THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2023-0278

Appeal of Port City Air Leasing, Inc.

BRIEF OF RESPONDENT PEASE AVIATION PARTNERS LLC d/b/a MILLION AIR PORTSMOUTH

Respectfully submitted by:

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15 Minute Oral Argument Requested
To be presented by Nathan R. Fennessy, Esq.

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2. Did the Wetlands Council properly conclude that the due process rights of an airport tenant with a limited leasehold interest were not impacted by a determination that the airport tenant lacked standing to appeal the granting of a wetlands permit for an adjacent parcel where the airport tenant had actual notice of the public hearing held by the New Hampshire Department of Environmental Services regarding the wetlands permit, participated in the public hearing, and identified potential contingent contractual liability as the only harm that the tenant would suffer from the granting of the permit?

STATEMENT OF THE CASE AND FACTS

Port City Air Leasing, Inc. ("Port City") has held a monopoly at Portsmouth International Airport ("Pease") for fixed based operations ("FBO") for more than two decades. FBOs provide crucial airport services, including but not limited to aircraft storage services, fueling and fuel sales, and aircraft maintenance and repair. This appeal is part of a multi-pronged approach by Port City to prevent or delay Pease Aviation Partners LLC d/b/a Million Air Portsmouth ("Million Air") from opening up a competing FBO at Pease.

Port City holds a leasehold interest in a portion of the airport property owned by the Pease Development Authority ("PDA"). Million Air's proposed FBO site on Exeter Street is adjacent to a portion of PDA's leased property. Port City's use of that property (the "Leased Premises")

is controlled by its lease with PDA ("the Lease"). The Lease states that, while Port City is authorized to use PDA's property for the purposes of offering its FBO services, that authorization is "not granted on an exclusive basis and that [PDA] may enter into leases or other agreements with other tenants or users at areas of the Airport other than the Leased Premises for similar, identical, or competing uses." Pet. Appx. at 136, para. 9.2.

PDA, not Port City, exercises dominion and control over the Leased Premises. PDA collects rent from Port City, Pet. Appx. at 124-25, and manages the Leased Premises by providing utility, fire, crash crew, and security services, *id.* at 139, 145-46. Because the Leased Premises are located within an Airport Security Identification Display Area, Port City employees, contractors, and agents may not access the property without applying for access and complying with security regulations promulgated by PDA. *Id.* at 117, para. 1.4. The Lease imposes strict limits on Port City's use of the Leased Premises, *id.* at 136-38, and Port City may make no alterations whatsoever to the property without PDA's consent. *Id.* at 147-48, para. 15.1. Port City does not have title to any land comprising the Leased Premises — that title is vested in the PDA. *See* Pet. Appx. at 113, para. C. Port City does temporarily hold title to the *buildings and equipment* located on the Leased Premises, but only for the duration of its fixed-period Lease. *Id.* at 121, para 1.(A.)5; *id.* at 123. When the Lease is terminated, title to the buildings and equipment will revert to PDA. *Id.* at 121, para 1.(A.)5.

Beginning as early as January 2021, Port City opposed Million Air's application to establish and operate an FBO at Pease on economic grounds. Appx. at 5-7. In public testimony to PDA, representatives of Port City complained that approving Million Air's FBO application would

improperly allow Million Air to bid for "an exclusive four year contract to fuel military aircraft" and doing so would be "dangerous for the community and possibly illegal." *Id.* at 6-7.

In March 2021, Port City sent a memo to PDA complaining that Million Air's FBO application endangered the "public good." Appx. at 27. The risks Port City identified, however, pertained largely to its own economic wellbeing. It complained that "[t]he greatest immediate risk is economic" because "[t]he military fuel need . . . represents over 76% of the fuel need at the airport, and only one FBO can provide it." *Id.* at 28. Port City warned that "[i]f Million Air wins the [military aircraft fueling] contract, Port City will have a massive fuel farm sitting empty, and approximately $7 million in specialized ground service and fueling equipment [will be] rendered redundant." *Id.* at 29. Port City then encouraged the PDA to invoke its "environmental protection mandate" as justification for denying Million Air's application so it could "protect[]the airport's revenue, jobs, growth, and Master Plan." *Id.* at 30. On the same day that Port City sent this memo to PDA, Port City sent a separate memo to PDA proposing to construct its own new facility on the same Exeter Street parcel that Million Air was proposing for its facility. Appx. at 33-67.

At the PDA Board of Directors meeting on April 15, 2021, Port City reiterated its opposition to Million Air's application. Appx. at 68, 70-72. Despite Port City's opposition, the PDA Board conditionally approved Million Air's FBO application subject to certain conditions, including, among other things, Million Air's receipt of a "wetlands permit." *Id.* at 75-79.

On December 1, 2021, Million Air submitted an application for a wetlands permit with the New Hampshire Department of Environmental

Services Wetlands Bureau ("DES"), pursuant to RSA 482-A:3, in order to construct a driveway to access the proposed site. *See* Appx. at 92-201. The submission was for a minimum impact project, as only 2,265 square feet of wetlands will be disturbed by the proposed plan.

In preparing its application, Million Air had originally retained a certified wetlands scientist to perform a wetlands delineation and report. Appx. 126-30; CR #22 Ex. B at 36. To be "absolutely sure" that Million Air's wetlands delineation was correct, PDA also hired its own independent third-party wetlands scientist from GM2 Associates, Inc. ("GM2") to prepare a report. Appx. 131-52; CR #22, Ex. F; CR #22 Ex. B at 36. In addition to these delineations, DES personnel, including a certified wetlands scientist, conducted their own field inspection of the property and the flagged wetlands delineations. CR #22, Ex. D.

