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 REPLY BRIEF

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Oral Argument Requested. Mr. Marvelley will argue.

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MATERIAL FACTS

The material facts remain unchanged from Port City Air's ("PCA") opening brief. They demonstrate PCA's injury and right to a hearing.

A. The Council has not yet engaged in factfinding.

The Hearing Officer dismissed the case without factfinding, based on his interpretation that "landowner" precludes tenants from appealing. Op. Br. at Add. 51. To find facts, a Hearing Officer must either consult with the Council on factfinding or have the Council resolve contested facts. *See* RSA 21-O:14; RSA 21-M:3, IX. Neither factfinding step has happened. *See generally* Opening Brief ("Op. Br.") at Add. 46-51 (order on dismissal); *id.* at Add. 52-58 (order denying reconsideration).[1] Any contested issues of fact that must be resolved to determine standing should be decided on remand.

B. The Council has not held a hearing on PCA's claims.

The Bureau held a non-adjudicatory public listening session; the Council has not engaged in factfinding. *See infra* at 15.

C. The dispute over the amount of wetlands impact is not material to standing.

Million Air ("MA") disputes that it understated its wetlands impact, claiming two companies delineated it and the Wetlands Bureau conducted a field inspection. MA Br. at 9. A 2017 study performed by a different

[1] This fact is also confirmed by the Certified Record only showing notices of pre-hearing conferences. CR at 33, 672.

would-be developer shows similar contours to a 1990 study, both of which point to a greater impact than MA acknowledges. CR at 6; *id.* at 55 (depicting wetland).

The Wetlands Bureau's "field inspection" consisted of a site walk. The Bureau did not take any samples or do any testing to check the accuracy of MA's delineations. CR at 376-9. The Bureau did not inspect the seasonal ponding area that MA failed to acknowledge as a wetland. *See generally id.*

MA's delineators did not study the seasonal ponding area. CR at 58-59; *id.* at 468 (overlay of National Wetlands Inventory Database graphical data); *id.* at 59 (diagram and photograph of ponding). If the ponding area is a wetland, there will be an even greater wetlands impact.

D. The Court should disregard MA's outside materials.

MA's Appendix consists of documents outside the Certified Record, which must not be considered. RSA 541:14.

If the Court considers those materials, it should reject MA's claims about them. PCA is not motivated by delay, MA Br. at 14, but by concerns with the project. CR at 47. Neither the Council nor DES raised standing (although DES later supported MA's definition of "landowner"). CR at 477-82. MA could have chosen to proceed with a merits hearing.

MA's claim that PCA is merely interested in PCA's own development is also unsupported by the record. PCA proposed a different kind of facility (not a fixed-base operator ("FBO")), with a different, safer footprint on a dry portion of the site that would not pose the same environmental hazards as MA's FBO facility. PCA proposed a

development without a fuel farm or fuel-truck parking area, MA Apx. at 35, and without a roadway through contaminated wetlands. *Compare* MA Apx. 58 (plan showing no roadway through wetlands) *with* CR at 110 (MA's proposed wetlands invasion in red and yellow shading).

ARGUMENT

"LANDOWNER," AS USED IN RSA 482-A:9, INCLUDES TENANTS.

PCA and MA agree that RSA 482-A:9 does not define "landowner," Op. Br. at 26; MA Br. at 24 (arguing that "aggrieved parties" references "landowner," but not claiming that "landowner" is defined), and that if the legislature intended for a term to have a broad meaning, "it would have defined it accordingly or provided no definition at all." MA Br. at 24; Op. Br. at 29.

A. The Court previously followed PCA's approach to define "landowner" in the context of DES' statutes.

Rather than defer to the agency's interpretation, the *Michele* Court used the dictionary to define "ownership and "owner," to which the dictionary assigns "broad definitions." *Appeal of Michele*, 168 N.H. 98, 103 (2015) ("We see no reason, however, to limit the meaning of the terms when the legislature did not see fit to do so."). As in *Michele*, this case involves an undefined term in RSA chapter 482-A, so the Court should look to the dictionary, which affords a broad definition of "landowner," and decline to limit the meaning of "landowner" because the legislature chose not to define the term.

The *Michele* Court noted RSA chapter 482-A's purpose is to protect waters and wetlands—not change property rights. 168 N.H. at 103-4 (quoting RSA 482-A:1). The Court held that anyone with common law dock building rights may apply for a dock permit under RSA chapter 482-A. *Id.* This case involves the same statutory chapter as *Michele*, so it has the same statutory statement of purpose. Since PCA meets the common law standing requirements (discussed *infra* at 12-15), it should qualify as a "landowner" to have standing before the Council.

