

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Docket No. 2018-0094

Appeal of Town of Lincoln.

RULE 10 APPEAL OF FINAL DECISION
OF THE WATER COUNCIL

**BRIEF OF APPELLEE, STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES**

September 28, 2018

THE STATE OF
NEW HAMPSHIRE
DEPARTMENT OF
ENVIRONMENTAL SERVICES

Gordon J. MacDonald
Attorney General

Mary E. Maloney, Bar No. 1603
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-3679
mary.maloney@doj.nh.gov

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES.....	4
STATEMENT OF THE CASE AND FACTS	6
A. Lincoln Agrees to Undertake Repair and Maintenance of the Levee	6
B. The Levee Falls into Disrepair	7
C. The Department Takes Action	8
D. The Department Issues a Letter of Deficiency to the Town.....	8
E. Repairs to the Levee.....	9
SUMMARY OF THE ARGUMENT.....	9
ARGUMENT	12
I. STANDARD OF REVIEW	12
II. THE WATER COUNCIL’S ORDER ON SUMMARY JUDGMENT IS REASONABLE AND LAWFUL.....	12
A. The Department of Environmental Services and the Water Council properly determined that the Town owns the Levee	12
B. The Water Council Correctly Interpreted <i>Appeal of Michele</i> , 168 N.H. 98 (2015).....	15
C. The Right-of-Entry Agreement and Assurance Establish that the Town Qualifies as an “Owner” for the Purposes of RSA ch. 482.....	17
D. The Record Contains Sufficient Evidence to Support A Finding that the Town Accepted a Dedication for the Repair and Maintenance of the Levee	18

E. RSA 41:14-a is Inapplicable to Town’s Acceptance of the Easement from the Paper Company	21
F. The Water Council Correctly Determined that the Department was Authorized to Issue its Administrative Order against the Town of Lincoln, to Enforce State Laws and Regulations.....	22
G. The Town’s Performance of the Repairs on the Levee Does Not Render the Administrative Order Moot.....	23
CONCLUSION	25
REQUEST FOR ORAL ARGUMENT.....	25
CERTIFICATION OF COMPLIANCE.....	25
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

Page(s)

Cases

Appeal of Cook, ___ N.H. ___, 186 A3d 228 (2018) 12, 14

Appeal of the City of Portsmouth, 151 N.H. 170 (2003) 14, 15

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

Appeal of Nottingham, 153 N.H. 539 (2006)..... 14, 22

Appeal of Old Dutch Mustard Co., 166 N.H. 501 (2014)..... 12

Appeal of the Town of Bethlehem, 154 N.H. 314 (2006)..... 12

Appeal of Town of Rindge, 158 N.H. 21 (2008) 12

Arcidi v. Town of Rye, 150 N.H. 694 (2004) 13, 16

Harris v. Adams, 123 N.H. 167 (1983)..... 21

Hersh v. Plonski, 156 N.H. 511 (2007)..... 11, 18, 19, 20, 21

Town of Bartlett v. Furlong, 168 N.H. 171 (2015)..... 21

Statutes

RSA 41:14-a..... 18, 21, 22

RSA 41:14-c..... 21, 22

RSA 41:14-c, I 21

RSA ch. 482 Passim

RSA 482-A..... 13, 14

RSA 482:1..... 14

RSA 482:2, II-a..... 12

RSA 482:11-a..... Passim

RSA 482:11, II..... 23

RSA 482:12 Passim

RSA 482:12, I 11, 14

RSA 482:12, II..... Passim

RSA 482:87..... 10, 23

Rules

Administrative Rules13, 14, 15

Other Authorities

Webster’s Third New International Dictionary 1512 (unabridged ed. 2002)
.....13

Administrative Order No. 16-012 WD9

Restatement (Third) of Property (Servitudes) § (2000).....13

STATEMENT OF THE CASE AND FACTS

A. Lincoln Agrees to Undertake Repair and Maintenance of the Levee

In March 1960, the Town of Lincoln (“Town”) Annual Meeting voted to authorize its Board of Selectmen to enter into and execute an Assurance with the United States Army Corps of Engineers (the “Corps”) in order to receive funds provided by the Flood Control Act of 1941 to restore the flood control dike at the Franconia Paper Mill, located along the East Branch of the Pemigewasset River (the “Levee”). *See* CR 52-53, 136-138. The Assurance, executed by the Town on June 3, 1960, 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 52 ¶¶ 4- 6. *see also* CR 57.¹