Pursuant to RSA 482-A:8, pertinent persons were notified via first-class mail about Million Air's permit application and were afforded thirty days to submit written comments. CR #22, Ex. B at 2. On March 17, 2022, a notice of public hearing was posted on the DES website. *Id.* Notices of the public hearing were also published in the *Union Leader*, *Portsmouth Herald*, and *Fosters Daily Democrat*. *Id.*

On April 6, 2022, DES held a public hearing on the application. CR #22, Ex. B at 1. At the hearing, members of the public were provided an opportunity to comment on the application. CR #22, Ex. B at 3; *see also* RSA 482-A:8. A representative of PDA testified that it had signed Million Air's application in its capacity as "owner" of the parcel, indicating that "PDA is aware of the application being filed and does not object to the filing." CR #22, Ex. B at 5. Port City and its consultants provided extensive comments at this hearing. CR #22, Ex. B at 15-30. Million Air's civil engineer from Hoyle Tanner then provided rebuttal to

the issues identified by Port City and its consultants. CR #22, Ex. B at 36-39.

On June 16, 2022, DES approved Million Air's application and granted it a wetlands permit. Appx. 202-04. On July 15, 2022, Port City filed an appeal of DES's decision to the Wetlands Council. Appx. 205-37. On September 9, 2022, Port City filed a motion for permission from the Wetlands Council to perform a third wetlands delineation. CR #14.

Million Air intervened in the appeal, CR #13, #16, and filed a Motion for Summary Dismissal on several grounds,[1] including that Port City lacked standing. CR #22. Million Air argued that RSA 482-A:10 limits the universe of people that may appeal DES permitting decisions to only "persons aggrieved" and defines the term "persons aggrieved" as those individuals falling into categories enumerated in RSA 482-A:8 and RSA 482-A:9 — the parties to the administrative dispute, certain municipal bodies, and "abutting landowners." *See* RSA 482-A:8–:10. Port City claimed that it was an abutting landowner because, among other things, it "owned" the building next to the parcel Million Air was seeking to develop.

On January 30, 2023, the Wetlands Council granted Million Air's Motion for Summary Dismissal. It rejected Port City's argument that it was the equivalent of an "abutting landowner" under RSA 482-A:9. CR #33 at 3-4. It observed that Port City was merely a tenant of PDA, under a lease that "includes restrictive provisions regarding Port City's rights, interests, and powers relative to the leased property." CR #33 at 4. As a

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[1] Million Air also based its Motion for Summary Dismissal on the ground that Port City could not make a showing that DES's decision was unlawful or unreasonable. CR #22 at 7-11. The Wetlands Council did not rule on this portion of the motion, *see* CR #33, 36; in the event that this Court does not affirm the Weland Council's dismissal of Port City's appeal, the case should be remanded for determination of that issue.

result of these restrictions, "Port City is not free to act upon, dispose of, nor transfer the leased property in a manner which an entity with fee ownership could." *Id.* The Wetlands Council therefore concluded that, because "Port City's leasehold interest in the property cannot be considered equivalent to a fee ownership," Port City is not a landowner and, therefore, not a "person aggrieved" under RSA 482-A:10 with standing to bring an appeal. *Id.* The hearing officer noted that "if the legislature intended tenants, license-holders, and minor easement holders to qualify for standing under RSA 482-A:10, they could have done so." *Id.* at 5.

The Wetlands Council also rejected Port City's alternative argument that prohibiting Port City from pursuing an appeal was a due process violation. CR #23 at 12-14. The hearing officer observed that RSA 482-A:10 "merely details the standing requirements for appeals to the Council," which "do not deprive anyone of their rights, but instead establish the injury or impact necessary for a party to seek redress in a given jurisdiction." CR #33 at 5-6.

On March 1, 2023, Port City filed a motion for reconsideration and rehearing. For the first time, Port City argued that it was entitled to an adjudicatory hearing. CR #34 at 14-15. In an order dated April 12, 2023, the Wetlands Council denied Port City's motion for reconsideration and rehearing, generally reiterating the reasoning from its prior order and, additionally, determined that Port City lacked standing to bring its due process claims. CR #36. This appeal followed.

STANDARD OF REVIEW

RSA Chapter 541 governs the Court's review of Wetlands Council decisions. *See* RSA 21-O:14, III. The party seeking to set aside a Wetlands Council order bears the burden of proof "to show that the [order] is clearly unreasonable or unlawful." RSA 541:13. "[A]ll findings of the [Wetlands Council] upon all questions of fact properly before it shall be deemed to be *prima facie* lawful and reasonable." *Appeal of Town of Lincoln*, 172 N.H. 244, 247 (2019). "[T]he order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." *Id.* "In reviewing the Council's findings, [the Court's] task is not to determine whether [it] would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." *Id.*

SUMMARY OF THE ARGUMENT

Statutes often limit appeal of administrative decisions to "persons aggrieved." RSA 482-A:10 is one such statute, and it defines "person aggrieved" as "any person required to be noticed by mail in accordance with RSA 482-A:8 and RSA 482-A:9." RSA 482-A:8 requires that notice be given to "the applicant and the property owner if different, the local governing body of the municipality involved, the planning board, if any, and the municipal conservation commission, if any." And under RSA 482-A:9 — the provision primarily at issue in this case — notice must be provided to "abutting landowners."

On appeal, Port City raises the same arguments rejected by the Wetlands Council. It argues that it is a "person aggrieved" in RSA 482-A:10 because Port City is an "abutting landowner" within the meaning of

RSA 482-A:9. It further argues that, if Port City is not a "landowner" and therefore not a "person aggrieved," then the statute violates its due process rights. Both arguments are unavailing.

First, the plain meaning of the word "landowner" excludes Port City. Port City is neither a title holder nor an exclusive possessor of the Leased Premises. Its leasehold interest is restricted by the terms of its Lease with PDA. Among other restrictions, Port City may only use the Leased Premises for limited purposes, Pet. Appx. at 136-38; may not make any alterations to the property without PDA consent, Pet. Appx. at 147-48, para. 15.1; and may not even access the property without a PDA security clearance, Pet. Appx. at 117, para. 1.4 (reference to Hangar 229). This Court's prior holdings in *Appeal of Michele* and *Town of Lincoln* establish that non-fee owners may, at times, be considered "landowners," but only if their property interest in the land rises to the level of fee ownership or the equivalent. *See Appeal of Michele*, 168 N.H. 98 (2015); *Appeal of Town of Lincoln*, 172 N.H. 244 (2019). Port City's interest in the Leased Premises falls far short of the standard established by these cases.

