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February 2, 2017

HAND DELIVERED

New Hampshire Supreme Court
Eileen Fox, Clerk
One Charles Doe Dr.
Concord, NH 03301

RE: Town of Pembroke v. Town of Allenstown
Case No. 217-2014-00424 (Superior Court)

Dear Clerk Fox:

In the above-referenced matter, please find enclosed an original and eight (8) copies of the Town of Pembroke's Rule 7 Notice of Mandatory Appeal. Also enclosed is a check in the amount of $250 to cover the cost of the filing fee.

Please contact me should you have any questions.

Sincerely,

Mark H. Puffer

MHP:sas
Encl.
cc: Merrimack County Superior Court (2 copies)
William R. Drescher, Esq.
Sharon Cuddy Somers, Esq.
Town of Pembroke

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FEB 06 2017
BY: .....

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Town of Pembroke

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

RULE 7 NOTICE OF MANDATORY APPEAL

This form should be used for an appeal from a final decision on the merits issued by a superior court or circuit court except for a decision from: (1) a post-conviction review proceeding; (2) a proceeding involving a collateral challenge to a conviction or sentence; (3) a sentence modification or suspension proceeding; (4) an imposition of sentence proceeding; (5) a parole revocation proceeding; (6) a probation revocation proceeding; (7) a landlord/tenant action or a possessory action filed under RSA chapter 540; (8) an order denying a motion to intervene; or (9) a domestic relations matter filed under RSA chapters 457 to 461-A other than an appeal from a final divorce decree or from a decree of legal separation. (An appeal from a final divorce decree or from a decree of legal separation should be filed on this form.)

1. COMPLETE CASE TITLE AND CASE NUMBERS IN TRIAL COURT

Town of Pembroke v. Town of Allenstown

Case No. 217-2014-CV-00424

2. COURT APPEALED FROM AND NAME OF JUDGE(S) WHO ISSUED DECISION(S)

Merrimack County Superior Court

Diane M. Nicolosi, P.J.

3A. NAME AND MAILING ADDRESS OF APPEALING PARTY. IF REPRESENTING SELF, PROVIDE E-MAIL ADDRESS AND TELEPHONE NUMBER

Town of Pembroke

311 Pembroke St.

Pembroke, NH 03275

E-Mail address:

Telephone number:

3B. NAME, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS AND TELEPHONE NUMBER OF APPEALING PARTY'S COUNSEL

Mark H. Puffer, Esq.

Preti Flaherty Beliveau & Pachios, LLP

P.O. Box 1318

Concord, NH 03302-1318

E-Mail address: mpuffer@preti.com

Telephone number: 603-410-1500

RULE 7 NOTICE OF MANDATORY APPEAL

4A. NAME AND MAILING ADDRESS OF OPPOSING PARTY. IF OPPOSING PARTY IS REPRESENTING SELF, PROVIDE E-MAIL ADDRESS AND TELEPHONE NUMBER

Town of Allenstown
16 School St.
Allenstown, NH 03275

E-Mail address:

Telephone number:

4B. NAME, FIRM NAME, MAILING ADDRESS, E-MAIL ADDRESS AND TELEPHONE NUMBER OF OPPOSING PARTY'S COUNSEL

William R. Drescher, Esq.
Drescher & Dokmo, P.A.
P.O. Box 7483
Milford, NH 03055-7483

E-Mail address: william.drescher@drescherdokmo.com
Telephone number: 603-673-9400

Sharon Cuddy Somers, Esq.
Donahue, Tucker & Ciandella, PLLC
225 Water Street
Exeter, NH 03833

E-Mail address: ssomers@dtclawvers.corn
Telephone number: 603-778-0686

5. NAMES OF ALL OTHER PARTIES AND COUNSEL IN TRIAL COURT

6. DATE OF CLERK'S NOTICE OF DECISION OR SENTENCING. ATTACH COPY OF NOTICE AND DECISION.

January 23, 2017

DATE OF CLERK'S NOTICE OF DECISION ON POST-TRIAL MOTION, IF ANY. ATTACH COPY OF NOTICE AND DECISION.