On July 7, 1960, pursuant to a Right-of-Entry Agreement, the Franconia Paper Mill granted certain rights to the Town of Lincoln and the United States of America to enter the land for the purpose of construction and restoration of the Levee. CR 86-88. Within the Agreement, the Franconia Paper Mill granted the Town an “irrevocable right to enter upon the lands... at any time to inspect the restored dike [Levee] with a view to its proper maintenance and operation.” CR 86 ¶¶ 1-2. The current owners are not parties to the Right-of-Entry Agreement. *Id.*

In 1971, Green Acre Woodlands, Inc. (formerly known as the Franconia Paper Corporation) (collectively “Paper Company”) granted to

¹ The Powerpoint slide show was prepared by the Town of Lincoln and shown at the 2015 Town Meeting to educate voters about the need for funding for the levee repair project

the Franconia Manufacturing Corporation by quitclaim deed, several parcels of land:

excepting and reserving all property and rights and interests in property as conveyed pursuant to the following deeds or other instruments or as otherwise herein specified ... [e]asements 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.

See CR 92 ¶ F.

B. The Levee Falls into Disrepair

In and around 1986, condominiums were built on the former Franconia Paper property, in the project's vicinity. Some of the condominiums were built directly into the Levee or within the Levee's area of protection. CR 98. Storms in the late 1990s and early 2000s significantly damaged the Levee and dislodged some of the granite blocks along its bank. CR 98. In 2007, the Corps rated the Levee as inactive in the Rehabilitation Inspection Program based upon a determination that the Town had not been actively operating and maintaining the Levee. CR 59 & 99. In 2011, Tropical Storm Irene damaged the Levee even further. CR 60.

In 2013, the Corps notified the Town, by letter, that it had inspected the Levee and determined its' condition was unacceptable, meaning that the Levee suffered from deficiencies that required immediate attention and could prevent the system from performing as intended during the next significant flood event. CR 99. The Corps' letter also included a list of corrective measures necessary to return the Levee to "active" status for rehabilitative funding to resume. CR 99-100. In late 2013, the Department

received a copy of the Corps' report to the Town including the list of corrective measures requiring immediate attention in order to return the Levee to active status. CR 102 ¶ 4.

C. The Department Takes Action

The Department is authorized by statute to order the owner of a dam to undertake the requisite maintenance, repairs, or reconstruction and to develop an emergency action plan within a period to be fixed by the order. N.H. RSA 482:12 (2013). Upon receipt of the Corps' letter, the Department contacted the Town about conducting the repairs on the Levee. CR 102 ¶ 5.

To that end, in May 2014, the Department conducted an informal inspection of the Levee. *Id.* ¶ 9. Following the informal inspection, the Department worked with the Town to identify the individual property owners whose homes were built into the Levee. *Id.*

A June 13, 2014 inspection of the Levee revealed a number of serious defects which resulted in the Department classifying the Levee as a "dam in disrepair." *Id.* ¶ 13. Additionally, the Department re-categorized the Levee as a "high hazard structure," under Env-Wr 101.21. *Id.* ¶ 14.

D. The Department Issues a Letter of Deficiency to the Town

In July 2015, the Department performed another inspection of the Levee and noted that it remained in disrepair. CR 105 ¶ 19. In August 2015, the Department issued the Town a Letter of Deficiency ("LOD"), which included six action items that, once completed, would bring the Levee out of disrepair. *Id.* at ¶ 20. The LOD also included dates by which the repairs were to be completed. *Id.*

On October 1, 2015, the Department received a response to its LOD from the Town, which contained an "*Intent to Complete Repairs*" form

signed by the town manager. *Id.* at ¶ 21. Also in this response, the Town returned the LOD with the Department’s completion dates crossed out and replaced with “TBDs,” initialed by the town manager. *Id.* This communication contained a series of dates in which the Town indicated it would meet certain deadlines. *Id.* The deadlines did not correspond with the specific categories detailed in the Department’s LOD but it did include commencement and completion of work deadlines. *Id.* at ¶ 21.