This interpretation of "landowner" does not violate Port City's due process rights. Bringing a due process claim requires a showing of harm. The only harm Port City alleges it will sustain from DES's grant of a minor impact wetlands permit is potential future contamination of the already-contaminated lot it leases, which Port City speculates might trigger its environmental indemnity agreement with PDA. The Wetlands Council properly determined that this hypothetical injury is too speculative to form the basis of a due process claim. In any case, Port City's interests in the DES proceeding are adequately protected by the public hearing procedure set forth in RSA Chapter 482-A.

By attempting to challenge DES's decision on appeal, Port City seeks to leverage its leasehold interest in PDA's property to interfere with PDA's development of its own property and improperly delay the institution of a competing FBO. The legislature and administrative agencies have latitude to limit who may appeal agency decisions to prevent precisely this type of abuse of process.

ARGUMENT

A. THE WETLANDS COUNCIL CORRECTLY INTERPRETED THE WORD "LANDOWNER" WITHIN RSA 482-A:9 AS EXCLUDING PORT CITY, A TENANT WITH LIMITED ACCESS TO AND USE OF THE LEASED PREMISES.

In dismissing Port City's appeal, the Wetlands Council correctly concluded that Port City lacked standing to challenge the DES wetlands permit issued to Million Air because Port City did not meet the definition of "a person aggrieved." Unlike many similar statutes limiting appeals to "persons aggrieved," RSA 482-A:10 specifically defines the term to mean:

> A person aggrieved under this section shall mean the applicant and any person required to be noticed by mail in accordance with RSA 482-A:8 and RSA 482-A:9.

RSA 482-A:10; *see also, e.g.*, RSA 669:35 (2008) (limiting appeals from town board of recount but providing no definition of "person aggrieved").

Port City cannot meet this definition because it does not fit within any of the categories of persons identified in RSA 482-A:8 (it is not the "applicant," the "property owner," "the local governing body of the municipality involved," "the planning board," or the "conservation commission") and does not qualify as an "abutting landowner" under RSA 482-A:9. Port City is simply a tenant of an adjoining lot owned by PDA. Pet Appx. at 4-7. As the Wetlands Council correctly determined, a "landowner" must possess fee ownership or an equivalent property

interest. CR #33 at 4; CR #36 at 3-4. Port City's limited leasehold interest is not sufficient to establish standing to appeal.

1. The plain and ordinary meaning of "landowner" excludes tenants with a limited leasehold interest like Port City.

The crux of this matter involves whether the Wetlands Council properly interpreted the term "landowner" in RSA 482-A:9. Million Air submits that the hearing officer correctly determined that the plain and ordinary meaning of "landowner" as used in RSA 482-A:9 excludes tenants with a limited leasehold interest similar to Port City from appealing DES permitting decisions related to neighboring properties.

When engaging in matters of statutory interpretation, the Court should give some deference to an agency's interpretation of its own regulations or statutes it interprets, although its "deference is not total." *See Appeal of Michele*, 168 N.H. 98, 101-02 (2015). Statutory interpretation begins with the language of the statute itself, and, if possible, the statute should be construed according to its plain and ordinary meaning. *Doe v. Attorney General*, 175 N.H. 349, 352 (2022). Statutes are interpreted as written, without considering what the legislature might have said or adding language that the legislature did not see fit to include. *See id.* The legislature is not presumed to waste words or enact redundant provisions and, whenever possible, every word of a statute should be given effect. *Id.* All parts of a statute must be construed together to effectuate its overall purpose and avoid an absurd or unjust result. *Id.* A statute's words and phrases are not considered in isolation, but rather within the context of the statute as a whole. *Id.*

a. Port City's property interest is not the equivalent of fee ownership as envisioned by *Michele* and *Town of Lincoln*.

The word "landowner" is not defined in the statute. This Court has on many occasions explored the plain and ordinary meaning of

"landowner." Port City relies on the framework that this Court adopted in *Michele* and *Town of Lincoln*. These cases, however, do not support Port City's position. Indeed, they underscore the deficiencies in Port City's position because, as the Wetlands Council observed, they establish that a "landowner" must be someone who "hold[s] an interest in property equivalent to fee ownership." CR #36 at 3. The record evidence shows that Port City does not.

Michele concerned an easement over a portion of pond-side property that granted the respondents "the right . . . to *exclusive use* of said parcel of shore frontage for whatever purposes they may desire." *Michele*, 168 N.H. at 100 (emphasis added). In considering whether the easement amounted to landownership, the Court began with dictionary definitions of the term "owner," and acknowledged that the definitions were broad.[2] *Id.* at 102-03. It therefore held that, at times, the term

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[2] *Michele* specified that ownership does not require possession. *Michele*, 168 N.H. at 259. Port City does not appear to argue that it is asserting ownership based on possession, but to the extent that its argument could be construed in that fashion, Port City does not have possession over the property; it merely *occupies* the property, and possession is not a matter of occupancy. *See Case v. St. Mary's Bank*, 164 N.H. 649, 656 (2013). In *Case v. St. Mary's Bank*, this Court explained what constitutes "possession" of real property. In that case, the Court was called on to determine whether a mortgagee was an "owner" within the meaning of RSA 540-A:1, I. *Id.* at 653–57. Accepting the premise that a "mortgagee in possession" would qualify as an owner, the Court considered what constituted "possession." *Id.* at 655–56. It explained that possession of real estate "is a factual issue" regarding whether a person "exercise[s] dominion and control" over the property. *Id.* at 656. The Court cited landlords as an example of people who typically exercise dominion and control over a property without occupying it:

> [C]ollection of rent alone by a mortgagee may not render the mortgagee a mortgagee in possession; however, the collection of rent and active management of the real estate will probably suffice. In an apartment building, factors indicating a mortgagee's possession include *the indicia of control that landlords normally exhibit*, such as leasing, making repairs, and paying bills. Additional factors could include making management decisions and receiving and responding to tenant complaints.

owner may encompass property interests other than fee ownership. *Id.* at 103. The court went on to assess whether the respondents' easement granted them a sufficient interest in the property to qualify as ownership. It then determined that, "[g]iven the broad grant of the [respondents'] easement," it did. *Id.* at 104.

