STATE OF NEW HAMPSHIRE
SUPREME COURT

2023 TERM

CASE NO. 2023-0278

In re Appeal of
Port City Air Leasing, Inc.

**PETITION FOR APPEAL FROM
THE NEW HAMPSHIRE WETLANDS COUNCIL
PURSUANT TO RSA CHAPTER 541**

APPELLANT PORT CITY AIR LEASING, INC'S OPENING BRIEF

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Oral Argument Requested. Mr. Marvelley will argue.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

Regulations

QUESTIONS PRESENTED

The following questions address whether an abutting tenant has standing to appeal a wetlands permit's issuance to the New Hampshire Wetlands Council, and whether the Wetlands Council erred in ruling that tenants lack standing. That issue raises statutory interpretation and due process issues, particularly since the Wetlands Council is the only forum to appeal a wetlands permit's issuance. RSA 21-O:5-a, V.

1. **Failure to interpret statutes in line with precedent and plain and ordinary meaning.** Under RSA 482-A:9 and RSA 482-A:10, Wetlands Council appeals may only be brought by, as relevant here, "abutting landowners". This Court has defined "landowner" to include non-fee-simple owners. *Appeal of Michele*, 168 N.H. 98, 103 (2015). The dictionary defines an "owner" as "[o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested." Did the Wetlands Council err by interpreting RSA 482-A:9 and RSA 482-A:10 to limit standing to owners in fee simple?

The question was preserved in Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal, CR at 425-27; [1] *Port City Air's Surreply Memorandum, id. at 676-78; and Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, id. at 694-97; Petition for Appeal at 4.*

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[1] All references to the Certified Copy of the Record that the New Hampshire Wetlands Council filed with this Court shall be noted as "CR". All references to this brief's addendum shall be "Add." There is no transcript in this case because there was no hearing on the issue of standing: the issue was decided without a hearing, based on the parties' filings. It was decided by the Hearing Officer without the input or vote of the Wetlands Council.

2. **Failure to interpret statutes in line with other statutes.** A bevy of other states' statutes, including one in New Hampshire, define "landowner" to include tenants. Here, the Wetlands Council ignored those other statutes to narrowly define "landowner" to mean owners in fee simple. Did the Wetlands Council err by limiting "landowner" to exclude tenants when other statutes, including one in New Hampshire, define "landowner" to include tenants?

The question was preserved in Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, CR at 695-96; Petition for Appeal at 4-5.

3. **Failure to interpret statutes to comport with federal due process rights.** Under the Fourteenth Amendment to the United States Constitution, there is a due process right to a hearing before the deprivation of a property interest. *Fuentes v. Shevin*, 407 U.S. 67, 81–82 (1972). Here, the Wetlands Council interpreted RSA 482-A:9 and RSA 482-A:10 to limit standing to fee-simple landowners, to the exclusion of tenants who suffer harm from a wetlands permit. That interpretation denies tenants a hearing before their property is harmed. Does the Wetlands Council's exclusionary interpretation of the standing statutes violate tenants' federal due process rights?

The question was preserved in Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal, CR at 424, 427-29; Port City Air's Surreply Memorandum, id. at 676; and Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, id. at 698-701; Petition for Appeal at 5.

4. **Failure to interpret statutes to comport with state due process rights.** The Constitution of the State of New Hampshire includes similar procedural due process rights to the United States Constitution. Here, the Wetlands Council interpreted RSA 482-A:9 and RSA 482-A:10 to limit standing to fee-simple landowners, to the exclusion of tenants who suffer harm from a wetlands permit. Does the Wetlands Council's exclusionary interpretation of the standing statutes violate tenants' state due process rights?

The question was preserved in Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal, CR at 423-425; and Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, id. at 698-99; Petition for Appeal at 5.

5. **As-applied due process violation under federal constitution.** Under federal law, a person has constitutional standing if he suffers injury in fact, caused by an event, and the injury is redressable. The injury can be even "a 'small' stake in the outcome". *Conservation L. Found., Inc. v. Pease Dev. Auth.*, No. 16-CV-493-SM, 2017 WL 4310997, at *14 (D.N.H. Sept. 26, 2017). Did the Wetlands Council err by suggesting that Port City Air lacks standing when it meets the federal constitutional test for standing?

The question was preserved in Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal, CR at 417 (raising question as to tenants at Pease International Tradeport; id. at 423-25; Port City Air's Surreply Memorandum, id. at 674 (appellant's rights being "directly affected"); and Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, id. at 698-702; Petition for Appeal at 5-6.

6. **As-applied due process violation under the state constitution.** Under New Hampshire law, a person who has "suffered a legal injury against which the law was designed to protect" has constitutional standing to seek redress. *Libertarian Party of New Hampshire v. Sec'y of State*, 158 N.H. 194, 195–96 (2008) (citation omitted). The appeals process and the Wetlands Council were intentionally designed to be the sole administrative forum for appealing wetlands permits. *See* RSA 482-A:10; RSA 21-O:5-a, V. Did the Wetlands Council err by ruling that Port City Air lacks standing when it meets New Hampshire's constitutional test for standing?

The question was preserved in Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal, CR at 417 (raising question as to tenants at Pease International Tradeport; id. at 424-25; Port City Air's Surreply Memorandum, id. at 674 (appellant's rights being "directly affected"); and Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, id. at 698-702; Petition for Appeal at 6.

7. The administrative hearing process resulted in a federal due process violation. Under federal law, courts apply a balancing test to determine when an administrative hearing process violates federal due process rights. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, Port City Air faces significant harm, the Wetlands Council's process denies standing to an entire class of injured persons, and the government established the sole appeals process to address harm caused by wetlands permits. Applying the federal balancing test, did the Wetlands Council's hearing process violate Port City Air's due process rights?

The question was preserved in Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, CR at 701-02; Petition for Appeal at 6.

8. **The administrative hearing process resulted in a state due process violation.** Under New Hampshire law, an administrative hearing process violates due process rights when a legally protected interest has been implicated, and the procedures fail to afford appropriate safeguards against a wrongful deprivation of the protected interest. *In re Kilton*, 156 N.H. 632, 637 (2007). Here, Port City Air has a legally protected interest and the Wetlands Council denied it the right to a pre-deprivation hearing. Has the hearing process violated Port City Air's due process rights?

The question was preserved in Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, CR at 701-02; Petition for Appeal at 6-7.

9. **The presence of constitutional harm triggers federal due process rights.** To show federal standing, a party must show injury in fact, causation, and redressability. The injury in fact can be as insignificant as "a 'small' stake in the outcome". *Conservation L. Found., Inc.*, 2017 WL 4310997, at *14 (citing *Dubois v. United States Dept. of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996)). Here, given the threat posed by Million Air's wetlands work, did the Wetlands Council err by ruling that Port City Air has not shown sufficient harm?

The question was preserved in Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal, CR at 419-20 (discussing harms to Port City Air); Port City Air's Surreply Memorandum, id. at 674-76; and Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, id. at 694, 699; Petition for Appeal at 7.

10. **The presence of constitutional harm triggers state due process rights.** Under New Hampshire law, a party has constitutional standing when it has "suffered a legal injury against which the law was designed to protect." *Libertarian Party of New Hampshire*, 158 N.H. at 195–96 (citing *Asmussen v. Comm'r, N.H. Dep't of Safety*, 145 N.H. 578, 587 (2000). Port City Air has alleged and shown that Million Air's wetlands work would spread preexisting contamination, and its business operations would add new contamination, both of which could reach Port City Air's leased premises, drinking water, and surface water. Port City Air owes a contractual environmental indemnity to clean up contamination it causes, and discerning the source of aviation-related contamination may be impossible. Did the Wetlands Council err by ruling that Port City Air has not shown sufficient harm?

The question was preserved in Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal, CR at 419-20 (discussing harms to Port City Air); Port City Air's Surreply Memorandum, id. at 674-76; and Port City Air Leasing, Inc.'s Memorandum in Support of Motion for Reconsideration and Rehearing, id. at 694, 699; Petition for Appeal at 7.

CONSTITUTIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE

Citations to and a verbatim copy of the constitutions, statutes, ordinances, rules, or regulations involved in the case include:

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.H. Const. Pt. 1, Art. 14:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

RSA 21-O:5-a, V:

> A quorum of at least 3 members of the wetlands council shall hear all administrative appeals from department decisions made under RSA 482-A relative to wetlands, or under RSA 483-B relative to shoreland protection and shall decide all disputed issues of fact in such appeals, in accordance with RSA 21-O:14.

RSA 21-O:14, I-a.(a):

> Any person aggrieved by a department decision may, in addition to any other remedy provided by law, appeal such decision by submitting a notice of appeal to the council having jurisdiction over the subject matter of the appeal within 30 days of the date of the decision and shall set forth fully in a notice of appeal every ground upon which it is claimed that the decision complained of is unlawful or unreasonable. Only those grounds set forth in the notice of appeal shall be considered by the council. On any such appeal, the council shall determine whether the department decision was unlawful or unreasonable by reviewing the administrative record together with any evidence and testimony the parties to the appeal may present.