E. Repairs to the Levee

The parties attempted to negotiate an Administrative Order by Consent, but when the parties could not agree upon its terms, the Department issued Administrative Order No. 16-012 WD (“Order”) on May 20, 2016. The Order incorporated the deadlines proposed by the Town for completion of the maintenance and repairs on the Levee. CR 106 at ¶25.

The Town appealed that Order to the Water Council. *Id.* The Water Council upheld the Department’s Order as reasonable and lawful. This appeal followed.

SUMMARY OF THE ARGUMENT

The Department acted reasonably and lawfully in issuing an Administrative Order requiring the Town of Lincoln to perform required inspection and maintenance of the Lincoln Levee pursuant to RSA 482:11-a, and the Water Council’s Order upholding the Department’s Order should be affirmed.

The owner of a dam is required to maintain and repair the dam so that it shall not become a dam in disrepair. RSA 482:11-a. Under RSA 482:12, the Department has a duty to inspect all dams in the State which, by reason of their condition, height or location, may be a menace to public safety. RSA 482:12, I. If the Department’s inspection finds that

maintenance or repair of a dam is required to comply with RSA 482:11-a or that public safety requires the repair or reconstruction of a dam, the Department must order the owner of the dam to undertake the necessary maintenance in repairs within a period to be fixed by the order. RSA 482:12, II. Further, the Department is authorized to issue administrative orders necessary to implement the purposes and intent of RSA ch. 482. RSA 482:87.

Due to storms in the late 1990s and early 2000s, the Levee on the East Branch of the Pemigewasset River in Lincoln, New Hampshire was significantly damaged. Pursuant to RSA ch. 482, the Department issued the Administrative Order to the Town, after inspecting the Levee and discovering structural deficiencies that created real threats to life and property.

The Water Council properly upheld the Department decision that the Town was the “owner” of the Levee based on the Assurance with the Corps in 1960 in which the Town made a commitment to inspect, maintain and repair the Levee in perpetuity, the Right-of-Entry from the Franconia Paper Company providing for the right to access the Levee for purposes of inspection, maintenance, and repair, and the reservation in the deed from Green Acre Woodlands, Inc. (successor to the Franconia Paper Company) to the Franconia Manufacturing Company. Further, a Power Point presentation given by the Town prior to issuance of the Administrative Order conceded that as part of the 1960 agreement (the Assurance) the Town obtained easements to build and maintain the Levee. CR 81. The Power Point also indicated that a failure to repair the Levee could result in fines, and further, the State could decide to repair the Levee without town involvement, the cost of which would be charged to the Town. CR 79; See also RSA 482:12, II.

Although the Town appealed the Department's Order and contends that it is not the owner of the Levee under RSA 482:11-a, the Town has, nevertheless, undertaken the repairs on the Levee. The Town has also received funds from the Corps based on its assurance that the Town has sufficient property interests in the Levee to perform the work at issue.

The Town accepted sufficient ownership interests in the property to be designated the owner of the Levee for purposes of its inspection, maintenance, and repair. *Hersh v. Plonski*, 156 N.H. 511 (2007). Further, this Court's decision in *Appeal of Michele*, 168 N.H. 98, 103 (2015) supports the Council's holding that the Town possesses sufficient property interests to be considered an "owner" for purposes of RSA ch. 482. The Council reviewed the plain language of the statute, its purposes and regulatory structure and found no inconsistency with property rights at common law such that it would prohibit finding that the Town has sufficient ownership in the Levee to be subject to regulation under RSA 482:11-a. *Id.*

The Council also correctly found that the Department's authority to exercise regulatory control over the Town, as the owner of the Levee, is independent of the Town's obligations under the Assurance. Further, the fact that the Town was in the process of making repairs on the Levee did not render the Administrative Order moot because the Department's regulatory and enforcement obligations are ongoing. In any event, compliance with the Administrative Order would render the current appeal moot, not the Administrative Order. An Administrative Order does not become void once the subject of the order comes into compliance and the Town has provided no law to support such a ruling.