Town of Lincoln expanded upon *Michele* and explained that the key inquiry in determining whether someone is an owner is the degree of property interest they possess. The Court determined that a Town's Right-of-Entry Agreement with the fee owner of a parcel did not amount to ownership. *Town of Lincoln*, 172 N.H. at 245. The Court employed the "bundle of sticks" analogy, stating that only by holding a sufficient number of sticks can a person with an encumbrance on property be considered an "owner" of the property. *Id.* at 253. It observed that, unlike the Town, the respondents in *Michele* "held nearly all of the sticks in the bundle," *id.*, and their easement imparted "exclusive rights that are tantamount to fee ownership," *id.* at 249.

Assessing Port City's leasehold through the lens of these cases, the Wetlands Council correctly determined that Port City's "interest in the leased property is restricted" and, therefore, it does not "hold[] a sufficient number of property right sticks" to be an owner. CR #36 at 3-4. Port City does not have title to any land comprising the Leased Premises — that title belongs to PDA. *See* Pet. Appx. at 113, para. C.

Id. (citations and quotations omitted; emphasis added). Only PDA exercises "dominion and control" over the Leased Premises as Port City's landlord. It collects rent, Pet. Appx. 124-25; controls Port City's means of accessing the premises, *id.* at 117; restricts Port City's ability to alter the property, *id.* at 147; provides utility, fire, crash crew, and security services, *id.* at 139, 145-46; and has the right to enter the property and make repairs and keep equipment on site for the purpose of doing so, *id.* at 142.

Port City does temporarily hold title to the *buildings and equipment* located on the Leased Premises, but only for the duration of its fixed-period lease. *Id.* at 121, para 1.(A.)5; *id.* at 123. Port City — unlike the parties in *Town of Lincoln* and *Michele* — must pay PDA for the right to access and use PDA's lot. Pet. Appx. at 124-25. Additionally, because the Leased Premises are located within an Airport Security Identification Display Area, Port City employees, contractors, and agents may not even access the property without applying for access and complying with security regulations promulgated by PDA. *Id.* at 127, para. 4.7. Unlike the parties in *Town of Lincoln* and *Michele*, Port City's leasehold is limited to a term of years, *see* Pet. Appx. at 123. And Port City may not use the Leased Premises for "whatever purpose [it] may desire," as was the case in *Michele*. PDA strictly limits the uses that are permitted on the property, *id.* at 136-38, and Port City may make no alterations whatsoever to the property without PDA's consent, *id.* at 147, para. 15.1.

In its opening brief, Port City suggests that it has "control" over the Leased Premises because it has the right to make improvements to the property. *See* Pet. Brief at 16, 22, 29. This argument, however, does not withstand scrutiny. Port City has an *obligation* to make approved improvements to the property, as consideration for its lease with PDA. Pet. Appx. at 118, para 1.(A.)1. In *Town of Lincoln*, the Town likewise had a duty to improve the property as consideration for its Right of Way, and the Court found that indicative of the fee owner's intent to retain sole ownership. *See Town of Lincoln*, 172 N.H. at 250. Port City's rights are even more restricted than the Town's rights in *Town of Lincoln*: Port City is required to obtain PDA's approval for any proposed improvements, "work cooperatively" with PDA to create a project schedule, provide PDA with a complete, definitive schedule for the improvements, and provide

PDA with blueprints and "itemized expenditures on at least a monthly basis." *Id.* at 118-19.

b. Port City's property rights do not amount to "ownership" in other legal contexts.

Port City asserts that it acts "in most respects like a landowner" because it is "a long-term tenant that pays the equivalent of property taxes; it can mortgage its leasehold interest; it owns buildings on its leases premises; it can pledge its interest for financing; and it can assign its rights to the lease." Pet. Brief at 19, 29. These rights are insufficient to establish ownership not only in the context of *Michele* and *Lincoln*, but also in other legal contexts where this Court has been called on to define ownership.

In the context of taxation, neither the length of Port City's lease nor its responsibility for property taxes support its claim of ownership. In *In re Reid*, this court held that a leasehold interest was not taxable. *In re Reid*, 143 N.H. 246, 250-54 (1998). The Court reasoned that taxability is a function of landownership, and that the lessee did not have a property interest arising to the level of "virtual ownership." *See id.* at 248-49. The court explained that while a perpetual lease may give rise to virtual ownership, a lease for a term of years generally will not. *Id.* This principle applies even to leases for a very long term: in one notable case, a tenant with a ninety-nine-year lease was deemed to not to have an ownership interest in property and, therefore, no taxable interest in the property. *See Hamptons Beach Casino, Inc. v. Town of Hampton*, 140 N.H. 785, 789-90 (1996). Although Port City is a long-term tenant, it has a lease for a term of years. *See* Pet. Appx. at 123; *see also Reid*, 143 N.H. at 250 (finding the option to renew a lease for a given number of terms does not make a lease perpetual). Therefore, under *Reid*, the

length of Port City's lease does not support—and, indeed, undermines—Port City's claim of ownership.

The fact that Port City claims to pay "the equivalent of property taxes" is irrelevant. Pet. Brief at 19. In *Reid*, the Court explained that tenants may consent to paying property taxes, even if they do not have what would otherwise be considered ownership of the property. *Reid*, 143 N.H. at 248-49. Port City has consented to paying taxes and, therefore, its payment of taxes has no bearing on its status as an owner. Pet. Appx. at 130.

More recently, this Court explored the concept of ownership in *Kymalimi LLC v. Town of Salem*, Case No. 2022-0202, 2023 WL 4542659 (July 14, 2023). In that case, the Court considered whether a tenant was an "owner of property" such that it could give permission to its sublessee to submit a site plan application. *Id.* at *1-2. Under the plain language of the statute and the circumstances of that case, the Court determined that the phrase "owner of property" is equivalent to the "owner of record" — in other words, the title owner. *Kymalimi*, 2023 WL 4542659, at *3. In setting this high bar, the Court rejected the tenant's arguments that, under *Michele*, a tenant should be considered an owner. *See id.* at *4. It emphasized that "the specific context and statutory language" in a particular case is the lynchpin of ownership. *Id.*

Port City is not a record owner of the land comprising the Leased Premises, and therefore would not possess the right to submit a site plan application without PDA's consent. *Id.* at *3; *see* Lease at 113, para. C. And here, like in *Kymalimi*, the specific statutory language and the context — an appeal to the Wetlands Council — counsel against finding Port City a "landowner" with standing to appeal. As discussed at length

below, it is common and desirable for an administrative agency to limit the universe of who may appeal its decisions.