Repeating the *Michele* analysis and outcome will not confer "standing to appeal even if the only harm inflicted on [PCA] from the DES decision is competition with [MA]." MA Br. at 23. MA's argument relies on the false premise that the permitted work and operations would not injure PCA. *See infra* at 13-15 (discussing injury to PCA).

Here, where PCA meets the common law standing requirements (discussed elsewhere in this brief), it should qualify for "landowner" standing before the Council. Confirming that tenants have standing puts them on the same footing as fee owners: it allows them to seek the Council's review of Bureau permitting decisions, which they should only seek if they are injured.

B. PCA fits the "bundle of sticks" metaphor.

In *Appeal of Town of Lincoln*, the Court referenced the "bundle of sticks" metaphor for property rights. 172 N.H. 244, 253 (2019). PCA holds many notable rights and responsibility "sticks," which are undisputed by MA. These are contained in PCA's long, thirty-year lease, including the rights to:

- Quiet enjoyment of and title to buildings. CR at 249; MA Br. at 7.
- Exclusive control of "the land, buildings, and other facilities and improvements," CR at 199 (compare with the "non-exclusive right to use" two apron areas, *id.*, emphasizing the exclusive nature of PCA's lease of the buildings, land, and facilities).
- Pursue tax abatement proceedings without the fee owner's involvement. CR at 214.
- Use the premises for PCA's business purposes. CR at 220.
- Mortgage the leasehold. CR at 242.

In addition, the lease includes burdens of landownership, including these risks and obligations:

- Manage and repair its buildings; CR at 226.
- Capital investment into the buildings to which it holds title: $500,000 in abutting Hangar 229, and $1,250,000 in other projects. CR at 199
- Pay a municipal services fee for fire, police, and roadway services. CR at 211.
- Pay taxes. CR at 214.
- Bear all risk of loss. CR at 216.

Even if the Court uses *Lincoln*'s "bundle of sticks" metaphor as a test, PCA holds enough "sticks" of rights and responsibilities to qualify as an owner.

MA suggests that this Court look to two inapposite decisions, *In re Reid,* 143 N.H. 246, 248 (1998), answering a different question of whether a landlord or tenant bears the burden of property taxes, rather than the pertinent question of what qualifies a tenant to have landowner standing,[2] and the non-precedential order in *Kymalimi LLC v. Town of Salem*, No. 2022-0202, 2023 WL 4542659 (N.H. July 14, 2023), which explicitly distinguished itself from the *Michele* Court's interpretation of RSA chapter 482-A).

The *Kymalimi* case's policy underpinnings are noteworthy. In *Kymalimi*, as here, a land-use applicant sought to exclude a party in interest from the approval process. As the equities supported requiring the subtenant in *Kymalimi* to obtain the fee owner's permission, they support PCA having a right to petition the Council with its objections to an injury-causing project.

C. MA's own notice-giving practices undermine their argument that "landowner" excludes tenants.

MA sent abutter's notices of its wetlands permit application to two other tenants: one who has a recorded deed for its building (not the land); and another who is a regular tenant with no deed. CR at 436 (abutter's notices); *id.* at 438, 445 (referenced deeds); *id.* at 441, 445 (referenced Portsmouth tax cards). MA believed tenants should receive notice.

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[2] The *Reid* Court also found error in requiring a tenant to pay taxes absent the tenant's agreement to do so. 143 N.H. at 250. Here, PCA agreed to pay taxes and has authority to pursue abatement proceedings alone, so the Court would likely find that PCA's leasehold is taxable. Having a taxable interest is one more indicator of ownership.

EXCLUDING TENANTS LIKE PCA FROM THE COUNCIL'S PROCESS VIOLATES DUE PROCESS RIGHTS.

A. PCA concedes its challenge that RSA 482-A:9 and A:10 are unconstitutional on their face.[3]

A constitutional challenge to a statute on its face succeeds when there are no constitutional applications of the law. MA Br. at 28 (quoting *Guare v. State*, 167 N.H. 658, 661-62 (2015)). Tenants such as a person renting a desk at a shared office space or a barber renting a chair in a shop might not possess enough sticks in the bundle to be injured by a wetlands permit. It would be constitutional to deny a hearing to uninjured tenants.