ARGUMENT

I. STANDARD OF REVIEW

This Court’s review of agency decisions is narrow in scope. *Appeal of the Town of Rindge*, 158 N.H. 21, 24 (2008); *Appeal of the Town of Bethlehem*, 154 N.H. 314, 318 (2006). To prevail on appeal the Town “must show that the Council’s order was ‘clearly unreasonable or unlawful.’” *Appeal of Old Dutch Mustard Co.*, 166 N.H. 501, 505 (2014). In reviewing the Water Council’s order, the Court need not reweigh the evidence but determine if the Council’s findings are supported by competent evidence. *Appeal of Michele*, 168 N.H. 98, 105 (2015). However, the Court reviews the Council’s rulings on legal issues *de novo*. *Appeal of Cook*, ___ N.H. ___, 186 A3d 228 (2018); *Appeal of Michele*, 168 N.H. 98 (2015).

II. THE WATER COUNCIL’S ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT IS REASONABLE AND LAWFUL

A. The Department of Environmental Services and the Water Council Properly Determined that the Town owns the Levee.

RSA 482:11-a, requires the owner of a dam to maintain and repair the dam so that it shall not become a dam in disrepair. RSA 482:11-a. RSA 482:12 requires the Department to inspect all dams in the State which by reason of their condition, height or location, may be a menace to the public safety. RSA 482:12, I.² If the Department’s inspection reveals that a dam requires maintenance or repair to comply with RSA 482:11-a, or that

² Under RSA 482:2, II-a, a “dam” is defined as any artificial barrier... which impounds or diverts water and which has a height of 6 feet or more.” The Levee constructed on the East Branch of the Pemigewasset River is an artificial barrier composed of granite blocks greater than six feet in height, the purpose of which is to divert potential high waters from the Pemigewasset River and keep them from encroaching on the adjacent flood plain. As such, it is properly characterized as a dam under RSA 482:2, II-a. N.H. RSA ch. 482:2, II-a (2013).

the public safety requires the repair or reconstruction of any dam or the development of an emergency action plan, the Department must order the owner of the dam to undertake the necessary maintenance, repairs, or reconstruction. RSA 482:12, II. The purpose of the RSA ch. 482 is to “provide[] a standard of conduct on the part of dam owners intended to protect against damage from the flooding of the land of others by their dams.” *Moulton v. Groveton Papers Co.*, 112 N.H. 50, 52 (1972).

The term owner is not defined within RSA ch. 482 or its administrative rules. The Council concluded that the Town is the “owner” of the Levee based on a “series of transactions that 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 the Town entered into with the United States to provide the necessary lands, easement and rights of way for the Corps to reconstruct the Levee, the Right of Entry Agreement, and the reservation of an easement in the 1971 deed. *Id.*

This Court has already determined that an easement holder is an owner for purposes of RSA 482-A. *Appeal of Michele, supra*. The Court found the most relevant definition for the term “ownership” was “the state, relation, or fact of being an owner: lawful claim or title”; it defined “owner” as “one that has the legal or rightful title *whether the possessor or not*”. *Id.* at 102-103 citing *Webster’s Third New International Dictionary 1512* (unabridged ed. 2002). In so holding, the Court recognized that an “easement creates a nonpossessory right to enter onto land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.” RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 1.2 (1), (4) (2000) (AM. LAW INST. 2000); *Appeal of Michele*, 168 N.H. at 103, citing *Arcidi v. Town of Rye*, 150 N.H. 694, 698

(2004). The Court held that the easement holders were owners of the land covered by their easement “[b]ecause the term owner encompasses property interests other than fee ownership.” *Appeal of Michele, supra*. The Court found, therefore, that “anyone who could build a dock under the common law can apply for a dock permit under RSA chapter 482–A.” *Id.* at 104.

The *Michele* Court also stated that it saw no evidence that the statute served to change the balance of property rights between fee owners and easement holders from what it was at common law. *Id.* The Court did not base its determination on administrative regulations. *Id.* Instead, it undertook an examination of the regulations under RSA 482-A only to note that they were consistent with its finding. *Id.* at 104.