In sum, as the Wetlands Council found, Port City's rights to use the PDA's property are "enumerated and confined." CR #36 at 4. Accordingly, "Port City does not hold a broad scope of exclusive rights sufficient to establish that Port City holds sufficient ownership interest to qualify as a landowner under RSA 482-A:9." *Id.*[3]

2. Port City's proposed interpretation of the statute would be fundamentally unworkable.

Port City asserts that the term "landowner" should encompass any "person with property rights." Pet. Brief at 16. This interpretation of the statute would grant tenants standing based on injuries that are insufficient to establish standing in the analogous land use context, and would interfere with fair and efficient administrative decision making. By contrast, interpreting "landowner" as only encompassing fee owners or the equivalent comports with existing land use law and reasonably identifies those who will be directly injured by DES decisions pertaining to adjacent lots.

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[3] The Court should easily dispense with Port City's effort to buttress its position with other statutes (most of which are from other states). Pet. Brief at 16-17. None of the statutes identified by Port City concern the regulation of wetlands. Instead, they concern the premises liability of "landowners" who permit others to conduct recreational activity on their property. *Compare* RSA 212:34 (regarding the duty of care owed by landowners to guests or trespassers); VA Code Ann. § 29.1-509; Tenn. Code. Ann. § 70-7-101–102 (same); *and* C.R.S.A. § 13-21-115 (same), *with* RSA Chapter 482-A (regarding regulation of wetlands); VA Code Ann. tit. 28.2, ch. 13 (same); Tenn. Code Ann. tit. 69, ch. 3 (same); *and* C.R.S.A. tit. 19 ch. 196 (same). In that context, it may make sense to adopt a broader definition of "landowner." In the context of administrative appeals, however, such a broad definition would interfere with the prompt issuance of permits and landowners' autonomy to develop their property.

In the context of land use, the legislature has always placed limits on the universe of individuals who can a challenge a decision by a land use board. *See, e.g.*, *Golf Course Investors of NH, LLC v. Town of Jaffrey*, 161 N.H. 675 (2011) (concluding that residents were not "aggrieved" by the planning board's decision and therefore did not have standing pursuant to RSA 676:5, I to challenge decision); *Hannaford Bros. Co. v. Town of Bedford*, 164 N.H. 764, 770 (2013) (concluding that grocery store lacked standing to challenge variance granted to competitor grocery store). To show that they are a "person aggrieved" and have standing, a party is required to identify an "injury that its particular property would incur" as a result of the administrative decision. *Hannaford Bros.*, 164 N.H. at 769. Not all injuries suffice to confer standing. *See Weeks Restaurant Corp. v. City of Dover*, 119 N.H. 541, 544-45 (1979) (standing does not extent to any community member who "feel[s] that they are hurt by the board's decision").

This Court's decision in *Hannaford Bros.* is particularly relevant to the circumstances here. In that case, a grocery store sought to challenge a competitor's effort to open up a competing grocery store in Bedford that would be larger than the existing limitation of 40,000 square feet in the commercial district. This Court concluded that adopting the incumbent store's position on standing would mean that "*any* property owner within the zoning district . . . would have standing to appeal." 164 N.H. at 768. The Court concluded that the real reason that the incumbent grocery store was challenging the variance received by its competitor was concerns about "increased" business competition, which was "not a type of harm sufficient to confer standing." *Id.* at 769; *see also Nautilus of Exeter, Inc. v. Town of Exeter,* 139 N.H. 450, 452 (1995) (concluding that health clubs lacked standing to challenge zoning board of appeals'

decision approving hospital's rehabilitation center because the increased competition with their business was not sufficient to establish standing); *Weeks Restaurant Corp.*, 119 N.H. at 545 ("[I]njury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise economy."). Similarly, as evidenced by its prior submissions to the PDA, Port City's primary concern is economic — it does not want Million Air to set up a competing business on PDA property. *See, e.g.*, Appx. at 28.

Adopting Port City's broad interpretation of the statute — considering anyone with an interest in property a "landowner" — would provide standing to appeal even if the only harm inflicted on Port City from the DES decision is competition with Million Air. In other words, Port City proposes broader appellate standing in the DES context than that allowed in the land use context. This would be a troubling result for several reasons.

DES approval is often a necessary prerequisite for landowners to develop their property. If any person, with any level of interest in an abutting property were able to challenge a DES permitting decision, it would drag out the approval process significantly. (Indeed, here, Port City's unsuccessful attempts to stop Million Air from setting up a competing business have added months to PDA and Million Air's efforts to establish the new FBO.) Allowing persons with only minor interests in an abutting property to drag out permitting decisions has both private and public impacts. It would burden the fee owner's, or equivalent's, fundamental right to use and develop their property "freely and without the need for judicial intervention." *Dugas v. Town of Conway*, 125 N.H. 175, 183 (1984). And it would be particularly troublesome for important but unpopular development projects, like affordable housing and

religious institutions. Anyone who opposes these developments, who has *any* interest in abutting property, could get a foothold to delay or quash these projects at DES, even if similar challenges would be unavailable before land use boards.

If the legislature had intended for "person aggrieved" to be interpreted more broadly in the DES context than in the land use context, it would have defined it accordingly or provided no definition at all. *See Greenland Conservation Com'n v. N.H. Wetlands Council*, 154 N.H. 529, 535 (2006) (stating that, because RSA chapter 482-A sets forth "the way the legislature has determined that DES shall carry out the purposes described in RSA 482–A:1," arguments proposing changes to the process should be made before the legislature). Instead, the legislature provided a definition of the term at least as narrow, if not narrower, than in the land use context.

