

**STATE OF NEW HAMPSHIRE
SUPREME COURT**

**Appeal of the Town of Lincoln
#2018-0094**

REPLY BRIEF OF THE TOWN OF LINCOLN

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ARGUMENT

I. None of the Department's conflicting theories of ownership render the Town an "Owner" of the Levee.

In its brief, the Department presents conflicting theories to justify its claim that the Town is the "owner" of the Levee. The Department first argues a "series of transactions":

[T]he Department's designation of the Town as owner of the Levee was based not on any one single document but on a "series of transactions that in its view culminated in the Town acquiring a sufficient ownership interest in the levee to trigger the repair and maintenance obligations of RSA 482:11-a." CR 156. These transactions include the Assurance in which the Town, not the United States, agreed to take responsibility for the Levee's ongoing maintenance and repair.

DES Brief at 16-17.

Later, however, the Department bases its argument on the Town's ownership of an easement in the Levee: "the easement does not require the Town to maintain the Levee. Those duties/obligations, for the purposes of the Administrative Order, arise from State law," DES Brief at 15; "the Town had the responsibility to (sic) under RSA 482:11-a to repair the dam by virtue of its ownership interest in the dam apart from its commitment it made to the United States in the 1960 Assurance," DES Brief at 22. These theories of ownership directly contradict one another, and the Department's "series of transactions" theory.

Further, there is no law to support these theories. There is no law to support the claimed Town ownership of the Levee on the basis of its

easement. *See* Town Brief at 22-24. There is no law to support the Department's argument that it is a party or otherwise able to enforce the agreement between the Town and the United States. *See* Town Brief at 25-28. Finally, there is no law to support the Department's "series of transactions" theory, because 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. No definition of "owner" presented by either party in this case supports a theory that "owner" means anyone entering a "series of transactions that in [the Department's] view culminate[s] in the Town acquiring a sufficient ownership interest in the levee to trigger the repair and maintenance obligations of RSA 482:11-a." *See* Town Brief at 18; DES Brief at 13. Defining "owner" pursuant to the Department's "series of transactions" theory is contrary to the plain meaning of "owner" and New Hampshire law.

II. The Town is not an Owner because it may be the only entity that is practically able to do the work.

The Department argues that "[t]he Town cannot have the ownership interest necessary to do the work, establish itself as the only body financially and practically able, and obligated to do the work, yet avoid the responsibilities that the Town's ownership interest creates under RSA ch. 482." DES Brief at 21; *see also* DES Brief at 17 n. 5 ("Nothing in RSA ch. 482 indicates that only one entity can be an "owner" of a dam. In some

circumstances, more than one party may have an obligation to effect repairs. In this case, however, the Town is both an ‘owner’ and the entity that has accepted money to perform the repairs, obligated itself to perform the repairs, and has actually undertaken the repairs. Based on its actions, at this point, the Town is the only party that actually can repair the Levee.”). Notably, the Department does not cite law to support its contention that an entity becomes an owner on this basis. Aside from the lack of support, there are several problems with this argument.

First, deeming the Town an owner on this basis is contrary to the language of RSA 482. *See* Town Brief at 18-19. While it may be practical for the Department to deem the entity most capable of performing repairs the owner for the purposes of RSA 482, the language of the statute does not support such action.

Second, deeming the Town an owner on this basis would set a dangerous precedent. Entities that have a property interest in a dam or levee would be incentivized to become financially or practically unable to complete repairs in hopes that “ownership” would be transferred to an entity “financially and practically able” to perform the work.

Finally, even if the Town could be deemed an owner on this basis, there is no evidence in the record that the other entity or entities that possess ownership interests in the Levee are incapable, financially or practically, of repairing or maintaining the Levee.

CONCLUSION

All of the Town's actions with respect to the Levee were driven by its obligations to the Corps of Engineers pursuant to the 1960 Agreement, not any ownership status or obligation to the State. DES has not presented any evidence or argument to the contrary, and the Order is, accordingly, unlawful and unreasonable.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 850 words, excluding the cover page, table of contents, table of authorities, and statutes.

Respectfully submitted,

Town of Lincoln,

By its Counsel,

UPTON & HATFIELD, LLP

Date: October 18, 2018

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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.

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