RSA 482-A:9:

> Like notice shall be mailed to all known abutting landowners, supplemented by reasonable notice by newspaper publications to those unknown, as may be ordered by the department.

RSA 482-A:10, I:

> Any person aggrieved by a decision made by the department under RSA 482-A:3 may appeal to the wetlands council and to the supreme court as provided in RSA 21-O:14, including the provisions relative to requesting mediated or unmediated settlement discussions. 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.

STATEMENT OF THE CASE AND FACTS

A. Port City Air.

Port City Air leases Hangar 229, which abuts the location where Million Air wants to build a jetport facility. CR at 3. Port City Air uses Hangar 229 for long-term storage of aircraft that are based at the airport; its fueling and other facilities are located elsewhere at the airport. *See id.* at 417. The hangar was originally built decades ago by the US Air Force, back when Pease Tradeport was an Air Force base, to serve as an aircraft maintenance hangar. *See id.* at 66, 82.

Like the other 230+ tenants at Pease, Port City Air leases its land. CR at 416. Port City Air exclusively leases Hangar 229 from the PDA. *Id.* at 199 (lease defining leased premises).[2] Port City Air pays municipal service fees and, if ever assessed, municipal taxes. *Id.* at 211 (Lease § 4.7); *id.* at 215 (Lease § 5.1). As far as title to the buildings, the lease provides that, during the period of the lease,

> title to any buildings or improvements situated or erected on the Leased Premises and the building equipment and other items installed thereon and any alteration, change or addition thereto shall remain solely in Lessee . . . .

Id. at 205 (Lease § 1.(A.)5). Port City Air committed to invest in capital improvements to Hangar 229. *Id.* at 202.

Port City Air is listed on the City of Portsmouth's tax cards for at least one portion of the parcel abutting Million Air's proposed project

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[2] Port City Air also has non-exclusive use of surrounding apron area that is not part of the leased premises. *See id.*

location. CR at 455. This is in line with other tenants at Pease. *See, e.g., id.* at 438 (deed to Spyglass Development LLC for building only); *id.* at 441 (Portsmouth tax card for Spyglass); *id.* at 445 (assignment of lease to Cinthesys Real Estate Management LLC); *id.* at 451 (Portsmouth tax card for Cinthesys).

B. Million Air proposes to impact an environmentally sensitive area.

Million Air proposes to build a jetport facility consisting of a fuel farm, hangar, and roadway on property abutting Port City Air's Hangar 229. CR at 3 (drawing showing proposal). A jetport facility means high-frequency, high-volume use by aircraft customers, unlike Port City Air's long-term storage operation at Hangar 229. Both the construction and operation of Million Air's jetport facility will impact a wetland, which requires a wetland permit from the New Hampshire Department of Environmental Services.

Despite the availability of other sites at the airport, *see* CR at 31, Million Air chose an environmentally sensitive area where its facility could harm drinking and surface water. The wetland on and adjacent to Million Air's site is hydrologically connected to Hodgdon Brook,[3] which in turn flows through the City of Portsmouth and onwards to the North Mill Pond, which then releases into the Piscataqua River. CR at 5. The path includes

[3] The Certified Record and quotations in this brief refer to "Hodg**s**on Brook" and "Hodg**d**on Brook". The correct spelling, discovered during the appeals process, is "Hodgdon".

residential neighborhoods. *Id.* Adding contamination to that wetland can reach those surface water resources. *See infra* at 17-19.

The wetland contains Gosling Station wells, a well system made up of between 52 and 64 well points installed in 1941 to supply water to the City of Portsmouth water system. CR at 6. The Gosling Station wells are no longer used, but recent photographs demonstrate that at least some well points are still on site and are not properly capped. *Id.* at 28-29. A hydrogeologist has opined,

> [a]lthough the Gosling Well field is no longer in service, the groundwater beneath this area remains important [to] the overlying wetlands and surface water resource should realize the same resource protection.

Id. at 83.

The wetland and the Gosling Station well points are connected to an aquifer located beneath the wetland. Gosling Station used to draw water from the aquifer now used by the Haven Well, which supplies water to Pease Tradeport and parts of the Town of Newington. CR at 5, 11-12, 98, 370, 418. Contaminating the wetland can reach the drinking water aquifer, and hence the drinking water system.

C. Million Air's proposed project poses specific threats of contamination via the wetland area.

The hydrological and geological makeup at Pease means that any potential contamination of the wetland at Million Air's chosen site can reach the connected surface and drinking water resources. At Pease, chemicals can easily reach subsurface water. A US Air Force assessment

> illustrates the vulnerability of the subsurface to contamination due to the underlying permeable sand and gravel present in the area of Pease Tradeport. Contamination entering the subsurface from a release or discharge to surface areas such as the wetland adjacent to the proposed project site could spread both vertically into a deeper groundwater zone and horizontally a considerable distance along a groundwater flow paths.

CR at 791.

Million Air's operations pose several contamination risks, including jet fuel spills and leaks and deicing with glycol. CR at 7, 101.

Million Air could also cause contamination before it pumps one gallon of fuel or deices its first aircraft by disturbing preexisting contamination at the site. CR at 371 ("Disturbing the soil to build a road and facility can stir contaminants into the aquifer, Hodgson Brook, the North Mill Pond and beyond.").

The Air Force, which tests groundwater at and around this site, found per- and polyfluorinated substances ("PFAS") concentrations of more than ten times the current acceptable aqueous standard. CR at 434 (graphic with red dots indicating results of 10+ times acceptable standard). *See also id.* at 67 ("PFAS compounds have been detected in multiple overburden groundwater wells surrounding [Million Air's proposed project location] at concentrations greater than 10 times the New Hampshire Aqueous Groundwater Quality Standard (NHAGQS).") (citations omitted). The proposed project location is also within the chemical plume of a designated Superfund site. *Id.* at 434.

D. Million Air's project, if allowed, will injure Port City Air.

Million Air's construction and operations threaten the wetland by disturbing preexisting contaminants and adding more contamination through jetport operations. If Million Air contaminates the wetland, it risks contaminating Port City Air's adjacent, downgradient premises, triggering cleanup and indemnification obligations to the PDA. CR at 4.

More importantly, contaminating the wetland risks the drinking water aquifer and the surface water resources to which the wetland connects. That risk is so significant that a hydrologist has opined that, beyond the construction risk, Million Air's jetport operations

> could result in a contaminant release that would jeopardize the quality of the wetland, surface water, and groundwater in this proven high value resource area below, downstream and downgradient of the project site. For these reasons, the impact of this project must be viewed in regional as well as local perspective.

CR at 84. Should that happen, Port City Air is one of the drinking water customers who would be impacted. CR at 230 (lease discussing payment of water and sewer utility). Other injured persons, including governmental bodies, are likely to make claims against both aviation-related entities. *Id.* Port City Air would be left trying to prove that Million Air was the contaminator and not Port City Air.

Damage to the wetland may trigger Port City Air's indemnity obligations to the PDA, or at least a claim under those obligations. Port City Air owes duties of indemnity to the PDA for, among other things, any claims, fines, liabilities, and losses related to Port City Air's "discharges, emissions, spills, releases, storage, or disposal of any Hazardous or

Regulated Substances . . . or any other act or omission by [Port City Air]. . . ." CR at 4; *id.* at 203 (Port City Air's lease). The Pease Development Authority has been sued before on environmental issues. *Conservation L. Found., Inc.*, 2017 WL 4310997 at *1 (summarizing Clean Water Act claims against Pease Development Authority). That history highlights the risk of environmental issues and claims concerning Pease Tradeport, and hence the heightened risk of a claim under Port City Air's indemnity.

E. Dispute over the amount of wetland that Million Air will impact.

There is also a base-level dispute about how much wetland Million Air would impact to build its roadway through and on top of the wetland. A 1990 study shows the wetland at issue as a large, single body. CR at 6; *id.* at 54 (drawing depicting wetland). A 2017 study done by a different would-be developer shows similar contours to the 1990 study and supports a significantly different conclusion about the amount of wetland that Million Air would impact. *Id.* at 6; *id.* at 55 (depicting wetland).

Million Air claims the wetland is much smaller than the other studies show. CR at 6; *id.* at 56. Million Air claims that the wetland bifurcated in the exact location where Million Air wants to pave a road. *See id.* at 56-57 (Million Air drawings showing bifurcated wetland and proposed roadway).

In addition to the wetland discussed above, Million Air's proposed site also contains a large seasonal ponding area that might also be wetlands, but Million Air does not acknowledge it as a wetland. CR at 58-59; *id.* at 468 (overlay of National Wetlands Inventory Database graphical data and Million Air's proposed project footprint).