The Council followed this Court’s analysis in *Appeal of Michele*, and properly determined the most relevant definition for the term “ownership” was “the state, relation, or fact of being an owner: lawful claim or title”; it defined “owner” as “one that has the legal or rightful title whether the possessor or not.” CR160; *Appeal of Michele*, 168 N.H at 103-104 (other citations omitted); *see also Appeal of Cook, supra., Appeal of Nottingham*, 153 N.H. 539, 553 (2006). The Council also noted that among purposes of the chapter is the protection of the public by mandating repair of dams to lessen flood damage and loss of life, and found that there was “no indication from this express purpose that the legislature intend to limit the scope of this mandate to only parties who own a fee simple ownership interest in as dam.” RSA 482:1. CR 160; *Appeal of Michele, supra.* *See also Appeal of Cook, supra.; Appeal of the City of Portsmouth*, 151 N.H. 170, 174 (2003). Finally, the Council also reviewed the chapter’s administrative rules to ascertain whether they were consistent with the Department’s interpretation of the term “owner.” CR 159 citing *Appeal of*

Michele, 168 N.H. at 104.³ Finding no inconsistency in the statute’s purpose or its administrative rules with property rights at common law, the Council correctly determined that as the holder of an easement, the Town was properly deemed to be the owner of the Levee under RSA 482:11-a and RSA 482:12, II. CR 160; *Appeal of Michele*, 168 NH at 103; *Appeal of Portsmouth, supra*.

B. The Water Council Correctly Interpreted *Appeal of Michele*.

The Town contends that the Council’s Order insupportably expands *Appeal of Michele*. In particular, the Town contends that Michele defined “owner” in the context of the benefits of an easement and not the obligations. The distinction that the Town attempts to draw between benefits and obligations fails for several reasons. First, *Michele* did not draw any lines between benefits or enjoyment of an easement and obligations or burdens of an easement except in the context of the lessened expectation of unencumbered use and enjoyment of the property of a fee owner who has surrendered an interest in his property pursuant to an easement. *Appeal of Michele*, 168 N.H. at 105-106.

Second, the Department does not argue that the Town’s easement imposes obligations on the Town’s part; the easement does not require the Town to maintain the Levee. Those duties and/obligations, for the purposes of the Administrative Order, arise from State law.

Similarly, the Town misconstrues the Court’s analysis in *Appeal of Michele* to mean that the designation of ownership is based upon what is “reasonably necessary to the enjoyment of the Town’s right to enter the premises ...” *See* Town’s Brief, p. 23. In this regard, the Court was actually addressing whether the dock permit was a reasonable use of the

³ In this context, there is no analytical distinction between RSA 482 and RSA 482-A.

easement. *Appeal of Michele*, 168 N.H. at 103. The Court noted that when there is an express grant in an easement, a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially. *Id.*, citing *Arcidi v. Town of Rye*, 150 N.H. at 701. *Arcidi* concerned an easement over the plaintiff's land for "ingress and egress by motor vehicle." *Id.* at 697 (quotation omitted). There, the Court held that it was reasonable for the easement holder to cut down trees, fill in wetlands, and build a gravel road across the easement, as these activities were necessary to the easement holder's ability to enjoy the benefit of the easement. *Id.* at 697, 702. The *Michele* Court determined that a dock was reasonably necessary of the easement.

Further, the fact that the easement in *Appeal of Michele* was broader than that in the instant case does insupportably expand the holding in *Appeal of Michele*. The Council's ruling follows, but does not expand the Court's holding. *Appeal of Michele, supra*. Moreover, as stated above, the Department designated the Town as the owner to enforce only those obligations that relate to the inspection, maintenance, and repair of the Levee which are fully within the scope of the Town's interest. RSA 482:11-a, RSA 482:12, II.

Finally, the Town maintains that because the Right of Entry Agreement grants the United States the same rights as the Town to enter the premises, then the United States could be deemed an owner of the Levee as well as the Town. Town's Brief at 24.⁴ However, as the Council noted, the 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

⁴ The United States was a necessary recipient of the grant of access to the Levee in the Right of Entry Agreement and the reservation, because the Corps undertook the reconstruction of the Levee in 1960 and also to perform post- construction inspection. But the United States undertook no obligation to maintain the Levee in the Assurance or Right of Entry Agreement.