N/A

7. CRIMINAL CASES: DEFENDANT'S SENTENCE AND BAIL STATUS

8. APPELLATE DEFENDER REQUESTED? ☐ YES ☒ NO
IF YOUR ANSWER IS YES, YOU MUST CITE STATUTE OR OTHER LEGAL AUTHORITY UPON WHICH CRIMINAL LIABILITY WAS BASED AND ATTACH FINANCIAL AFFIDAVIT (OCC FORM 4)

RULE 7 NOTICE OF MANDATORY APPEAL

9. IS ANY PART OF CASE CONFIDENTIAL? ☐ YES ☒ NO
IF SO, IDENTIFY WHICH PART AND CITE AUTHORITY FOR CONFIDENTIALITY.
SEE SUPREME COURT RULE 12.

10. IF ANY PARTY IS A CORPORATION, LIST THE NAMES OF PARENTS, SUBSIDIARIES AND AFFILIATES.

11. DO YOU KNOW OF ANY REASON WHY ONE OR MORE OF THE SUPREME COURT JUSTICES WOULD BE DISQUALIFIED FROM THIS CASE? ☐ YES ☒ NO

IF YOUR ANSWER IS YES, YOU MUST FILE A MOTION FOR RECUSAL IN ACCORDANCE WITH SUPREME COURT RULE 21A.

12. IS A TRANSCRIPT OF TRIAL COURT PROCEEDINGS NECESSARY FOR THIS APPEAL?
☒ YES ☐ NO

IF YOUR ANSWER IS YES, YOU MUST COMPLETE THE TRANSCRIPT ORDER FORM ON PAGE 4 OF THIS FORM.

13. LIST SPECIFIC QUESTIONS TO BE RAISED ON APPEAL, EXPRESSED IN TERMS AND CIRCUMSTANCES OF THE CASE, BUT WITHOUT UNNECESSARY DETAIL. STATE EACH QUESTION IN A SEPARATELY NUMBERED PARAGRAPH. SEE SUPREME COURT RULE 16(3)(b).

1. Did the trial court err by ruling that Allenstown may expend excess septage revenues as it sees fit, contrary to the plain meaning of Section 3.06 of the parties' Intermunicipal Agreement ("IMA") which allowed Allenstown to expend septage revenues for the Wastewater Treatment Facility ("WWTF") but did not authorize Allenstown to spend septage revenues for any other purpose?

2. Did the trial court err by finding that Allenstown's interpretation of Section 3.06 of the IMA (that it could expend excess septage revenues as it saw fit) was consistent with other provisions of the IMA, including provisions which required that each Town pay for its own collection system and that both Towns pay identical user charges?

3. Did the trial court err by giving no weight to the parties' conduct for the first five years of the IMA during which Allenstown used excess septage revenues only for the WWTF, and only began using excess septage revenue for purposes other than the WWTF when two of the three Allenstown signatories to the IMA were no longer members of the Allenstown Sewer Commission?

4. Did the trial court err by finding that the only reasonable explanation that certain language in Section 3.06 of the IMA changed from "will" to "may" was that Allenstown was unwilling to have its use of the excess septage revenue restricted?

5. Did the trial court err by misinterpreting and misapplying provisions of the Clean Water Act and regulations promulgated thereunder, including 40 C.F.R. §35.2140(f) which requires that "revenue from the project [the WWTF]" be used to reduce all user charges proportionately?

6. Did the trial court err by finding that septage haulers were "users" of the WWTF within the meaning of the Clean Water Act so that excess septage revenue or profit from septage haulers did not need to be used to reduce user charges proportionately?

7. Did the trial court err by finding that Pembroke had refused to participate in the BioMag project, that Pembroke had not contributed to the construction and operation of the BioMag project, and that Allenstown was entitled to all WWTF capacity generated by the BioMag project?

14. CERTIFICATIONS

I hereby certify that every issue specifically raised has been presented to the court below and has been properly preserved for appellate review by a contemporaneous objection or, where appropriate, by a properly filed pleading.

Appealing Party or Counsel

I hereby certify that on or before the date below, copies of this notice of appeal were served on all parties to the case and were filed with the clerk of the court from which the appeal is taken in accordance with Rule 26(2).

2/2/17

Date

Appealing Party or Counsel

TRANSCRIPT ORDER FORM

INSTRUCTIONS:

1. If a transcript is necessary for your appeal, you must complete this form.
2. List each portion of the proceedings that must be transcribed for appeal, e.g., entire trial (see Supreme Court Rule 15(3)), motion to suppress hearing, jury charge, etc., and provide information requested.
3. Determine the amount of deposit required for each portion of the proceedings and the total deposit required for all portions listed. Do not send the deposit to the Supreme Court. You will receive an order from the Supreme Court notifying you of the deadline for paying the deposit amount to the court transcriber. Failure to pay the deposit by the deadline may result in the dismissal of your appeal.
4. The transcriber will produce a digitally-signed electronic version of the transcript for the Supreme Court, which will be the official record of the transcribed proceedings. Parties will be provided with an electronic copy of the transcript in PDF-A format. A paper copy of the transcript will also be prepared for the court.