The wetland's size—and how much will be impacted—matters. Applicants seeking to make larger scale impacts must go through additional, protective steps in the permitting process. CR at 60 (citing Env-Wt 311.10; Env-Wt 311.03). If the 1990 and 2017 studies are correct, Million Air would have thousands more square feet of wetlands impact than Million Air claims. If the seasonal ponding area is a wetland, the total impact would be several more thousands of square feet. The wetlands are high value, given the drinking and surface water connections, making it even more important to know the exact area of wetlands impact and to deploy the additional, protective steps.

F. Procedural history.

Million Air applied to the Department of Environmental Services Wetlands Bureau for a wetlands permit. While Million Air gave abutter's notices to other tenants, it did not provide an abutter's notice to Port City Air, which is the closest abutter to the proposed facility. CR at 436 (list of entities receiving notice of wetland permit application).

The City of Portsmouth Conservation Commission, acting in an advisory capacity, raised significant concerns about the proposed project, including that the wetland setbacks at Pease are inadequate to protect the wetland and that the project proposes to store jet fuel and glycol near wetlands. CR at 7-8. The Commission unanimously voted to recommend that the Wetlands Bureau deny Million Air's application. *Id.* at 8.

The Wetlands Bureau then held a public listening session. *See* CR at 320-66 (transcript of session). The session was not an evidentiary hearing; no findings of fact were made or required as a result of the session. *See*

RSA 482-A:8 (defining public listening sessions); Env-Wt 202.03 (department applies rules for non-adjudicative proceedings). The Bureau issued a permit. CR at 24. Port City Air, an abutter, appealed. *Id.* at 2. Million Air intervened in the case and moved to summarily dismiss the appeal, claiming that Port City Air lacked standing to appeal because it was a tenant—not a landowner. *Id.* at 51 (motion to intervene); *id.* at 179 (motion for summary dismissal). Port City Air timely objected, but the Wetlands Council, without a hearing or vote, and acting through the Hearing Officer, (Zachary Towle, Esq.) dismissed the case based on standing.[4] CR at 681; Add. at 46-51 (order dismissing appeal). Port City Air timely moved for reconsideration/rehearing but the Council denied the motion. CR at 687; *id.* at 772; Add. at 52-58 (order denying motion for reconsideration/rehearing). This appeal followed.

[4] In 2022, the Wetlands Council docket shows nineteen total appeals. Of those cases, Port City Air's case is one of nine cases that were summarily dismissed on standing grounds. For cases docketed in 2022, that is a nearly 50% dismissal rate on just standing grounds. *See* https://www4.des.state.nh.us/Legal/index.html?jump=Appeals/Wetlands%20Council and search docket numbers beginning "22" (last visited Sept. 27, 2023).

SUMMARY OF THE ARGUMENT

THE WETLANDS COUNCIL ERRONEOUSLY INTERPRETED RSA 482-A:9 AND A:10 TO PRECLUDE INJURED TENANTS FROM APPEALING WETLANDS PERMITTING DECISIONS.

The Wetlands Council is the only forum to appeal wetlands permitting decisions. RSA 21-O:5-a, V. "Abutting landowners" can appeal. RSA 482-A:9-10. Dictionary definitions, other statutes, and New Hampshire case law all point to "landowners" including tenants. The Wetlands Council erred by ruling that Port City Air, a long-term commercial tenant that, in most respects, acts as the property owner, is not a "landowner" and therefore cannot appeal an injurious wetlands permit. Unless the statutes are construed to avoid denying a hearing to tenants who have due process rights, the statues are unconstitutional.

IF RSA 482-A:9 AND A:10 EXCLUDE TENANTS FROM THE WETLANDS COUNCIL PROCESS, THOSE STATUTES ARE UNCONSTITUTIONAL.

Port City Air has state and federal due process rights that were triggered when the Wetlands Bureau issued a wetlands dredge and fill permit that injured Port City Air. If RSA 482-A:9 and A:10 deny standing to Port City Air, those statutes violate Port City Air's due process rights by denying it a hearing to challenge the injury-causing wetlands permit.

THE WETLANDS COUNCIL ERRED IN SUGGESTING THAT PORT CITY AIR LACKED SUFFICIENT INJURY TO BE AGGRIEVED.

State and federal law set a low threshold to establish an injury that triggers due process rights. Port City Air faces tangible injury if Million Air is permitted to do the work allowed by the wetlands permit. The Wetlands Council erred in suggesting that Port City Air failed to meet the requisite showing of injury.

ARGUMENT

THE WETLANDS COUNCIL ERRONEOUSLY INTERPRETED RSA 482-A:9 AND A:10 TO PRECLUDE INJURED TENANTS FROM APPEALING WETLANDS PERMITTING DECISIONS.

A. Rules of statutory interpretation.

This question requires the Court to interpret RSA 482-A:9 and A:10, which it does *de novo*. *In re G.G.*, 166 N.H. 193, 195 (2014). The Court "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." *Petition of New Hampshire Div. for Child., Youth & Fams.*, 170 N.H. 633, 639 (2018) (hereinafter "*DCYF*") (citing *In re G.G.*, 166 N.H. at 195). The Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *DCYF*, 170 N.H. at 639 (citing *In re G.G.*, 166 N.H. at 195). The Court "do[es] not consider words and phrases in isolation, but rather within the context of the statute as a whole." *DCYF*, 170 N.H. at 639 (citing *In re G.G.*, 166 N.H. at 195). Importantly, the Court interprets statutes to avoid an unconstitutional result. *Deere & Co. v. State*, 168 N.H. 460, 470 (2015) (quoting *Alliance of Auto. Mfrs. v. Gwadosky,* 430 F.3d 30, 35 (1st Cir. 2005) ("Throughout, we keep in mind the elementary rule that every reasonable construction must be resorted to in order to save a statute from unconstitutionality.").

B. Statutory scheme at issue.

RSA chapter 21-O is the Department of Environmental Services' enabling statute. It establishes several councils, each of which hears appeals of permitting, enforcement, and other decisions by DES. RSA 21-O:5-a, -O:7, -O:9, -O:11. The Wetlands Council hears "all administrative appeals from department decisions made under RSA 482-A," and a wetlands permit is an example of such a department decision. RSA 21-O:5-a, V. DES' enabling statute contemplates that "[a]ny person aggrieved by a department decision" may appeal to the relevant council. RSA 21-O:14, I-a.(a).

RSA chapter 482-A, which governs water management and protection, interplays with DES' enabling statute. RSA chapter 482-A is designed and intended to protect the state's wetlands and the interests of the general public. RSA 482-A:1. Like RSA 21-O:14, I-a.(a), RSA 482-A:10 provides:

> [a]ny person aggrieved by a decision made by the department under RSA 482-A:3 may appeal to the wetlands council and to the supreme court . . . . 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:9 lists who must receive notice of a wetlands permit application. As relevant here, the list includes "abutting landowners," which the statute does not define.

C. The statutes' plain and ordinary meaning should result in a ruling that tenants are "abutting landowners".

A "landowner" is "one who owns land." LANDOWNER, BLACK'S LAW DICTIONARY (11th ed. 2009); LANDOWNER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) ("an owner of land"). An "owner" is "[o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested." OWNER, BLACK'S LAW DICTIONARY (11th ed. 2019); OWNER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 1986) ("to possess, take possession of," and "one that has the legal or rightful title whether the possessor or not"). To "own" is "[t]o rightfully have or possess as property; to have legal title to." OWN, BLACK'S LAW DICTIONARY (11th ed. 2019); OWN, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) ("to have or hold as property or appurtenance : have a rightful title to, whether legal or natural : possess"). Taking those definitions together, a landowner is a person with property rights—not just a fee-simple interest.

Statutes around the country reinforce that "landowner" includes people other than fee-simple interest holders. *See, e.g.,* VA Code Ann. § 29.1-509 ("'Landowner' means the legal title holder, any easement holder, lessee, occupant or any other person in control of land or premises, including railroad rights-of-way."); Tenn. Code Ann. § 70-7-101 ("'Landowner' means the legal title holder or owner of such land or premises, or the person entitled to immediate possession of the land or premises, and includes any lessee, occupant or any other person in control of the land or premises;"); Colo. RSA § 13-21-115(7)(b) ("'Landowner' means, without limitation, an authorized agent or a person in possession of

real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property."). *See also* O.R.S. § 105.672 (4)(a) (defining "owner" to mean "[t]he possessor of any interest in any land, including but not limited to the holder of any legal or equitable title, a tenant, a lessee, an occupant, the holder of an easement, the holder of a right of way or a person in possession of the land…."). A court has interpreted Colo. RSA § 13-21-115(7)(b) "to be no more expansive than the common law definition." *Wark v. United States*, 269 F.3d 1185, 1188 (10th Cir. 2001). If Colorado's broad statutory definition is coextensive with common law, then the term "landowner" necessarily includes tenants.

A New Hampshire statute also defines "landowner" to include tenants. RSA § 212:34 defines "landowner" as

> an owner, lessee, holder of an easement, occupant of the premises, or person managing, controlling, or overseeing the premises on behalf of such owner, lessee, holder of an easement, or occupant of the premises, including the state or any political subdivision.