In arguing for its preferred interpretation, Port City vastly overstates the impact of the Wetlands Council's decision. It states that, "If the Wetlands Council's order stands, the Wetlands Council will never permit a tenant to appeal a wetlands permitting decision, no matter how egregious the permitting decision, and no matter how dangerous or severe the harm to the tenant." Pet. Brief at 29; *see also id.* at 23 (arguing the Wetlands Council decision "will deny standing to all tenants, no matter their degree of harm"). Contrary to what Port City claims, the Wetlands Council did not adopt a rigid conception of "ownership" that excludes all tenants; rather, it adopted the flexible interpretation espoused by this Court in *Michele* and *Town of Lincoln*. *See* CR #33 at 3-5; CR #36 at 2-4. The Court need not determine if tenants may *ever* have an ownership interest to determine that, under *Michele* and *Town of Lincoln*, Port City does not.

In contrast to Port City's proposed definition, the Wetlands Council's concept of ownership, adopted from this Court's holdings in *Michele* and *Town of Lincoln,* is a flexible way to define appellate standing before DES. It measures one's right to participate in the process based on the degree of interest they have in the land — and, therefore, what they have to lose from DES regulation of abutting property. Contrary to what Port City suggests, persons with only minor interests in abutting properties, like Port City, are not shut out of the DES permitting process altogether: they may participate in the public hearing before DES. *See* RSA 482-A:3, XIV(a). But the legislature has determined, as a general matter, that only abutting land*owners* will suffer potential injuries direct and serious enough to warrant appellate standing to challenge DES's ultimate permitting decisions.

B. THE WETLANDS COUNCIL'S INTERPRETATION OF "LANDOWNER" DOES NOT VIOLATE PORT CITY'S DUE PROCESS RIGHTS.

Port City makes numerous arguments that the Wetlands Council's construction of RSA Chapter 482-A results in an unconstitutional violation of its due process rights.[4] Regardless of whether Port City's due process claims are analyzed under the Federal or State constitution and regardless of whether they are framed as a facial or an as-applied challenge, they fail for multiple reasons.

First, the Wetlands Council correctly decided that Port City lacked standing to challenge the constitutionality of RSA Chapter 482-A. Second, even if Port City had standing to bring its constitutional challenges, it cannot make a viable claim of due process for three

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[4] Port City similarly argues that the Wetlands Council's interpretation of RSA 482-A:9 leads to an absurd result because it creates a violation of Port City's due process rights. *See* Pet. Brief at 5, 23. For the same reasons explained in this section, the Wetlands Council's statutory interpretation does not result in a due process violation.

reasons: (1) standing is not a due process issue; (2) Port City does not identify how the Wetland Council's interpretation of RSA 482-A:9 impacts a constitutionally protected interest; and (3) the public hearing process under RSA chapter 482-A provides interested parties a sufficient opportunity to be heard.

1. Port City lacks standing to challenge the constitutionality of RSA chapter 482-A.

The Wetlands Council correctly determined that Port City lacks standing to bring a due process claim. *See* CR #36 at 6-7. Procedural due processes analyses under the State Constitution and Federal Constitution are similar. Under both, the Court first considers whether the process implicates a legally protected interest. *See Petition of Whitman Operating Co., LLC*, 174 N.H. 453, 461 (2021); *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976). Next, the Court must assess whether the procedures provided were adequate to protect that interest. *Whitman Operating Co.*, 174 N.H. at 461; *Mathews*, 319 at 323. Federal courts have stated that one must be provided "some form of hearing." *Mathews*, 424 U.S. at 333. In New Hampshire, one must be provided notice and an opportunity to be heard. *In re Sch. Admin. Unit #44*, 162 N.H. 79, 87 (2011). The State Constitution is at least as protective of a defendant's due process rights as the federal constitution. *State v. Ramos*, 149 N.H. 118, 120 (2003). Therefore, protections afforded under the State Constitution are adequate to satisfy those guaranteed under the Federal Constitution. *See id.*

In New Hampshire, a person has standing to challenge the constitutionality of a statute "only when his own personal rights have been or will be directly and specifically affected." *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 35 (2005). Port City cannot make such a

showing because its concerns about the permit relate to future contingent liability that it may have to third parties.

Port City argues that it will suffer "harm that triggers due process rights" because its leased property could conceivably be contaminated by Million Air's operation, and that contamination could trigger Port City's environmental indemnity to PDA. Pet. Brief at 24-26. This is not a sufficiently direct and specific harm. As the Wetlands Council found, "[b]y Port City's own admission," its claimed injury was "contingent 1) on speculative, non-definitive, future contamination occurring and 2) on a speculative, non-definite, future finding that Port City is responsible for that contamination." CR #36 at 6.

Port City contests the Wetlands Council's findings, asking the Court to consider anew expert reports regarding the likelihood of contamination. DES, however, has already heard at the public hearing Port City's arguments regarding contamination, CR #22, Ex. B at 15-30, and considered multiple expert reports furnished by Port City, *id.* at 16-17, and was not persuaded. Ultimately, the likelihood of any contamination and resultant indemnification is a factual determination, and the Court must defer to facts found by DES. *In re Town of Bethlehem*, 154 N.H. 314, 318 (2006) ("Agency findings are deemed *prima facie* lawful and reasonable and [the Court] does not sit as a trier of fact in reviewing them."); *see also Town of Lincoln*, 172 N.H. at 247.

The Wetlands Council correctly concluded that Port City's purported injury is only "a speculative, secondary effect from [DES]'s granting of the Permit." CR #36 at 6. Such an injury is not sufficient to establish standing to raise a constitutional challenge. *See Petition of Burling*, 139 N.H. 266, 272 (1994). Based on the facts found by DES,

Port City lacks standing to challenge the constitutionality of RSA Chapter 482-A.

2. RSA chapter 482-A:10 is constitutional on its face.

Port City appears to argue that RSA 482-A:10 is unconstitutional on its face. *See* Pet. Brief at 26 para. e. This argument is underdeveloped, and therefore, the Court need not address it. *See State v. Blackmer*, 149 N.H. 47, 49 (2003). It also plainly fails on its merits.