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. Together with the easement, these documents provide sufficient basis upon which the Department designated the Town as the owner of the Levee for purposes of its ongoing maintenance and repair.⁵

**C. The Right-of-Entry Agreement and Assurance
Establish that the Town Qualifies as an
“Owner” for Purposes of RSA ch. 482.**

The Council’s decision that the Town is the “owner” of the Levee pursuant to RSA ch. 482 is reasonable and lawful because the Town sought and accepted interests in the Levee from the fee owner of the underlying property, the Paper Company, for the specific purpose of inspecting and maintaining the Levee in perpetuity. The Right-of-Entry Agreement, together with the Assurance and later deed, indicate that the Town has, and has always believed that it had, an ownership interest in the Levee sufficient to support the Department’s determination that the Town is the “owner” of the Levee pursuant to RSA 482:11-a and RSA 482:12, II.

To be clear, the Department has never claimed that the Town is the owner of the Levee in fee. But this Court does not require fee ownership to qualify as an owner for purposes of RSA 482. Instead it is enough that the Town has sufficient ownership interests in the Levee to be deemed the owner of the Levee for purposes of the inspection, maintenance, and repair the Levee under RSA 482:11-a. *Appeal of Michele*, 168 N.H. at 103 (based upon its common meaning, the term ‘ownership’ as used in the statute, is neither limited to fee ownership, nor requires possession). The Town has

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.

all of the indicia of ownership necessary to qualify it as an owner for regulatory purposes. Further, because the Town has the duties prescribed in RSA 482:11-a, it is subject to the Department's enforcement authority related to those duties. RSA 482:12, II.

D. The Record Contains Sufficient Evidence to Support a Finding that the Town Accepted a Dedication for the Repair and Maintenance of the Levee.

The Town contends that it never acquired an interest in the Levee (other than the Right of Entry Agreement) and never accepted a dedication, or voted to acquire the Levee. *Hersh v. Plonski*, 156 NH 511 (2007); *see also* RSA 41:14-a. But sufficient evidence in the record supports that very finding: the Town undertook full responsibility to maintain the Levee and though the easement, the ability to repair the Levee was properly dedicated to the Town by the Paper Company and accepted by the Town.

Dedication is “the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use.” *Hersh*, 156 N.H. at 515. The common law doctrine of dedication applies to transfers of land in fee as well as transfers of an interest in land, such as the gifting of an easement to the public for a public purpose. *Hersh*, 156 N.H. at 515; 77 Am. Jur. Proof of Facts 3d §1 (2004). To be effective there must be proof that: 1) the owner unequivocally intended to dedicate the easement to public use, and 2) the interest in land was accepted by the public. *Id.* Acceptance must be clear, unequivocal, and inconsistent with any other construction. *Hersh*, 156 N.H. at 516. In particular, the acceptance component protects the public from having an undesirable dedication imposed on it, where the burdens of maintenance of the interest might outweigh the public benefits. *Id.* at 515 citing 77 Am Jur. Proof of Facts 3d

§ 13 at 37 (2004).

Dedication and acceptance may be express or implied and must evidence a clear intent to dedicate. 77 Am. Jur. Proof of Facts 3d §1; *Hersh*, 156 N.H. at 515. Dedication by deed is an example of an express act constituting an offer to dedicate. *Id.* As the Town admits in its brief, examples of implied acts include “opening up or improving a street, removing snow from it or assigning police patrol to it.” 77 Am. Jur. Proof of Facts 3d §14; *Hersh* 156 N.H. at 515.

Several documents reflect an express intent by the Paper Company to dedicate the relevant interests to the Town. The first document is the Right of Entry Agreement executed by the Paper Company in 1960. In that agreement, the Paper Company granted to the Town (and the Corps) an irrevocable right to enter the land for the purpose of construction and restoration of the Levee. CR 86-87. This grant was limited to a period of six months from the date of execution of the agreement. *Id.* at CR 86. The Right of Entry Agreement also granted to the Town (and the Corps) the right “to enter upon said lands at any time to inspect the restored dike with a view to its proper maintenance and operation.” CR 86.