Given the Wetlands Council's enabling statute created a single forum for all aggrieved persons to appeal, the plain and ordinary meaning of the term "landowner," and the term's use and definition in other statutes, the Court should rule that tenants are landowners and hence have standing to appeal wetlands permit decisions to the Wetlands Council. The Wetlands Council erred in ruling otherwise.

D. New Hampshire case law confirms that tenants, and Port City Air specifically, qualify as "landowners" under RSA chapter 482-A.

This Court has already defined "landowner" to include more than just fee-simple interest holders. In *Appeal of Michele*, the Supreme Court interpreted wetlands-related statute RSA 482-A:11. That case involved an argument over whether a permit applicant, who had a non-possessory easement, qualified as a "landowner" to obtain a dock permit to build a dock in the pond. 168 N.H. at 100-101. The appellants claimed that "ownership" and "landowner-applicant," as used in the statute, mean that only fee owners can apply for a dock permit. *Id.* at 101.

The Supreme Court noted that the statute does not define the terms "ownership" or "landowner-applicant," so it looked to the terms' "common usage, using the dictionary for guidance." *Id.* at 102 (quoting *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 185 (2014)). The Court viewed the statute's lack of definition as intending a broad definition. *Id.* at 103 ("[w]e see no reason, however, to limit the meaning of the terms when the legislature did not see fit to do so."). The Court concluded that "'ownership,' as used in the statute, neither is limited to fee ownership nor requires possession." *Id.* at 103. The Court determined that the holder of a non-possessory easement constituted an "owner" for purposes of the statute. *Id.*

Conversely, the Court has held that a holder of a right-of-entry does not qualify as a "landowner". *Appeal of Town of Lincoln*, 172 N.H. 244, 249 (2019). In *Town of Lincoln*, the town did not own a levee, but had a right of entry to enter the land and perform construction work. *Id.* at 245.

The town made certain assurances the Army Corps of Engineers, who repaired the levee, including an assurance that the town would operate and maintain the restored levee. *Id.*

The issue in the case was whether the town was an "owner" of the levee pursuant to RSA 482:11-a, which concerns dam/levee maintenance. DES contended that the right of-entry and assurances made by the Town to the federal government were enough to qualify as "ownership" under RSA 482:11-a. *Id.* at 250.

The Court ruled that the town was not an owner, largely because it did not have exclusive use of the levee. *Id.* at 249. The Court distinguished the town, which had a limited, nonexclusive right-of-entry for a limited purpose, from the dock applicant in *Michele* who had "the legal right to the 'exclusive use' of the subject land 'for whatever purposes they may desire.'" *Id.*

The Court summarized its distinction by using the "bundle of sticks" metaphor:

> To employ the traditional law school metaphor of a "bundle of sticks" representing property rights, here the Town holds but one stick out of the bundle. By comparison, the easement holders in *Michele* held nearly all of the sticks in the bundle — the fee owners retained no rights of use or control over the lakefront property, having transferred those rights to the easement holders. *See Michele*, 168 N.H. at 100, 123 A.3d 255. Thus, in contrast to *Michele*, the Town's "single stick" is not a sufficient ownership interest to deem it "[t]he owner" under RSA 482:11-a. Simply put, the Town "owns" an easement, it does not "own" the levee.

Town of Lincoln, 172 N.H. at 253. That rationale highlights that being a "landowner" does not turn on having a fee-simple interest. Rather, the

Court determines whether a party holds enough sticks out of the bundle. Exclusivity, rights of use, and rights of control are important sticks to hold.

Port City Air qualifies as a landowner because it has rights like the easement holder in *Michele*. Port City Air leases Hangar 229 for its exclusive use for Port City Air's business purposes. CR at 199 (lease defining leased premises); *id.* at 220 (permitted uses).[5] Port City Air pays municipal service fees and, if ever assessed, municipal taxes. *Id.* at 211 (Lease § 4.7); *id.* at 215 (Lease § 5.1). As far as title to the buildings, the lease provides that, during the term of the lease:

> title to any buildings or improvements situated or erected on the Leased Premises and the building equipment and other items installed thereon and any alteration, change or addition thereto shall remain solely in Lessee . . . .

CR at 205 (Lease § 1.(A.)5).

Although Port City Air is a tenant, it is listed on the City of Portsmouth's tax cards for at least one portion of the parcel abutting Million Air's proposed project location. CR at 455. This fits with other tenants at Pease, including two other tenants who received abutter's notices of this project. *Id.* at 438 (deed to Spyglass Development LLC for building only—not land); *id.* at 441 (Portsmouth tax card for Spyglass*); id.* at 445 (assignment of lease to Cinthesys Real Estate Management LLC); *id.* at 451 (Portsmouth tax card for Cinthesys); *id.* at 436 (listing of entities receiving abutter's notices).

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[5] Port City Air also has non-exclusive use of surrounding apron area that is not part of the leased premises. *See id.*

In all material respects, Port City Air acts as the landowner. It has exclusivity, control, and tax obligations. Those metaphorical sticks make up most of the bundle and align Port City Air with the easement holder in *Michele*, and distinguish Port City Air from the nonexclusive right-of-entry holder in *Town of Lincoln*.

The Wetlands Council erred by ruling that Port City Air does not qualify as a "landowner" under RSA 482-A:9; it also erred by ruling that Port City Air lacks standing to appeal the issuance of Million Air's wetlands permit. Add. at 51. On this review, the Court should interpret "landowner," in the context of RSA 482-A:9 and A:10, to include tenants like Port City Air, rule that Port City Air has standing to appeal Million Air's permit, and reverse the Wetlands Council's orders dismissing Port City Air's appeal.

E. Interpreting "landowner" to include tenants avoids a constitutional conflict.

The Court interprets statutes to avoid an unconstitutional result. *Deere & Co.*, 168 N.H. at 470 (quoting *Gwadosky,* 430 F.3d at 35) ("Throughout, we keep in mind the elementary rule that every reasonable construction must be resorted to in order to save a statute from unconstitutionality."). As explained below, denying standing to Port City Air, and tenants in general, denies a class of persons who become injured by wetlands permits the ability to petition the Wetlands Council. *Infra* at 34-39. RSA 21-O:5-a, V makes clear that the Wetlands Council is the only forum to challenge the issuance of wetlands permits that injure them, so

barring injured parties from participating denies their only opportunity for due process rights.

Denying standing to injured persons violates state and federal constitutional protections. As explained above, there is a reasonable, supportable construction of the statute that avoids an unconstitutional outcome. *Supra* at 27-32 (discussing statutory interpretation). The Court should endorse that interpretation to avoid an unconstitutional result.

IF RSA 482-A:9 AND A:10 EXCLUDE TENANTS FROM THE WETLANDS COUNCIL PROCESS, THOSE STATUTES ARE UNCONSTITUTIONAL.

A. Standard of review.

The Court reviews the constitutionality of a statute *de novo*. *Deere & Co.*, 168 N.H. at 471 (citing *Am. Fed'n of Teachers—N.H. v. State of N.H.,* 167 N.H. 294, 300 (2015)). Port City Air bears the burden of proof to demonstrate that the statutes are unconstitutional. *Id.* The Court only holds a statute to be unconstitutional if there is a clear and substantial conflict between the statute and the constitution. *Id.* "When doubts exist as to the constitutionality of a statute, those doubts must be resolved in favor of its constitutionality." *Id.*

B. The statute violates Port City Air's state due process rights.

Since the government issued a wetlands permit that injures Port City Air, Port City Air has a right to redress. The New Hampshire Constitution provides:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

N.H. Const. Pt. 1, Art. 14th.

Corporate entities are entitled to New Hampshire's procedural due process protections. *See Petition of Whitman Operating Co., LLC*, 174 N.H. 453, 461 (2021) (considering procedural due process claim brought by related companies). Due process rights attach to administrative matters, as well as court cases. *Appeal of Lawson Grp.*, 175 N.H. 397, 404 (2022) (discussing procedural due process in context of action by New Hampshire Compensation Appeals Board); *Petition of Grimm*, 138 N.H. 42, 46 (1993) (discussing procedural due process in context of action by Board of Examiners of Psychologists).

The permit's issuance injured Port City Air within the meaning of N.H. Const. Pt. 1, Art. 14th. Port City Air is required to show that its "own rights have been or will be directly affected." *State v. Actavis Pharma, Inc.*, 170 N.H. 211, 214 (2017) (quoting *Eby v. State*, 166 N.H. 321 (2014)). The permit allows Million Air to engage in construction and operations that pose a substantial risk of contaminating Port City Air's leased premises. *See supra* at 19-20 (discussing risks to Port City Air). Million Air could also harm surface water and drinking water resources, affecting the public. If that happens, Port City Air is harmed because it is connected to the public water supply. *See supra* at 19-20. Additionally, if Million Air

harms these resources, Port City Air faces exposure under its indemnification obligations to the PDA.

