHIBIT
State's
Exh. C

RIGHT-OF-ENTRY AGREEMENT

WHEREAS, in the Flood Control Act of Congress approved August 18, 1941, provision is made for the restoration of flood control dikes; and

WHEREAS, the flood control dike at Franconia Paper Company situated along the East Branch of the Pemigewasset River, Town of Lincoln, New Hampshire, requires restoration; and

WHEREAS, the authorization of such restoration is subject to the condition that local interests furnish free of cost to the United States of America all lands, easements and rights-of-way necessary for the work; and

WHEREAS, Franconia Paper Company is the owner in fee simple of certain lands situated in the Town of Lincoln, County of Grafton, State of New Hampshire, which lands are more particularly set forth and indicated on the attached maps entitled "Merrimack River Flood Control, Lincoln, Repair of Flood Control Dike, Drawings Nos. MER-1-1390, 1-1404, and 1-1405"; and

WHEREAS, the Town of Lincoln and the United States of America desire to use the said lands for purposes of construction of the restoration of the dike and for depositing spoil from excavation operations to be conducted thereon, and other uses incident thereto.

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) and other valuable consideration, the receipt of which is hereby acknowledged, and the benefits to Franconia Paper Company hereinafter referred to as the "owner", that will result from the proposed restoration of the dike, the Franconia Paper Company grants to the Town of Lincoln and the United States of America, hereinafter called the "Government", a permit upon the following terms and conditions:

1. The owner hereby grants to the Governments and their assigns, for a period of six months from the date of this document, a permit for the right and privilege to deposit on the lands hereinabove described or any part thereof to the full capacity of such lands or part thereof, any and all spoil and other matter excavated in connection with the restoration project.

2. The owner hereby grants to the Governments an irrevocable right to enter upon the lands hereinabove described at any time within the period above stated in order to survey and carry out such exploratory work as may be necessary in connection with the restoration, and in addition, the owner grants to the Governments the right to enter upon the above lands to perform construction work of any nature necessary in the restoration of the dike, and to enter upon said lands at any time to inspect the restored dike with a view to its proper maintenance and operation.

3. This permit includes the right of ingress and egress on other lands of the owner in the Town of Lincoln not herein described, provided such ingress and egress is necessary and not otherwise conveniently available to the Governments and their assigns.

4. The owner reserves for itself, its successors and assigns, all such rights and privileges in said lands as may be used and enjoyed without interfering with or abridging the rights and privileges hereby granted to the Governments.

5. The owner hereby expressly and fully releases the Governments, their officers, agents, servants and contractors from liability for any and all damages done or caused to be done and from any claim or demand whatsoever for injuries suffered by or done to the premises by reason of the deposit of such spoil or other materials, or by construction performed thereon.

hereinafter described during the period of this permit or right-of-entry.

IN WITNESS WHEREOF, the Franconia Paper Company through its President has executed this instrument and affixed its corporate seal this 7 day of July, 1960.

Witness:

Dorothy DeBoer

FRANCONIA PAPER COMPANY

By [signature] Pres

STATE OF ~~NEW HAMPSHIRE~~ NEW JERSEY
PASSAIC COUNTY, ss.

July 7 1960

Personally appeared R.L. MARCALUS, known to be the PRESIDENT of Franconia Paper Company, who executed this instrument in its behalf, and acknowledged to me to be his free act and deed and the free act and deed of said company, before me,

[signature]
Notary Public

My commission expires

NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Mar. 21, 1965

LINC000233

MINUTES OF MEETING

OF BOARD OF DIRECTORS, JULY 5, 1960

At a special meeting held at 51 Market Street, East Paterson, New Jersey, the following resolution was adopted.

"Be it resolved that Robert L. Marcalus, President, be duly authorized to sign the Right-of-Entry Agreement and any other pertinent documents pertaining to the restoration work to be performed at Lincoln, N. H., by the United States Army Engineer Division, New England, Corps of Engineers."

Secretary

This is a true copy of the resolution adopted by the Board of Directors of Franconia Paper Corporation at a meeting held on July 5, 1960.

Secretary

LINC000234

STATE OF NEW HAMPSHIRE

WATER COUNCIL

DOCKET NO. 16-10 WC

RE: TOWN OF LINCOLN APPEAL

TOWN OF LINCOLN, NH ("APPELLANT")

NH DEPARTMENT OF ENVIRONMENTAL SERVICES ("APPELLEE")

ORDER ON APPELLANT'S and APPELLEE'S CROSS MOTIONS FOR SUMMARY JUDGMENT

ORDER: APPELLEE'S MOTION GRANTED.