The second document is an easement reserved to the Town (and the Corps) in the deed from the Paper Company to the Franconia Manufacturing Corporation. CR 89-97. Within the deed the Paper Company excepted and reserved an easement to the Town (and the Corps) “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 [Levee]...” CR 92. Both documents identify that the easement serves the public purpose to allow the Town to meet its obligation to inspect, maintain, and repair the Levee. CR 86-88; CR 92. These documents constitute express evidence of the Paper Company’s unequivocal intention

to dedicate, and the Town's acceptance of an easement for the purpose of meeting its obligation to inspect, maintain and repair the Levee. *Hersh*, 156 N.H. at 515 (other citations omitted).

Beyond the documents, the Town's own actions manifest implied acceptance. First, the record demonstrates that in 1960 at the Town's Annual Meeting the citizens voted to authorize its Board of Selectmen to enter into and execute an Assurance with the Corps for the Town to receive funds provided by the Flood Control Act of 1941 to restore the Levee. CR 52. 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 work; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army." *Id.* The vote was recorded by the Town in its Annual Report. CR 136-138. The Annual Report reflects the unanimous vote of its citizenry authorizing the Board of Selectmen to execute an Assurance with the Corps "or other Agreement in reference thereto, and authorizing the Selectmen to acquire any real estate interest for said project." CR 138.

The Council identified each of these transactions in concluding such an easement existed resulting in the Town acquiring sufficient ownership interests to trigger the maintenance and repair obligations of RSA 482:11-a and RSA 482:12, II. CR 156.

Perhaps most telling of the Town's acceptance, the Town sought, and by now may have accepted, millions of dollars in federal funds to protect the Town's interest in downstream property. CR 52 The Town accepted federal funds for the reconstruction of the Levee and assured the Corps that it would obtain all of the interests necessary to maintain and repair the Levee in perpetuity. *Id.* Finally, and most importantly, the

Town actually is performing the work at issue. *See* Town’s Brief, p. 27.

The Town cannot have it both ways. The Town is either trespassing on property in which it has no interest or it actually accepted the interest that the Council found. The 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.

In total, this evidence provides a sound basis to conclude that the Town accepted the easement from the Paper Company. 77 Am. Jur. Proof of Facts 3d §14; *Hersh* at 515.

**E. RSA 41:14-a is Inapplicable to Town’s
Acceptance of the Easement from the Paper
Company.**

The Town also contends that in 2005, pursuant to RSA 41:14-c, it adopted the procedure set forth in RSA 41:14-a, entitled “Acquisition or Sale of Land, Buildings, or Both” and there has been no vote under RSA 41:14-a to acquire the easement. RSA 41:14-c provides: “[t]owns may adopt the provisions of RSA 41:14-a, at any duly warned meeting. Once adopted, these provisions shall remain in effect until specifically rescinded by the town at any duly warned meeting.” RSA 41:14-c, I.

The interests at issue, however, arose many years prior to the Town’s adoption of the procedures under RSA 41:14-a. The Town has submitted no evidence of its own retrospective use of the procedures under RSA 41:14-a, for all the lands or building it acquired prior to 2005. In any event, it is well established that prospective application of a statute is to be presumed unless its purpose is remedial or a contrary intent is shown.

Town of Bartlett v. Furlong, 168 N.H. 171 179 (2015); *Harris v. Adams*, 123 N.H. 167, 170 (1983). The specific language of RSA 41:14-c does not evidence any intent by the legislature that the statute is to have

retrospective application. RSA 41:14-c. The Town's failure to use RSA 41:14-a procedures with respect to any of its pre-2005 property confirms that the Town does not believe the statute is retrospective.

In short, the procedures for acceptance of land under RSA 41:14-a do not apply to the acceptance of the easement dedicated to and accepted by the Town decades before the Town adopted the procedures in RSA 41:14-c relative to acquisitions of land or interest in land.

F. The Water Council Correctly Determined that the Department was Authorized to Issue its Administrative Order against the Town of Lincoln, to Enforce State Laws and Regulations.⁶

The Town argues that it is only subject to the Corps' jurisdiction and regulation under the Assurance it executed with the United States, and the State has no standing to enforce that agreement. *See* Town's Brief p. 25. The Assurance does reflect the Town's ownership interest in the Levee, but the Department has never sought to enforce the Assurance. The Department has the independent authority to impose repair and maintenance obligations on the Town, as on all owners of dams, under RSA 482:11-a, and RSA 482:12. As noted above, the Department determined, and the Council correctly ruled, that the Town had the responsibility to 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. CR 160.