Since Port City Air was injured, it has a right to resort to the laws. By statute, the Wetlands Council is the only forum to appeal a wetlands permit. RSA 21-O:5-a, V. Since the Wetlands Council is the only possible forum, if RSA 482-A:9 and A:10 deny injured persons like Port City Air standing to appeal, the statute denies due process rights.

If the laws only permit the Wetlands Council to hear arguments to overturn a wetlands permitting decision, and the statute deprives injured persons like Port City Air of standing, then the statutory scheme is unconstitutional.

C. The statute violates Port City Air's federal due process rights.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "**nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added).

That right entitles injured persons with the right to a hearing "at a time when the deprivation can still be prevented," because "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." *Fuentes*, 407 U.S. at 81-82.

As with New Hampshire's due process rights, federal due process rights attach to corporations. *Covington & L. Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896). They also attach to administrative processes.

Eldridge, 424 U.S. 319 (deciding challenge of administrative agency's hearing process based on due process challenge).

To show federal standing, a party must show injury in fact, which can be as insignificant as "a 'small' stake in the outcome". *Conservation L. Found., Inc.*, 2017 WL 4310997 at *14 (citing *Dubois*, 102 F.3d at 1281). In fact,

> [t]he Supreme Court has held "that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are 'persons for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."

Conservation L. Found., Inc., 2017 WL 4310997 at *14 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183, (2000)). *See also id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972), and citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992) ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.")). In that *Conservation Law Foundation* order, The Court held that a nonprofit that does not own land at Pease Tradeport had standing to bring Clean Water Act claims. *Id.* at *2, *16.

For the same reasons discussed above, Port City Air meets the injury-in-fact test. *See supra* at 19-20 (threat of contamination to leased premises; threat of large indemnity exposure; and threat to public water supply).

For standing to seek redress in federal courts, parties asserting standing must show causation and redressability. To the extent those elements are relevant to standing before a state agency, they are readily

met. As discussed in this brief, Million Air's wetlands permit injures Port City Air. Port City Air has ample evidence to provide the Wetlands Council in favor of overturning the permit, but RSA 482-A:9 and A:10 deny Port City Air the opportunity to even challenge the permit. Those statutes are the cause of Port City Air's ongoing deprivation. A favorable resolution of this claim would give Port City Air access to the only forum that can overturn the permitting decision in the first instance.

RSA 482-A:9 and A:10 caused Port City Air's deprivation. Had the statute included tenants who suffer an injury in fact, Port City Air would have had statutory standing to appeal to the Wetlands Council and raise its concerns in favor of reversing the Wetlands Bureau's permitting decision. Ruling RSA 482-A:9 and A:10 unconstitutional and overturning the Wetlands Council's dismissal will allow Port City Air to proceed with its challenge to the wetlands permit. Port City Air does not need to show, at this stage, that it would succeed on the merits before the Wetlands Council. *Katz v. Pershing, LLC*, 672 F.3d 64, 72 (1st Cir. 2012) (quoting *Antilles Cement Corp. v. Fortuño*, 670 F.3d 310, 318 (1st Cir. 2012)) ("To [show redressability], the plaintiff 'need not definitively demonstrate that a victory would completely remedy the harm.'"). Even so, Port City Air has demonstrated compelling concerns and evidence of injury.

D. The hearing process denied Port City Air its due process rights.

A related issue is whether the administrative hearing process—the only way to challenge a wetlands permit's issuance—violated Port City Air's due process rights. Port City Air meets the requirements to show that

the hearing process violated Port City Air's state and federal due process rights.

New Hampshire employs a two-prong analysis to determine whether an administrative hearing process creates a due process violation. First, the Court considers whether a legally protected interest has been implicated; second, the Court evaluates whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest. *In re Kilton*, 156 N.H. at 637 (citing *Appeal of Town of Bethlehem*, 154 N.H. 314, 328, (2006)).

Similarly, the federal test evaluates the private interest that will be affected by the official action; the risk of erroneous deprivation of such interest through procedures used and probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and fiscal and administrative burdens of additional of substitute procedural requirements. *Eldridge*, 424 U.S. at 335.

Port City Air satisfies the state and federal tests. As explained above, it has a legally protected interest as an abutting long-term tenant making long-term investments in improvements to its facility, particularly given its environmental indemnity and the risk that Million Air's construction and operations in and near these wetlands will trigger that indemnity. The hearing process, if the summary dismissal stands, would not provide an adequate safeguard against a deprivation of Port City Air's (or any commercial tenant's) rights. Port City Air was not afforded an adjudicatory hearing at the permitting stage. Unlike other situations, Port City Air does not seek a new or different hearing process; rather, it seeks access to the already-established Wetlands Council appeals process. There

are no additional procedural burdens, as the hearing process established by statute and regulation is already in place.

Following the state and federal balancing tests, Port City Air has a deprivation of rights and a right to an adjudicatory hearing. The hearing process already exists. Weighing the harm to Port City Air against the low administrative burden, there can be no question that Port City Air would suffer a constitutional deprivation if the hearing process denied it access.

THE WETLANDS COUNCIL ERRED BY SUGGESTING THAT PORT CITY AIR LACKED SUFFICIENT INJURY TO BE AGGRIEVED.

Port City Air faces much more harm than the small degree required to trigger state and federal due process rights. Under state law, Port City Air must have "suffered a legal injury against which the law was designed to protect." *Libertarian Party of New Hampshire*, 158 N.H. at 195-96 (citing *Asmussen*, 145 N.H. at 587 (quotations and brackets omitted)). Here, RSA 21-O:5-a, V provides an exclusive remedy of appeal to the Wetland Council to challenge injurious permits, and the permit is injurious to Port City Air.

Federally, "a 'small' stake in the outcome" suffices. *Conservation L. Found., Inc.*, 2017 WL 4310997 at *14 (citing *Dubois*, 102 F.3d at 1281). Even esthetic concerns are enough. *Conservation L. Found., Inc.*, 2017 WL 4310997 at *14 (citing *Friends of the Earth, Inc.*, 528 U.S. at 183).

Million Air's proposed project poses a direct risk to Port City Air. The project risks disturbing contaminants already in a wetland, and risks

adding new contamination to the wetland. Port City Air is downgradient of that wetland, so its leased parcel risks becoming contaminated. CR at 4. Port City Air owes duties of indemnity to the PDA for, *inter alia*, any claims, fines, liabilities, and losses related to Port City Air's 'discharges, emissions, spills, releases, storage, or disposal of any Hazardous or Regulated Substances . . . or any other act or omission by [Port City Air] . . . ." CR at 4; *id.* at 203 (Port City Air's lease). Proving that Million Air caused new contamination at Port City Air's facility would be a costly endeavor, if it is even possible.

Beyond construction disturbing preexisting contamination in the wetland, Million Air's operations pose several contamination risks, including jet fuel spills and leaks and deicing with glycol. CR at 7, 101. The wetland is connected to a drinking water source that is currently in use. The natural connection is underscored by Gosling Station's presence in and around the wetlands.

The risk of contamination to the wetland spreading to surface and drinking water is serious; a hydrologist has opined that, beyond concerns with Million Air's construction, Million Air's operations

> could result in a contaminant release that would jeopardize the quality of the wetland, surface water, and groundwater in this proven high value resource area below, downstream and downgradient of the project site. For these reasons, the impact of this project must be viewed in regional as well as local perspective.

CR at 84. Should that happen, Port City Air is one of the drinking water customers who would be impacted. CR at 230 (lease discussing payment of water and sewer utility).

Other injured persons seeking redress for drinking or surface water damage from aircraft-related chemicals are likely to make claims against Million Air and Port City Air, as the two aviation-related entities near the wetland. *Id.* Port City Air would be left trying to prove that Million Air was the contaminator and not Port City Air.

The wetland is connected to surface water resources, including Hodgdon Brook, the North Mill Pond, and the Piscataqua River. CR at 68. If Million Air damages those water resources and impacted people make claims, including the PDA potentially claiming under the indemnity, Port City Air faces the same risk of needing to prove that Million Air caused the problem.

Port City Air has more than the requisite harm to trigger state and federal due process protections. The Wetlands Council erred in ruling otherwise. CR at 777.

CONCLUSION

The legislature created one forum to challenge wetlands permitting decisions. "Any person aggrieved by a department decision" is supposed to be able to appeal to the relevant council. RSA 21-O:14, I-a.(a). RSA 482-A:9's use of the term "landowners" should be construed to include tenants because tenants can be injured in a way that triggers due process rights. The rules of statutory construction and due process principles support interpreting "landowner" to include tenants.

Any other outcome would mean that tenants, including commercial tenants who invest millions of dollars in their facilities, would have no recourse to challenge a wetland permit that harm them, which violates state

and federal due process rights. It would create two classes of abutters: fee-simple holders who can appeal and tenants who, in almost all respects, appear as landowners but who cannot appeal. At Pease Tradeport, it would mean that none of the 230+ tenants, some of whom have invested many millions of dollars in their property, could appeal a wetland permitting decision, no matter how much injury it causes them.