Background

This Appeal concerns the Department of Environmental Services, Water Division's ("DES") issuance of Administrative Order 16-012 WD ("Order") dated May 20, 2016, to the Town of Lincoln under the authority of RSA 482:11-a, requiring it to engage in a number of corrective measures intended to repair the Pemigewasset River Levee located in Lincoln, New Hampshire.

DES investigated the structural integrity of the levee, (which the statute includes in the definition of a "dam". RSA 482:2, II (a)), found a number of significant deficiencies, and determined that it should be classified as a "high hazard" dam within the meaning of DES rules. A high-hazard dam is one the failure of which "would result in probable loss of human life." Env-Wr 101.21. DES determined that the Town was the "owner" of the dam within the meaning of RSA 482:11-a, and, therefore, was required to correct the deficiencies in the levee's structure.

The Town of Lincoln appealed the issuance of the Order to the Water Council on June 17, 2016, pursuant to RSA 21-O:14, I-a and 482:14. The Appeal asserts that the Department's Order is illegal and unreasonable for three reasons. First, it is not the

owner of the dam within the meaning of RSA 482:11-a, which in its view, requires a finding that the Town holds title in fee to the levee, which it does not. Moreover, because the Town is not the owner of the levee, and its only agreement regarding dam maintenance and repair is between it and the United States, it is not subject to state law regarding its maintenance. Finally, issuance of the Order was unnecessary and unreasonable because the Town agreed to make, and is making, the repairs required by the Order. *Appeal,* para. 4.

DES filed a Motion for Summary Judgment on May 25, 2017, asserting that as a matter of law the Town is the owner of the levee for purposes of maintenance and repair. DES is empowered to regulate the levee, and thus the Town, as owner, is subject to state laws regarding the same. And the Town cannot dictate what mechanism is used by DES to enforce those laws. *Motion*, at 7. The Town filed its Objection and Cross Motion for Summary Judgment on June 26, 2017.

Analysis

The NH Supreme Court has stated that summary judgment will only be granted if, after considering all of the record evidence in the light most favorable to the non-moving party, there is no issue of material fact, and the moving party is entitled to judgment as a matter of law. *Gamble v. University System of New Hampshire*, 136 N.H. 9, 16 (1992).

RSA 21-M:3, IX(e) provides that the Hearing Officer is to decide all questions of law presented during the pendency of an appeal. That would include the legal issues raised by the subject Motion. For the reasons that follow, I have determined that there are no material factual issues in dispute and DES's Motion for Summary Judgment should be granted.

The first issue here is whether fee simple ownership of the dam is required in order to impose the maintenance and repair obligations of RSA 482:11-a on that owner.

RSA 482:11-a simply provides that the "owner of a dam shall maintain and repair the dam so that it shall not become a dam in disrepair. The owner shall develop an emergency action plan for any dam, the failure of which may threaten life or property."

Neither the statute, DES regulations, nor case law define the term "owner" for purposes of RSA 482. The RSA 482 regulations do indicate that the owner of a dam need not be the owner of the real estate to which the dam is affixed. *See*, *e.g.*, Env-Wr 303.08(a) and (c) (DES entitled to evidence of ownership of a dam or the property to which a dam is tied "if ownership of a dam is tied to ownership of property…."); *and*, Env-Wr 402.01(b) and 402.02(b)(2) (content of application to construct or reconstruct a dam). These regulations, however, do not further define the nature of the ownership interest that is necessary to comply with the rules.

DES agrees that the Town is not the fee owner of the levee. *Motion*, at 8. DES argues instead, that the Town is the constructive owner of the levee for purposes of RSA 482:11-a by virtue of a series of transactions that in its view culminated in the Town acquiring a sufficient ownership interest in the levee to trigger the maintenance and repair obligations of RSA 482:11-a.

Those transactions included, first, the Town's entrance into an "Assurance" agreement with the United States on June 3, 1960, to provide the necessary "lands, easements and rights-of way" for the Army Corps of Engineers ("Corps") to reconstruct the levee, and for the Town to "maintain and operate" the levee after its construction. *Motion*, Ex. A.