To succeed in challenging the statute's constitutionality, Port City "must establish that no set of circumstances exist under which it would be valid." *Guare v. State*, 167 N.H. 658, 661-62 (2015) (quotation and brackets omitted); *see also N.H. Democratic Party v. Secretary of State*, 174 N.H. 312, 323-25 (2021) (discussing U.S. Supreme Court jurisprudence regarding facial unconstitutionality and stating that *Guare* sets forth the correct test). For reasons explained below, Port City cannot establish that there are "no constitutional applications" of RSA 482-A:10. Therefore, Port City's facial challenge must fail. *Boulders at Strafford, LLC v. Town of Strafford*, 153 N.H. 633, 642 (2006) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

a. RSA chapter 482-A does not violate due process by providing standing limits more stringent those set forth in *Lujan*.

Port City appears to assert that RSA 482-A:10 is unconstitutional because it establishes standing requirements more stringent than the constitutional minimum of standing (requiring injury in fact, causation, and redressability) set forth in federal caselaw. *See* Pet. Brief at 5-7, 24; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This argument fails for two separate, dispositive reasons.

First and foremost, constitutional standing is not a legally protected liberty or property interest, nor does Port City argue it is.

Constitutional standing is grounded in the Federal Constitution's case and controversy requirement. *Lujan*, 504 U.S. at 560. *Lujan* provides a floor, a "constitutional minimum," for when a federal court *may* exercise subject matter jurisdiction. *Id.*; *see Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). It does not create a *right* to have one's case heard, let a lone a legally protected liberty or property interest sufficient to invoke due process.[5] *See Sch. Admin. Unit* #44, 162 N.H. at 83–84; *Mathews,* 424 U.S. 323. As the Wetlands Council rightly recognized, "the requirements for standing . . . do not deprive anyone of their rights, but instead establish the injury or impact necessary for a party to seek redress in a given jurisdiction." Pet. Appx. at 7-8.

Second, Port City conflates standing to appeal a DES decision with standing to bring a legal action in a court of law. There is a "generally accepted distinction between participating in agency proceedings, on the one hand, and seeking review of those decisions, on the other." *Ruel v. New Hampshire Real Estate Appraiser Bd.*, 163 N.H. 34, 40-41 (2011) (citation and brackets omitted). In setting the parameters for appeals, agencies need not conform to *Lujan* but rather are "free to permit third parties to participate in the proceedings before it, for such assistance as those parties may offer, without creating a right in those parties to review a negative decision that the agency may ultimately make." *Id.*; *accord Consolidated Edison Co. of N.Y., Inc. v. O'Leary*, 131 F.3d 1475, 1478-81 (Fed. Cir. 1997) (holding that participation in Department of Energy proceedings and suffering harm due to a department decision were not sufficient to create standing to challenge those decisions on appeal).

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[5] Moreover, federal constitutional standing jurisprudence has not been adopted by New Hampshire courts, as our state lacks an analogous case and controversy requirement. *See Duncan v. State*, 166 N.H. 630, 642 (2014).

Indeed, the United States Supreme Court has recognized standing requirements to appeal federal administrative decisions that differ from the constitutional standing test announced in *Lujan*. *See Assoc. of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153-54 (1970) (establishing that, in order to have standing to appeal an administrative decision, one must have suffered an injury in fact and that injury must be in the "zone of interest" protected by the subject law); *see also N.H. Bankers Ass'n v. Nelson*, 113 N.H. 127, 128 (1973) (holding that standing floor to appeal administrative order or decision is to be determined by the single "injury in fact" test rather than the federal bipartite test).

Contrary to Port City's contention, this appeal is not its "only avenue" to address the injuries it speculates will result from DES's decision. Pet. Brief at 22. Port City has the ability to bring a future case against Million Air (or others) if the future contamination it is worried about ever actually occurs.

b. The administrative hearing process set forth in RSA chapter 482-A is designed to provide notice and opportunity to be heard to those whose property or liberty interests may be implicated by DES decision making.

Contrary to Port City's contentions, the hearing and appeals procedures set forth in RSA Chapter 482-A provide adequate notice and an opportunity to be heard. *See* Pet. Brief at 6-7; 26-28. The notice provisions, RSA 482-A:8 and RSA 482-A:9, are aimed at ensuring the persons most likely to be impacted by a DES decision are notified of the relevant hearing. "Due process . . does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Kilton*, 156 N.H. 632, 638-39 (2007). RSA 482-A:8 and RSA 482-A:9 provide for thorough

notice, wherein the applicant, the property owner, the local governing body of the municipality, the planning board, the municipal conservation commission, and any abutting landowners receive notice of the public hearing by mail, and the public receives the opportunity to review all permit applications. *See* RSA 482-A:8–9. This process is reasonably calculated to provide notice to interested parties and sufficient to overcome a facial due process challenge.

As for providing an opportunity to be heard, RSA chapter 482-A resembles other administrative statutes, in that it provides a robust initial review process and a more limited appellate procedure. When an administrative statute provides an "elaborate procedure for administrative and judicial review," appeals are generally intended to be "simple, prompt, and non-legalistic." *Hallahan v. Riley*, 94 N.H. 338, 340 (1947) (unemployment compensation); *Ridlon v. N.H. Bureau of Sec. Reg.*, 172 N.H. 417, 423 (2019) (applying principle to securities regulation).

The state's authority to limit appeals in this way is rooted in sovereign immunity. When a sovereign consents to be sued, "it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Ridlon*, 172 N.H. at 423-24. The *Ridlon* court, considering the constitutionality of an administrative scheme, observed that avenues of relief may be more limited when one seeks redress against the State. *Id.* at 423. Challenging state agency decision making is akin to a suit against the state; the State could hypothetically provide *no* avenue for such appeals. Therefore, RSA chapter 482-A is not facially invalid for limiting who may challenge agency decisions.

3. RSA 482-A:10 is constitutional as applied to Port City.

Port City's as-applied challenges to RSA 482-A:10 are similarly futile. Port City fails to identify how the Wetlands Council decision interferes with its constitutionally protected interests. Whatever interests Port City may have were adequately protected through its participation in the public hearing.

a. The Wetlands Council decision does not interfere with Port City's property interests.