The Court should rule that Port City Air, as a tenant, qualifies as a "landowner" as that term is used in RSA 482-A:9. It should reverse the Wetlands Council's orders and remand the case for a hearing on the merits of Port City Air's case.

REQUEST FOR ORAL ARGUMENT

Port City Air requests fifteen minutes of oral argument before the full Court, to be argued by Jacob Marvelley.

COPY OF EACH DECISION BEING APPEALED

The following documents are included in an addendum to this brief:

1. New Hampshire Department of Environmental Services Wetlands Council's Order on Intervenor Pease Aviation Partners LLC d/b/a Million Air Portsmouth's Motion for Summary Dismissal of Port City Leasing, Inc.'s Appeal, dated January 30, 2023. Add. at 46.

2. Order on Port City Air Leasing, Inc.'s Motion for Reconsideration and Rehearing, dated April 12, 2023. Add. at 52.

CERTIFICATE OF COMPLIANCE WITH RULE 16(3)(1)

The undersigned hereby certify that each appealed decision that is in writing is being submitted at the time of this brief's filing in an addendum attached to this brief.

CERTIFICATE OF COMPLIANCE WITH RULE 16(11)

The undersigned hereby certify that this brief complies with the 9,500-word limitation and that the relevant sections of this brief contain 8,688 words.

Respectfully submitted,
PORT CITY AIR LEASING, INC.

By and through its attorneys,

HOEFLE, PHOENIX, GORMLEY & ROBERTS, PLLC

Dated: September 27, 2023

/s/ Jacob Marvelley

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief will be timely served via the electronic filing service on counsel of record.

Dated: September 27, 2023

/s/ Jacob Marvelley
Jacob Marvelley, NH Bar #20654
Daniel Hoefle, NH Bar #1170

ADDENDUM

TABLE OF CONTENTS

STATE OF NEW HAMPSHIRE
WETLANDS COUNCIL

DOCKET NO. 22-10 WtC

IN RE: PORT CITY AIR LEASING, INC. APPEAL

ORDER ON INTERVENOR PEASE AVIATION PARTNERS LLC d/b/a MILLION AIR PORTSMOUTH'S MOTION FOR SUMMARY DISMISSAL OF PORT CITY LEASING, INC.'S APPEAL

ORDER: MOTION GRANTED

On July 15, 2022 Port City Air Leasing, Inc. ("Port City"), through its representatives, filed a Notice of Appeal with the Wetlands Council (the "Council") requesting the Council remand the Wetlands and Non-Site Specific Permit 2021-03615 (the "Permit") which the State of New Hampshire Department of Environmental Services ("NHDES") issued to Pease Aviation Partners LLC d/b/a Million Air Portsmouth ("Million Air") on June 16, 2022. On November 1, 2022 Million Air filed a Motion for Summary Dismissal, to which Port City objected on November 11, 2022. On November 15, 2022 NHDES filed a response to Port City's objection; on November 18, 2022 Million Air filed a reply to Port City's objection; and on December 1, 2022 Port City filed a surreply to NHDES's and Million Air's replies.

LEGAL STANDARD

A statute's meaning is first interpreted from the language used. See McKenzie v. City of Berlin, 145 N.H. 467, 470 (2000). Undefined statutory language is given its plain and ordinary meaning, but the intent of the legislature must be considered through examination of a statute as a whole. See Cross v. Brown, 148 N.H. 485, 486 (2002). A statutory provision must be construed in a manner "consistent with the spirit and objectives of the legislation as a whole." Stablex Corp. v. Town of Hooksett, 122 N.H. 1091, 1102 (1982), quotation omitted. Statutes are interpreted "in the context of the overall statutory scheme and not in isolation." Energy North Natural Gas, Inc. v. City of Concord, 164 N.H. 14, 16 (2012). "Where reasonably possible, statutes should be construed as consistent with each other." Appeal of Derry Educ. Assoc., 138 N.H. 69, 71 (1993). "When interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Appeal of Campaign for

Ratepayers Rights, 142 N.H. 629, 631 (1998), quotation omitted. "To the extent two statutes conflict, the more specific statute controls over the general statute." Ford v. N.H. Dep't of Transp., 163 N.H. 284, 293–94 (2012).

DISCUSSION

STANDING:

Standing before the Council is statutorily defined in RSA § 482-A:10, I:

> Any person aggrieved by a decision made by the department under RSA 482-A:3 may appeal to the wetlands council and to the supreme court as provided in RSA 21-O:14, including the provisions relative to requesting mediated or unmediated settlement discussions. 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 § 21-O:14, I-a(a) reflects the language used in RSA § 482-A:10, I, as well as the other relevant statutes which authorize appeals before the other NHDES Councils. See e.g. RSA § 485:29; RSA § 147-A:15, I; RSA § 125-C:12, III; RSA § 489:10. Port City appears to argue that "person aggrieved" in RSA § 21-O:14, I-a(a) establishes a basis for standing before the Council, and that such language should be interpreted through a plain reading of the text and with the application of the plain and ordinary meaning of the words. See Port City Air's Memorandum Objection to Million Air's Motion for Summary Dismissal [hereafter "Port City's Objection"] pp. 10-11. Such an interpretation is unnecessary in the present matter. RSA § 482-A:10, I clearly establishes what a "person aggrieved" constitutes for the purposes of appealing a NHDES decision under RSA § 482-A:3 to the Council. There is nothing to indicate that the use of the language "person aggrieved" in RSA § 21-O:14, I-a(a) is intended to supplant or expand who has standing to appeal a NHDES decision under RSA § 482-A:3. RSA § 21-O:14, I-a(a) defines the administrative appeal process for all of the NHDES Councils, while RSA § 482-A:10 establishes appellants' ability to utilize RSA § 21-O:14 for the purposes of appealing a NHDES decision under RSA § 482-A:3: these statutes may be read in a manner consistent with each other and in a manner which supports the legislature's intent. To the degree, if any, RSA § 21-O:14, I-a(a) conflicts with RSA § 482-A:10, I regarding the application of the term "person aggrieved" and the standing requirements for an appeal to the Council, RSA § 21-O:14, I-a(a) is the more general statute and therefore the more specific language of RSA § 482-A:10, I controls.

Accordingly, the only relevant method for Port City to have standing before the Council and to pursue an appeal pursuant to RSA § 21-O:14 is to qualify as a "person aggrieved" as defined in RSA § 482-A:10. For Port City, the only method to qualify as a "person aggrieved" is to qualify as an abutting landowner as stated in RSA § 482-A:9.

Port City contends it qualifies as a 'landowner' because it possesses a long-term lease with the Pease Development Authority ("PDA"). See Port City's Objection, p. 1; see also Million Air's Motion to Dismiss, Exhibit A, Lease Between Pease Development Authority as "Lessor" and Port City Air Leasing, Inc. as "Lessee" (hereafter the "Lease") p. 3, Article 1.1 ("[the PDA] . . . leases to [Port City] . . . the land, buildings and other facilities and improvements located in the . . . Airport Zone . . . ."). The Airport Zone property for which Port City holds a lease is Hangar 229, located at 12 Aviation Avenue in Portsmouth, New Hampshire. See Lease, p. 3, Article 1.1; see also Notice of Appeal, p. 2 (the Permit authorized Million Air's project on land proximate to Hangar 229). Port City further argues it qualifies as a landowner because it "pays[s] the equivalent of property taxes"; it "owns the buildings on its leased premises"; it "can pledge its interest for financing"; and it "can assign its rights (sic) the lease." Port City's Objection, pp. 11-12.

Port City's argument that it qualifies as a 'landowner' for the purposes of standing relies on a broad definition of ownership which would expand the concept of ownership to include "a person with property rights." Port City's Objection, p. 11. Port City's argument relies on caselaw regarding easements and the State of New Hampshire Supreme Court's determination that a) a statute which does not limit the meaning of the term 'ownership' may be read to encompass property interests beyond fee ownership; and b) "when there is an express grant of an easement, 'a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially.'" Appeal of Michele (New Hampshire Wetlands Council), 168 N.H. 98, 103 (2015), quoting Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). The Court ultimately determined that the easement in Appeal of Michele granted the holder sufficient interests in the relevant land to qualify as an owner under RSA ch. 482-A for the purposes of obtaining a dock permit. 168 N.H. at 104. In Appeal of Town of Lincoln, the Court further defined why the holders of the easement in Appeal of Michele qualified as owners: the easement was expansive

and "granted exclusive rights that are tantamount to fee ownership — with all of its incidental benefits and burdens." Appeal of Town of Lincoln, 172 N.H. 244, 249 (2019) (determining a limited and non-exclusive easement regarding a levee did not grant the holder ownership-equivalent status).