Second, on July 7, 1960, the owner of the fee simple interest in the land that included the levee granted to the Town and the United States the right to "enter upon the lands at any time to inspect the restored dike with a view to its proper maintenance and operation." *Motion*, Ex. C.

Third, on June 22, 1971, the owner in fee of the subject real estate reserved to the Town and the United States an "easement…to enter the premises…at any time to inspect

the restored flood control dike with a view to its proper maintenance and operation…." *Motion*, Ex. D, p.4, para. F.

As the end result of these transactions between the Town and the fee owners of the levee, DES argues that the Town is the holder of an easement that grants to it a right to enter the land occupied by the levee for purposes of inspection, maintenance and repair of that structure, and is, therefore, the owner of the levee for purposes of RSA 482:11-a. DES relies, in principal part, on *Appeal of Michele*, 123 A.3d 255 (N.H. 2015) in support of its position.

In *Michele* our Supreme Court upheld the N.H. Wetlands Council determination that the holder of an easement over property owned in fee simple by others was lawfully entitled to apply for a permit to construct a dock in waters adjacent to the fee owners' property under RSA 482-A:11, II. That provision provides that "[b]efore granting a permit under this chapter, the department may require reasonable proof of *ownership* by a private landowner-applicant." (Emphasis added). The fee owners objected to the grant of the permit because the easement holders were not the "owners" of the water-front land.

As is the case here, the Court noted that the term "ownership" was not further defined by the legislature. To resolve the issue, it was required to engage in statutory construction. The opinion recites the standards of statutory construction as applied to both statutes and regulations, with the following analysis and conclusion:

> "[w]hen a term is not defined by statute, we look to its common usage, using the dictionary for guidance." (Citation omitted). *Webster's Third New International Dictionary* defines "ownership" as "the state, relation, or fact of being an owner; lawful claim or title"; and "owner" as "one that has the legal or rightful title *whether the possessor or not*." Webster's Third New International Dictionary 1612 (unabridged ed. 2002) (emphasis added). We acknowledge that these are broad definitions. We see no reason, however, to limit the meaning of the terms when the legislature did not see fit to do so. Based upon the common meaning of the term, we conclude that "ownership," as used in the statute, neither is limited to fee ownership nor requires possession. We further conclude that parties who hold title to a shoreline easement…are "owners" under the statute….
>
> *Id.* at 259.

The Town argues that the *Michele* definition of "ownership" to include the holding of an easement interest for purposes of the wetlands rules of RSA 482-A, is not controlling for purposes of the dam construction, maintenance and regulation rules of RSA 482. In its view, the Town must be the fee owner of the levee in order for it to be subject to the repair and maintenance rules of that statute.

The Town argues that it cannot be the owner of the levee because the landowner never dedicated the levee to the Town, and the Town never accepted the dedication, citing *Hersh v. Plonski*, 156 N.H. 511, 516 (2007) (municipality cannot be charged with affirmative obligation to maintain a street, park, etc., without actual or constructive offer and acceptance of the property). Moreover, the Town adopted the provisions of RSA 41:14-a in 2005, which provides a procedure by which a town may acquire land, buildings or both; and the Town never followed those procedures to acquire the levee. While factually accurate, these arguments do not address the legal position advanced by DES that the *Michele* finding that an ownership interest in an easement, rather than fee ownership, is as sufficient for purposes of imposing dam regulations as it is for compliance with wetlands impact rules.

To that end, the Town seeks to distinguish the situation in *Michele* from that involved here by arguing that the easement holders in that case were seeking to enforce certain rights implied by the terms of the easement, while in this case the state is seeking to impose certain obligations on the holder of the easement. It also argues that the Supreme Court relied in part on certain DES regulations under RSA 482-A in arriving at its interpretation of the term "owner" that do not have a counterpart under regulations adopted under RSA 482. *Obj*. at 7-8.

The "rights versus obligations" argument is not persuasive in the subject case because the Town's 2016 power point presentation to its citizens as part of its effort to obtain public financing for the mandated dam repairs belies that point. *Motion*, Ex. B. For example, the Town asserts that it needs the funding authorization to repair the failing dam because the purpose of the dam is to "protect lives and property in floodway." Ex. B, slide 17. The floodway consists not only of private dwellings, but also several parcels of

public and Town land. Ex. B, slide 18. The assessed value of private property in that floodway is $24,254,900 and annual taxes from affected properties is $311,433. Ex. B, slide 21. "The levee remains in similar condition to its post-Irene 2011 state. The Town has been fortunate that there has been no major flooding event since that time." Ex. B, slide 22. If the Town fails to repair the dam, "the full cost for a State-led repair project would be charged to the Town....This could result in a huge spike in our tax rate in a single year." Ex. B, slide 25. Finally, if the Town accepts responsibility to repair the dam, "[i]n a future catastrophic event, Levee repairs will be paid by ...[the US Army Corps of Engineers.]" Ex. B, slide 30.