PROCEEDINGS TO BE TRANSCRIBED

PROCEEDING DATE (List each day separately, e.g. 5/1/11; 5/2/11; 6/30/11)	TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.)	NAME OF JUDGE	LENGTH OF PROCEEDING (in .5 hour segments, e.g.,1.5 hours, 8 hours)	RATE (standard rate unless ordered by Supreme Court)	DEPOSIT
9/8/16	Trial Day 1	Diane Nicolosi	4 hours	X $137.50	$550.00
9/9/16	Trial Day 2	Diane Nicolosi	4 hours	X $137.50	$550.00
10/11/16	Trial Day 3	Diane Nicolosi	4 hours	X $137.50	$550.00
10/13/16	Trial Day 4	Diane Nicolosi	4 hours	X $137.50	$550.00
				X $137.50	$
				X $137.50	$
				X $137.50	$
				X $137.50	$
				X $137.50	$
				X $137.50	$
				TOTAL DEPOSIT	**$2200.00**

PROCEEDINGS PREVIOUSLY TRANSCRIBED

PROCEEDING DATE (List date of each transcript volume)	TYPE OF PROCEEDING (Motion hearing, opening statement, trial day 2, etc.)	NAME OF JUDGE	NAME OF TRANSCRIBER	DO ALL PARTIES HAVE COPY (YES OR NO)	DEPOSIT FOR ADDITIONAL COPIES
				☐ Yes ☐ No	TBD
				☐ Yes ☐ No	TBD
				☐ Yes ☐ No	TBD

NOTE: The deposit is an estimate of the transcript cost. After the transcript has been completed, you will be required to pay an additional amount if the final cost of the transcript exceeds the deposit. Any amount paid as a deposit in excess of the final cost will be refunded. The transcript will not be released to the parties until the final cost of the transcript is paid in full.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
163 North Main St./PO Box 2880
Concord NH 03302-2880

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

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

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

ORDER

January 23, 2017

Tracy A. Uhrin
Clerk of Court

(485)

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

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

Town of Pembroke

v.

Town of Allenstown

Docket No. 217-2014-CV-424

ORDER

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

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

Facts

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

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

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

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

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

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

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

> No septic waste of any kind, whether it is treated or not treated shall be discharged in the Pembroke System that is tributary to the Allenstown System. Since the Town of Allenstown's existing wastewater treatment facility is not equipped to handle and treat septage, the Town of Allenstown cannot accept septage wastes from the Town of Pembroke at this time.

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

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

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

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

> Any septage haulers who may subsequently use the Suncook Wastewater Treatment Facility shall be subject to the Town of Allenstown's ordinances and regulations regarding licensing, permits, use and fees associated with septage hauling.

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

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

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

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

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

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

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

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

2006 IMA § 4.03.

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

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

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

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

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

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

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

Analysis

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

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

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

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

2006 IMA § 3.06

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

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

2006 IMA § 3.06.

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

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

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

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

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

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

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

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

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

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

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

[2] "The funds received from the collection of sewer rentals shall be kept as a separate and distinct fund to be known as the sewer fund. Such fund shall be allowed to accumulate from year to year, shall not be commingled with town or city tax revenues, and shall not be deemed part of the municipality's general fund accumulated surplus. Such fund may be expended only for the purposes specified in RSA 149-I:8, or for the previous expansion or replacement of sewage lines or sewage treatment facilities." RSA 149-I:8, I (emphasis added).

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

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

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

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

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

The 2006 IMA § 4.05 reads as follows.

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

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

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

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

> After completion of building a project, revenue from the project (e.g., sale of a treatment-related by-product; lease of the land; or sale of crops grown on the land purchased under the grant agreement) shall be used to offset the costs of operation and maintenance. The grantee shall proportionately reduce all user charges.

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

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

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

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

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

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

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

BioMag Capacity

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

order are GRANTED and all inconsistent are DENIED.

SO ORDERED.

Date: 1/20/2017

Diane M. Nicolosi
Presiding Justice