Port City does not possess a fee ownership interest in the relevant land. Port City does not possess an easement on PDA owned land, buildings, other facilities or improvements. Port City possesses a leasehold interest regarding property owned by the PDA. See Lease, generally. A lessee is defined as "[s]omeone who has a possessory interest in real . . . property under a lease," otherwise known as a tenant. LESSEE, Black's Law Dictionary (11th ed. 2019). A lease is defined as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration." LEASE, Black's Law Dictionary (11th ed. 2019). Unlike the easement in Appeal of Michele, the Lease includes restrictive provisions regarding Port City's rights, interests, and powers relative to the leased property. The Lease is set for an established term. See Lease, p. 11, Article 3. Port City's activities on the leased property are limited, with Port City requiring the PDA's written consent before undertaking activities not contemplated in the Lease. See Id., p. 24, Article 9. Port City's abilities to delegate its responsibilities and obligations under the Lease, to assign its rights under the Lease, and to sublease the leased properties are all limited under the Lease, either being outright denied or subject to the PDA's consent. See Id., p. 44, Articles 19.1-19.3. Port City is further barred from mortgaging its "estate" in the leased property without the PDA's consent. See Id., p. 46, Article 19.7. These limitations, along with the remainder of the Lease's terms, do not support the conclusion that the Lease grants Port City rights in the leased property which are equivalent to fee ownership- 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. Unlike in Appeal of Michele, it cannot be concluded that Port City's leasehold interest in the relevant PDA property sufficiently grants Port City exclusive rights equivalent to fee ownership. As Port City does not have a fee ownership interest in the relevant property, and Port City's leasehold interest in the property cannot be considered equivalent to a fee ownership, it cannot be concluded that Port City qualifies as a landowner. Therefore, Port City cannot be considered an abutting landowner and "person aggrieved" under RSA § 482-A:10.

Port City argues that, if it cannot qualify as a landowner, it (as well as the other lessees operating on PDA property) can never appeal a wetlands decision which occurs on PDA property, which would qualify as an "absurd and unjust result." See Port City's Objection, p. 11. This argument is uncompelling.

The purpose of the Council is to determine whether NHDES acted unlawfully or unreasonably. See RSA § 21-O:14. An argument can be made that every resident of New Hampshire has an interest in ensuring NHDES acts lawfully and reasonably, but this is not the criteria for appellant standing before the Council. RSA § 482-A:10 explicitly identifies who qualifies as a "person aggrieved"- the legislature elected to impose specific and limited qualifications as to who may be a "person aggrieved" under RSA § 482-A:10. Compare RSA § 482-A:10 and RSA § 485:29; RSA § 147-A:15, I; RSA § 125-C:12, III; RSA § 489:10 (only RSA § 482-A:10 includes a limiting definition of "person aggrieved"). 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; moreover, the legislature could have simply not included a definition of "person aggrieved" in RSA § 482-A:10, thereby, ostensibly, opening the door for debate as to whether a tenant may qualify as a "person aggrieved." The language of RSA § 482-A:10 precludes this possibility. To have standing before the Council, Port City must qualify as one of the identified interest holders identified in RSA § 482-A:10. Port City is not the applicant, the municipality, the planning board, or the municipal conservation commission: Port City's only method for standing is to prove it qualifies as an abutting landowner. As discussed above, Port City does not qualify as a landowner- it is a tenant on land owned by the PDA. Port City has further failed to articulate a compelling argument that it should qualify as a landowner. The results of adhering to statutory language and requiring Port City to meet statutory standing requirements can be neither absurd nor unjust.

Port City further argues that, if RSA § 482-A:10 precludes Port City from appealing the Permit, that Port City's due process rights under Part I, Article 14 of the New Hampshire Constitution are violated because Port City is unable to seek redress under RSA § 21-O:14 regarding the Permit. See Port City's Objection, pp. 12-14. This argument is uncompelling because RSA § 482-A:10 merely details the standing requirements for appeals to the Council; the

requirements for standing (whether defined statutorily or by common law) 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. Port City does not qualify as a "person aggrieved" under RSA § 482-A:10 and therefore is not entitled to seek the Council's determination of whether NHDES acted unlawfully or unreasonably in issuing the Permit.

CONCLUSION

As Port City does not qualify as a landowner, it cannot qualify as an abutting landowner and therefore cannot be a "person aggrieved" with standing pursuant to RSA § 482-A:10. As Port City did not qualify as a landowner, the question of whether Port City could qualify as an abutting landowner was not addressed. Likewise, the substantive claims raised by the Parties cannot be addressed due to the lack of jurisdiction. Moreover, the lack of jurisdiction precludes the Council from acting on Port City's September 9, 2022 Response to Order to Clarify, and subsequent filings, as well as Port City's September 9, 2022 Motion to Perform Delineation, and subsequent filings. Million Air's November 1, 2022 Motion for Summary Dismissal is **GRANTED**. Port City's appeal is hereby **DISMISSED**.

By order of the Hearing Officer.

/s/ Zachary Towle Date: 1/30/2023
Zachary N. Towle, Esq., NH Bar 270211
Hearings Officer, Wetlands Council

Pursuant to RSA § 541, any party whose rights are directly and adversely affected by this decision may file a motion for reconsideration with the Council within 30 days of the date of the decision.

STATE OF NEW HAMPSHIRE
WETLANDS COUNCIL

DOCKET NO. 22-10 WtC

IN RE: PORT CITY AIR LEASING, INC. APPEAL

ORDER ON PORT CITY AIR LEASING, INC.'S MOTION FOR RECONSIDERATION AND REHEARING

ORDER: MOTION DENIED

On July 15, 2022 Port City Air Leasing, Inc. ("Port City"), through its representatives, filed a Notice of Appeal with the Wetlands Council (the "Council") requesting the Council remand the Wetlands and Non-Site Specific Permit 2021-03615 (the "Permit") which the State of New Hampshire Department of Environmental Services ("NHDES") issued to Pease Aviation Partners LLC d/b/a Million Air Portsmouth ("Million Air") on June 16, 2022. On November 1, 2022 Million Air filed a motion to dismiss, and on January 30, 2023 the Council issued its Order on Million Air's Motion for Summary Dismissal of Port City's Appeal (the "Order"), dismissing Port City's appeal for lack of standing. On March 1, 2023 Port City filed a Motion for Reconsideration and Rehearing (hereafter "Motion for Rehearing") and, on March 7, 2023, Million Air filed an objection.

LEGAL STANDARD

A motion for rehearing is permitted under Ec-Wet 203.18 and RSA § 541:3.[1] An aggrieved party "may apply for a rehearing in respect to any matter determined in an action or proceeding, or covered or included in the order . . . ." RSA § 541:3. The aggrieved party is required to specify in their motion all grounds for a rehearing and must set forth fully every ground which the aggrieved party claims that the decision or order complained of is unlawful or unreasonable. RSA § 541:4. A motion for reconsideration "allows a party to present points of law or fact that the [Council] has overlooked or misapprehended." Smith v. Shepard, 144 N.H. 262, 264 (1999), quoting Barrows v. Boles, 141 N.H. 382, 397 (1996). The Council may grant a motion for rehearing if "in its opinion good reason for the rehearing is stated in the motion." RSA § 541:3. The moving party bears the burden of persuasion. See Ec-Wet 203.16(f).

[1] For the purposes of this Order, no distinction is drawn between the terms 'reconsideration' and 'rehearing.'

DISCUSSION

Port City alleges two primary issues with the Order:

1. The Council's definition of "landowner," as present in RSA § 482-A:9, is overly narrow; and
2. The Council's definition of "landowner," as present in RSA § 482-A:9, results in an unconstitutional reading of the applicable statutes.

I. DEFINING 'LANDOWNER' IN RSA § 482-A:9

Statutory standing before the Council is defined in RSA § 482-A:10, I:

> Any person aggrieved by a decision made by the department under RSA 482-A:3 may appeal to the wetlands council and to the supreme court as provided in RSA 21-O:14, including the provisions relative to requesting mediated or unmediated settlement discussions. 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:8 requires five persons be notified by mail of a public hearing: the applicant; the property owner; the local governing body of the municipality involved; the planning board; and the municipal conservation commission. RSA § 482-A:9 extends the notice requirement of RSA § 482-A:8 to "abutting landowners." To have statutory standing before the Council to appeal a NHDES decision made under RSA § 482-A:3, an appellant must qualify as one of the six persons identified in RSA § 482-A:8 and 9.

Port City contends that it qualifies as an abutting landowner. See Port City's Objection to Motion to Dismiss, pp. 1, 6, 10-12. Port City does not own the applicable land in fee simple: Port City possesses a leasehold interest in land, buildings, and other facilities owned by the Pease Development Authority ("PDA"). It is Port City's position that the possessor of a leasehold interest can qualify as a landowner for the purposes of RSA § 482-A:8. See Motion for Rehearing, pp. 4-7.

In support of its position, Port City relies on Appeal of Michele, wherein the New Hampshire Supreme Court determined that the broad scope of exclusive rights conferred by a

specific easement to the easement holders invested said holders with "a sufficient ownership interest to obtain a dock permit under RSA chapter 482-A." 168 N.H. 98, 104 (2015). The Court exercised statutory interpretation to define 'ownership' as provided in RSA § 482-A:11, II, with the Court concluding the legislature did not limit the meaning of the term to fee ownership, and therefore an easement holder could qualify as an 'owner' under the statute. See id. at 102-03.