Clearly the Town regards its ability under the terms of the easement to enter the premises of the dam for purposes of its repair and maintenance is the grant of a valuable right to protect the people and the property of the Town, as well as an obligation to do so. I believe the holding in *Michele* cannot be distinguished on this point. (This same series of arguments advanced by the Town in seeking funding for dam repairs also negates its argument that any obligation regarding the dam repair only arises from its 1960 "Assurance" with the United States. *See*, *eg*., *Surreply*, at 4.)

Moreover, the fact that the Supreme Court noted that its definition of ownership was consistent with DES regulations under RSA 482-A, while similar language does not exist in regulations promulgated under RSA 482, is not persuasive. It is clear from the language of the *Michele* decision that the holding in that case was not based on the existence of such language, and its absence under RSA 482 regulations is not determinative here. ("Although we need not look beyond the plain and unambiguous terms of the statute to ascertain the legislative intent in this case...we note that DES's regulations are consistent with our ruling." *Id*. at 260.). The dam safety regulations are not inconsistent with DES's position here. There is no language in those regulations that requires a finding of fee ownership before jurisdiction attaches.

It should also be noted that the *Michele* court looked to the statutory purpose or policy of the relevant statute when ruling on an issue of statutory interpretation. ("[W]e do not consider words and phrases in isolation, but rather within the context of the statute

as a whole…[citation omitted]. This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. [citation omitted]"). *Id.* at 258. The court could not find within the language of the dock permitting statute any indication that the legislature intended to limit permit holders to those who only hold a fee simple interest in the shoreland.

Here, one of the express purposes of RSA 482 is to protect the public by mandating repair of dams in disrepair to lessen flood damage and potential loss of life. RSA 482:1. There is no indication from this express purpose that the legislature intended to limit the scope of this mandate to only those parties who own a fee simple ownership interest in a dam in disrepair and there is no such language to be found in that statute. Thus, the common law definition of "ownership" as applied in *Michele* is equally applicable here. (The Town asserts that the definition of "owner" found in Ballentine's Law Dictionary, 3d ed. 2010, should be adopted in this case because that definition arguably is more limiting in scope. Town's *Surreply,* at 3. The Supreme Court did not choose to rely on Ballentine's for purposes of its analysis and its lead will be followed here.)

Given the above, the Town's argument that it is not the owner of the dam within the meaning of RSA 482:11-a, and therefore not subject to DES regulatory action is rejected. The Town holds an easement interest in the dam that is sufficient for purposes of imposing on that entity the repair and maintenance requirements of that statute.

Finally, the Town's argument that DES was unreasonable in issuing the administrative order in this case either because it was subject only to federal jurisdiction by virtue of the 1960 Assurance Agreement with the United States or was already voluntarily repairing the dam is not persuasive. In the first instance, as noted above, the Town does have responsibility under RSA 482:11-a to repair the dam by virtue of its ownership interest in the dam and that responsibility is separate and distinct from its commitment to the federal government encompassed in the 1960 Assurance. Although not entirely clear from the pleadings, if the Town is attempting to assert a preemption argument here, *see Surreply*, at 4, that argument would fail. DES has adequately

established that there is no federal preemption of state dam safety regulation in this situation. DES *Motion* , at 15, 16.

Secondly, while voluntary compliance with the state's requirements regarding dam safety are to be encouraged, the fact that DES was required to impose regulatory action in order to assure compliance indicates that its actions cannot be considered unreasonable. As DES points out, the Town's commencement of the necessary repairs to the failing dam were only initiated after DES undertook enforcement action against it. Moreover, voluntary compliance may be terminated at any time. And this dam, and every other similar structure that falls within the scope of RSA 482, will be subject to continuing state oversight regardless of voluntary compliance with DES orders. DES *Motion*, at 18, 19. Under these facts, it cannot be said that DES discriminated against this particular property owner, or otherwise acted unreasonably or unlawfully in issuing the challenged administrative order.