⁶ To the extent that the Town's challenge can be interpreted as a pre-emption argument, the Town has not raised that in its Notice of Appeal or briefed it. Thus the Town has not adequately preserved it for appeal. *Appeal of Town of Nottingham*, 153 N.H. 539, 555 (2006) (failure to adequately brief argument constitutes waiver); *See also Appeal of Barry*, 141 N.H. 170 (1996) (The Court will not address claims made only in passing, without any development or citation to authority.)

**G. The Town’s Performance of the Repairs on the
Levee Does Not Render the Administrative Order
Moot.**

Finally, the Town argues that the Administrative Order was unnecessary and unreasonable because the Town is already fulfilling its obligation to repair the Levee. *See* Town’s Brief at 27-28. Fundamentally, compliance with an Administrative Order does not void the order. To the extent that the Town’s compliance makes the current action unnecessary, it is the appeal, not the judgment that is rendered moot. *See Henderson v. Frank*, 131 F.2d 484, 484 (3d Cir. 1942) (“Since the appellants have complied fully with the order appealed from, the appeal is dismissed as moot”); *see also Smith v. Smith*, 160 Idaho 778, 784, 379 P.3d 1048, 1054 (2016) (“When a judgment debtor voluntarily pays the judgment, the debtor’s appeal becomes moot, and it will be dismissed”).

In addition, agreeing to comply or taking steps toward compliance with RSA 482:12 does not guarantee compliance. The Administrative Order preceded the Town’s commencement of repairs on the Levee. The record reflects many delays on the part of the Town, including the Town’s representation that it did not have the easements necessary to repair the Levee, an unsuccessful vote at the 2014 and 2015 Town Meetings to fund the repairs of the Levee, and an effort by the Town to shift the burden to private property owners to repair the Levee. Though now undertaking repairs, the Town continues to deny that it has any obligation to maintain the Levee under state law, meaning that the Town continues to refuse to accept the Department’s regulatory and enforcement authority. Given this history, the Department deemed it proper and fully within its regulatory authority to issue the Administrative Order requiring the necessary repairs on the Levee. RSA 482:12; RSA 482:11, II; RSA 482:12, II; RSA 482:87. The compliance of the Town following issuance of the Department’s order

does not render that order moot. *Londonderry School District SAU #112 v. State of New Hampshire*, 157 N.H. 734, 736 (2008). This Court has noted that it is hesitant to dismiss a case as moot simply because one party voluntarily attempts to remedy its failure to act. *Id.*

The Department's duty to inspect and regulate the Levee is an ongoing one that does not cease upon completion of the current reparations of the Levee. Based upon its inspection of the Levee, the Department found structural deficiencies and real threats to life and property, and reasonably and lawfully issued the Administrative Order against the Town. Notwithstanding the current repairs the Town is conducting on the Levee, the Town continues to deny the Department's oversight of the Town with respect to the Levee on an ongoing basis. The issues in this case are not academic. *Londonderry*, 157 N.H. *supra*. Given the Department's ongoing duties and responsibilities to inspect and regulate the condition of Levee in order to protect the health and safety of the public, the Administrative Order issued against the Town is not moot.

CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Honorable Court affirm the Council’s Order.

REQUEST FOR ORAL ARGUMENT

The Department requests a 15-minute oral argument.

CERTIFICATION OF COMPLIANCE

I hereby certify that the within brief complies with Sup. Ct. R. 26(7) and contains 6005 words, excluding cover page, table of contents, table of authorities, statutes, rules, and appendix.

Respectfully submitted,

THE STATE OF
NEW HAMPSHIRE
DEPARTMENT OF
ENVIRONMENTAL SERVICES

By its attorney,

GORDON J. MACDONALD
ATTORNEY GENERAL

Dated: September 28, 2018

/s/ Mary E. Maloney
Mary E. Maloney, Bar No. 1603
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679
mary.maloney@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to Russell F. Hilliard, Esq. Counsel for the Town of Lincoln.

Dated: September 28, 2018

/s/ Mary E. Maloney