The Court clarified its holding in Michele in Appeal of Town of Lincoln, wherein the Court stated "[t]he holding in Michele is necessarily confined to the question and facts presented in that case." 172 N.H. 244, 253 (2019). Employing the 'bundle of sticks' metaphor to represent property rights, the Court noted that the easement holders in Michele qualified as 'owners' under RSA § 482-A:11 sufficient to apply for a dock permit because they "held nearly all of the sticks in the bundle—the fee owners retained no rights of use or control over the lakefront property, having transferred those rights to the easement holders." Id. Port City contends that its leasehold interest, like the easement in Michele, encompasses such a broad scope of exclusive rights that Port City's leasehold interest should qualify Port City as a "landowner" for standing purposes under RSA § 482-A:9. See Motion for Rehearing, p. 6-7.

The holdings in Michele and Lincoln illustrate the process for determining whether Port City qualifies as a landowner under RSA § 482-A:9. First, statutory interpretation must be applied to the landowner language in RSA § 482-A:9 to determine its meaning. Second, it must be determined whether Port City, through its leasehold interest, holds a sufficient number of 'property right sticks' to qualify as a landowner as provided in RSA § 482-A:9.

The Council effectively evaluated the landowner language in RSA § 482-A:9 in the Order, concluding that the plain meaning of 'landowner' required a party to, at least, hold an interest in property equivalent to fee ownership. See Order, p. 4. Like in Michele, the landowner language in RSA § 482-A:9 is not limited to fee ownership, therefore such a limitation should not be read into the statute. Likewise, the legislature chose the term 'landowner' and elected to not include alternative property interest holders such as tenants and easement holders.

The Council further effectively evaluated whether Port City's leasehold interest granted Port City an interest in the PDA owned property equivalent to fee ownership. See id. The

Council determined that Port City's lease did not grant Port City the equivalent of fee ownership. Unlike in Michele, 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. In Michele the Court emphasized that the easement holders possessed "whatever rights are reasonably necessary to enable it to enjoy the easement beneficially." Michele, 168 N.H. at 103, quoting Arcidi v. Town of Rye, 150 N.H. 694, 701 (2004). In contrast, Port City's leasehold interest is defined in its lease with the PDA: Port City's rights to use the PDA's property are enumerated and confined. As detailed in the Order, Port City's interest in the leased property is restricted, with Port City being either prohibited from taking actions an owner in fee simple could undertake or requiring the PDA's permission before undertaking such actions. See Order, p. 4. Port City fails to sufficiently argue the Council has misapprehended the terms of Port City's lease in its Motion for Rehearing. See Motion for Rehearing, pp. 6-7.

While Port City identifies differences between the rights granted under a leasehold and an easement (see id., p. 7), these differences are not relevant to the present matter. The question posed is whether a non-fee ownership sufficiently qualifies as a fee ownership based on the interests held. Leaseholds and easements encompass different interests, but, the existence of these differences does not establish that either a leasehold or an easement can or cannot be commensurate with fee ownership. The Court in Michele clearly determined that an easement can equate to fee ownership: the present question is whether Port City's leasehold interest, specifically, can also equate to fee ownership. The distinctions noted by Port City between a leasehold interest and an easement do not support a reversal of the Order.

Port City has failed to demonstrate that the Council acted unlawfully or unreasonably in issuing the Order. The Council concludes it did not overlook or misapprehend any relevant material regarding RSA § 482-A:9; the meaning of 'landowner'; or the extent of Port City's leasehold interest. There being no good reason to reverse the Order, Port City's Motion for Rehearing is **DENIED**.

II. *PORT CITY'S DUE PROCESS RIGHTS*

Port City contends that the Council unlawfully and unconstitutionally deprived Port City of its right to be heard by denying its standing for not meeting the landowner requirement of RSA § 482-A:9. See Motion for Rehearing, p. 8. Port City asserts that "[s]tatutes defining standing can violate a person's rights if they are too underinclusive or are misapplied." Motion for Rehearing, p. 8, quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987). Port City further contends "RSA 482-A:9 and 482-A:10 cannot establish a higher injury or impact necessary for a party to seek redress than the Constitution allows." Motion for Rehearing, p. 10.

The heart of Port City's due process argument relates to whether the statutory standing requirement imposed in RSA § 482-A:10 deprives Port City of its right to a hearing, allegedly in violation of the New Hampshire Constitution, Part I, Articles 14 and 15. The Hearing Officer is empowered to answer all questions of law, and whether a statute is constitutional is a question of law. See RSA § 21-M:3, IX(e); N.H. Democratic Party v. Secretary of State, 174 N.H. 312, 321 (2021). "The party challenging a statute's constitutionality bears the burden of proof." Prof'l Fire Fighters of N.H. v. State of N.H., 167 N.H. 188, 192-193 (2014). "The constitutionality of an act passed by the coordinate branch of the government is to be presumed." Id. "It will not be declared to be invalid except upon inescapable grounds . . . ." Id. "The general rule in New Hampshire is that a party has standing to raise a constitutional issue only when the party's own rights have been or will be directly affected." Hughes v. N.H. Div. of Aero., 152 N.H. 30, 35 (2005).

"Due process under Part I, Article 14 provides that all citizens have a right to the redress of their actionable injuries." In the Matter of Martin & Martin, 160 N.H. 645, 649 (2010), quotations omitted. "The article does not prohibit all impairments of the right of access to the courts." Id. "Reasonable regulations regarding the commencement of suits do not automatically violate the constitutional guaranty that justice will be administered promptly." Id. As Port City's argument regarding Part I, Article 15—and the subsequent arguments raised by Port City in section 3 of its Motion for Rehearing—do not appear to be relevant to the present matter and were raised for the first instance in its Motion for Rehearing, the Council elects to not consider

these arguments. See Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 655 (2000).

Port City's argument that RSA § 482-A:10 violates Article 14 fails because Port City lacks standing to raise such a constitutional issue. See Hughes, 152 N.H. at 35. Port City contends that its 'injury in fact' is that granting the Permit could result in Port City's leased property being contaminated (see Port City's November 10, 2022 Objection to Summary Dismissal, p. 8), and said contamination could trigger Port City's environmental indemnity "because it would be difficult to prove [whether Million Air's permitted project or Port City] caused the contamination." Id. The core of Port City's claimed 'injury in fact' is the allegedly likely potential that:

> Million Air's act or omission [at the Permit project site] [could] trigger a need for Port City Air to defend against a claim, be financially responsible for cleaning contamination that Million Air causes to Port City Air's down gradient leased premises, and potentially pay a claim if a factfinder mistakenly finds that Port City Air caused a spill that impacts drinking, surface water, or land.
>
> Notice of Appeal, p. 3, Section C "Appellant's standing, Env-WtC 203.02(a)(4)"

By Port City's own admission, its claimed injury is a speculative, secondary effect from NHDES's granting of the Permit. The Permit is for the construction of a road which will impact 2,265 square feet of palustrine forested wetland. Port City is not arguing that this road, nor the impact its construction will have on the wetland, will have a present effect on Port City's interests. Port City's alleged 'injury in fact' is that Million Air's construction/use of the road may result in contamination which may potentially affect Port City's interests. Moreover, Port City is arguing that its 'injury in fact' is the possibility that Port City might be found to be responsible for contamination—originating from the construction/use of the road—to property leased by Port City and/or surrounding land and water. There is no indication that the alleged 'injury in fact' is actual or imminent: the injury proposed by Port City is hypothetical because it is contingent 1) on a speculative, non-definite, future contamination occurring and 2) on a speculative, non-definite, future finding that Port City is responsible for said contamination. Furthermore, Port City has also not availed itself of 'environmental injury in fact' as recognized by the U.S. Supreme Court because Port City has not claimed any interest in the relevant wetland due to use,

aesthetic value, or recreation. Accordingly, it cannot be concluded that Port City will suffer an 'injury in fact' due to the Permit, thereby depriving Port City of standing to challenge the constitutionality of the statutory standing provision of RSA § 482-A:10. As Port City lacks standing to challenge the constitutionality of RSA § 482-A:10, Port City's Motion for Rehearing is **DENIED**.

CONCLUSION

Upon review of the record and the relevant filings in this appeal, the Council concludes that Port City has failed to demonstrate that the Council acted unlawfully or unreasonably in issuing the Order. The Council concludes it did not overlook or misapprehend any material questions of fact or law. There being no good reason to reverse the Order, Port City's Motion for Rehearing is **DENIED**. The Council affirms its dismissal of Port City's appeal.

By order of the Hearing Officer.

/s/ Zachary Towle Date: 4/12/2023
Zachary N. Towle, Esq., NH Bar 270211
Hearings Officer, Wetlands Council

Pursuant to RSA § 541, any party whose rights are directly and adversely affected by this decision may file a motion for reconsideration with the Council within 30 days of the date of the decision.