Port City alleges that the DES decision interferes with its constitutionally protected property rights because Million Air's operation may cause contamination on the Leased Premises, "which could reach Port City's leased premises, drinking water, and surface water." Pet. Brief at 7, 25-26. It alleges that this, in turn, might one day trigger its environmental indemnity obligations if contamination is mistakenly attributed to Port City. *Id.* As explained above, the Wetlands Council found that Port City's "claimed injury is a speculative, secondary effect" of the permitting decision. CR #36 at 6. Even if Port City could demonstrate that contamination may actually affect it, Port City still does not identify a harm sufficient to invoke due process protection.

The hallmark of a legally protected interest is an "individual entitlement grounded in State law." *See Town of Bethlehem*, 154 N.H. at 329; *see also Whitman Operating Co.*, 174 N.H. at 461 (requiring plaintiffs who were denied a government benefit to show entitlement to that benefit in order to claim a violation of due process). Port City does not identify how its claimed injury constitutes interference with anything to which it is *entitled* under State law — the rights conveyed by its Lease. Far from guaranteeing Port City a lot free from contamination, the Lease repeatedly acknowledges the presence and possibility of contamination on the Leased Premises from other airport operations. *See, e.g.*, Pet. Appx. at 113-14, para. D, 166-72. If, as Port City speculates, the

establishment of Million Air will make it difficult to identify the source of new contamination, that is a natural consequence of the Lease, which provides that PDA may lease its other lots "for similar, identical, or competing uses." Pet. Appx. at 136, para. 9.2.

Absent a showing that Port City's lack of standing interferes with a any entitlement granted to Port City under its lease, Port City's "participation is of a statutory — not constitutional due process — dimension." *Town of Bethlehem*, 154 N.H. at 329.

b. Even if Port City has an interest in the permitting decision that is protected by due process, the public hearing held under RSA 482-A:8 was sufficient to protect that interest.

Even if Port City has a protected liberty or property interest, that interest was adequately protected by the public hearing process. *See* RSA 482-A:8 (describing public hearing notice and procedure requirements); RSA 482-A:3 (mandating public hearing in certain permitting cases). The hallmarks of adequate process are notice and an opportunity to be heard. *See Sch. Admin. Unit #44*, 162 N.H. at 87; *Mathews*, 424 U.S. at 333. Port City does not argue that it was deprived of adequate notice.[6] Therefore, the only issue is whether Port City was provided an opportunity to be heard.

Port City argues that only an adjudicatory hearing can satisfy its right to be heard. Pet. Brief at 23. Port City asserts that the public hearing, during which "Port City Air, like every member of the public,

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[6] On March 17, 2022, a notice of public hearing was posted on the DES website. CR #22, Ex. B at 2. Notices of the public hearing were also published in the *Union Leader*, *Portsmouth Herald*, and *Fosters Daily Democrat*. *Id.* Although Port City states in its recitation of the facts that it was not provided individual notice of the permit application, it does not argue that any failure to be notified amounted to a constitutional violation. Pet. Brief at 14. In any case, even if Port City did not receive notice, its opportunity to be heard was not adversely impacted, as it presented extensive, prepared testimony at the public hearing.

had an opportunity to speak," was inadequate because "[t]here was no ability to question or cross-examine, and the permitting authority did not adjudicate the issues or find facts raised by the public participants." *Id.*; *see also* RSA 482-A:8. If Port City ever adequately raised this argument, it did so for the first time in its Motion for Reconsideration, CR #34 at 14-15, and, therefore, this argument is not preserved and this Court need not consider it. *See Rochester City Council v. Rochester Zoning Bd. of Adjustment*, 171 N.H. 271, 280 (2018) (explaining that arguments must be raised "at the earliest possible time").

This argument also fails on its merits. This Court has long held that public hearings on permitting decisions provide an adequate "opportunity to be heard" for the purposes of due process. *In re Town of Nottingham*, 153 N.H. 539, 551 (2006). Planning Board and Zoning Boards routinely make permitting decisions without adjudicatory hearings; and, under the APA, adjudicative proceedings are only afforded to *parties* in "contested cases" — Port City does not contend to be a party, nor that this is a "contested case." *See* RSA 541-A:1, I, IV (defining adjudicative proceeding and contested case); *Town of Bethlehem*, 154 N.H. at 326-27. Port City presents no reason why a DES proceeding should be different from analogous administrative processes. Indeed, it would be untenable for DES to provide an opportunity for all interested third parties, like Port City, to adjudicate other people's permit applications.

CONCLUSION

The legislature and administrative agencies have latitude to limit who may appeal agency decisions. The limitation at play in this case, wherein only "persons aggrieved" may challenge DES permitting decisions, is no departure from this norm. Through RSA 482-A:8 and

RSA 482-A:9, the legislature and DES indicate which persons are potentially affected enough by permitting decisions to warrant appellate intervention — Port City, bearing only a limited leasehold interest in nearby property, is not one of those persons. As a mere tenant with limited, non-exclusive rights to access and use property belonging to another person, Port City need not and should not be allowed to intervene in DES permitting decisions; the public hearing process is legally sufficient to protect its interests.

Port City has failed to meet its burden of showing that the Wetlands Council's interpretation of "landowner" in RSA 482-A:9 was erroneous, as well as its burden of showing that its due process rights are at all implicated by the Wetlands Council's decision. Accordingly, Million Air respectfully requests that the Court affirm the Wetlands Council's decision and dismiss Port City's appeal.

ORAL ARGUMENT

Million Air respectfully requests that the Court schedule this matter for oral argument. If this request is granted, Nathan R. Fennessy will present the oral argument on behalf of Million Air.

WORD COUNT CERTIFICATION

I hereby certify that the foregoing brief complies with Supreme Court Rules 16(11) and 26(7) and contains 9,166 words, excluding the cover page, Table of Contents, Table of Authorities, and Appendix.

Respectfully submitted,

MILLION AIR

By its attorneys,

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CERTIFICATE OF SERVICE

I, Nathan R. Fennessy, Esquire, hereby certify that on this 13th day of November 2022 a copy of the foregoing has been timely provided through the Court's electronic service filing system to all counsel of record.

By: */s/ Nathan R. Fennessy*
Nathan R. Fennessy, Esq.