In conclusion, there being no issues of material fact in dispute, and given the above analysis, DES's Motion for Summary Judgment is granted.

By order of the Hearing Officer.

11/8/17
Date

COPY

David F. Conley, Esq. (Bar #130)

Reconsideration:

Pursuant to RSA 541:3, any party whose rights are directly and adversely affected by this decision may file a motion for rehearing with the NH Water Council within thirty days of the date of this decision.

STATE OF NEW HAMPSHIRE

WATER COUNCIL

DOCKET NO. 16-10 WC

RE: TOWN OF LINCOLN APPEAL

TOWN OF LINCOLN, NH ("Town")

NH DEPARTMENT OF ENVIRONMENTAL SERVICES ("DES")

ORDER ON APPELLANT'S MOTION FOR REHEARING

ORDER: APPELLANT'S MOTION DENIED.

The Water Council issued its Final Order in the subject Appeal on November 11, 2017. The Order granted DES's Motion for Summary Judgment, affirming DES's determination that the Town was the holder of a sufficient property interest in a dam on the Pemigewasset River to render it an "owner" of the dam, and, therefore, subject to the repair and maintenance obligations imposed by RSA 482:11-a.

On December 8, 2017, the Town filed its Motion for Rehearing of the Order with the Water Council pursuant to Env-WC 204.16. DES filed its Objection to said Motion on December 12, 2017, and the Town filed its Reply to the Objection on December 22, 2017.

The Town first argues in its Motion for Rehearing that the Council erred in conceiving its argument that RSA 482:11-a requires fee ownership to be applicable. It is apparent from certain of the Town's arguments advanced in its Notice of Appeal and its Objection to and Cross Motion for Summary Judgment that it did assert that fee ownership was required in order to enforce the maintenance and repair obligations of RSA 482:11-a. *See, e.g., Appellee's Objection to Appellant's Motion*, paras. 3, 4, and 5. (Furthermore, the Town and DES are now in agreement that something less than fee

ownership is required to trigger the provisions of RSA 482:11-a. *See, e.g.*, Town's Reply, pg. 1.)

The Town also argues here as it did in its appeal that there has been no acceptance and dedication of an ownership interest in the dam, an argument that was rejected in the Order. As DES observes in its Objection to the Town's Motion for Rehearing, assuming arguendo that acceptance and dedication is a requirement under these facts, there is ample evidence of the Town's efforts to exercise its ownership interest in repairing the dam to find that acceptance and dedication has been established. There is no basis to reconsider this argument on rehearing.

The Town's further argument that only an owner who has the authority to remove a dam in disrepair or modify its design can be an "owner" for purposes of the repair and maintenance requirements of RSA 482:11-a because of a perceived different standard of "ownership" contained in RSA 482-11, I is without merit. The State's authority to impose repair and maintenance obligations on the Town with respect to a dam in disrepair stems from RSA 482:11-a. The plain language of RSA 482:11, I, on the other hand, deals with an "owner or contractor" in noncompliance with plans and specifications regarding construction or reconstruction of a dam, but not a dam in disrepair.

The Town's second assignment of error is that the Order "insupportably expands" the holding in *Appeal of Michele,* 168 N.H. 98 (2015) by concluding that the holder of an easement in land is subject to obligations associated with such ownership. This argument was likewise addressed in the Order, and the Town offers no new evidence to be considered at rehearing.

Finally, the Town argues in its Motion for Rehearing that the Order "constructively amends the Town's contract with the United States to add the State as a party to the contract." In its Reply to DES's Objection to a rehearing, the Town states that it is obligated to the United States to repair and maintain the dam under its 1960 Assurance with the United States…but the State is not a party to this agreement and cannot seek to enforce it, citing *Brooks v. Trustees of Dartmouth College*, 161 N.H. 685,

697 (2011). The State has the independent authority to impose repair and maintenance obligations on owners of dams in disrepair under RSA 482:11-a. It need not be a party to the 1960 Assurance in order to exercise this authority.

For the above reasons, Appellant's Motion for Rehearing is denied.

By order of the Hearing Officer.

1/23/18
Date

for David F. Conley, Esq. (Bar #130)

Reconsideration:

Pursuant to RSA 541:6, any party whose rights are directly and adversely affected by this decision may appeal by petition to the Supreme Court within thirty days of the date of this decision.