However, those hypothetical applications are on the narrow fringes of the universe of tenancies. The concern that injured tenants will be denied a hearing should still inform the Court's interpretation of "landowner" to avoid an unjust or absurd result. *Petition of New Hampshire Div. for Child., Youth & Fams.*, 170 N.H. 633, 639 (2018).

B. PCA's as-applied challenge succeeds.

PCA's "as-applied challenge solely questions the constitutionality of the ordinance 'in the relationship of the particular ordinance to particular property under particular conditions existing at the time of litigation.'" *McKenzie v. Town of Eaton Zoning Bd. Of Adjustment*, 154 N.H. 773, 778–79 (2007) (citation omitted). The Court considers "whether the provision is

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[3] This concession also renders moot MA's claim that the facial challenge was underdeveloped. *See* MA BR. at 28. MA does not make a similar argument against Port City Air's other constitutional arguments.

rationally related to a legitimate governmental interest under the particular facts of this case." *McKenzie*, 154 N.H. at 779.

Applying RSA 482-A:9 and 10 to exclude PCA would deprive a constitutionally injured person of a hearing for no rational reason. The statutes do not parse out injured versus uninjured persons. Instead, RSA 482-A:9 and A:10 define a "person aggrieved" as "any person required to be noticed by mail," which includes "abutting landowners" regardless of their injury. That statutory scheme creates two groups of similarly situated people who are treated differently—a landowner and a tenant, each holding many "sticks" of ownership, could suffer substantially the same harm, but only one—the landowner—could seek relief from the Council, which is the only forum to challenge a permitting decision. RSA 482-A:10; RSA 21-O:5-a, V.

Similarly, at places like Pease Tradeport, a prospective tenant like MA could apply for a wetlands permit that harms an abutting tenant, but the abutting tenant could not seek review of the Bureau's permitting decision.

The State did not file a brief with this Court and has not asserted any legitimate governmental interest for excluding injured tenants. The Council's robust hearing process already exists and does not require any modifications to allow tenants to use it. PCA was already using it when MA moved for summary dismissal.

C. PCA's injury afforded it due process rights.

PCA has shown 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)), and that it has at least (in fact, more) than "a 'small' stake in the outcome". *See Conservation L. Found., Inc. v. Pease Dev. Auth.*, No. 16-CV-493-SM, 2017 WL 4310997, at *14 (D.N.H. Sept. 26, 2017) (citation omitted). The Bureau's award of a permit to MA causes the requisite harm to PCA to trigger PCA's right to seek redress.

MA does not contest the facts underpinning PCA's environmental issues. The site is contaminated with PFOS and is within a Superfund site chemical plume. Op. Br. at 18. The wetlands are connected to public drinking water and surface water resources; contaminating the wetland jeopardizes those resources. *Id.*

MA plans to dredge the wetlands, which can stir preexisting contaminants. *Id.* at 18. They seek to build and operate a FBO, storing and providing jet fuel and glycol, and using other aviation-related chemicals—all next to wetlands that are connected to the drinking water resource and the North Mill Pond, and all upgradient of PCA's adjacent facility. MA Br. at 6 (MA wants to become an FBO); CR at 434 (graphic showing location of MA's proposed facilities in relation to wetland). MA offers no expert to rebut hydrologist Danna Truslow's concerns that these activities in this location pose a regional-level environmental impact. Op. Br. at 19.

PCA's leased premises stand to be contaminated and its drinking water stands to be impacted. *Id.* at 19-20. PCA's Hangar 229 is downgradient from MA's site, meaning that groundwater flows from MA's site towards PCA's building. *Id.* at 19. PCA is connected to the Pease water system, which is fed by the Haven Well. *Id.*

PCA's indemnity is onerous. Prior environmental litigation concerning Pease Tradeport highlights the risk of costly, high-stakes

litigation on environmental issues. *See Conservation L. Found.,* 2017 WL 4310997, at *1 (discussing Clean Water Act complaint).

MA suggests, without evidence, that PCA's complained-of harm will not happen. Whether the harms will happen is a question of fact. The case has not yet reached the factfinding stage. There must be a dividing line between an appellant making a showing to establish standing at the Council's summary dismissal stage and proving the appellant's case in chief. In *Lujan*, the United States Supreme Court created a progressive burden based on the case's procedural posture, with the burden matching the procedural status (allegations to survive a motion to dismiss; affidavit or similar facts for summary judgment; and proof at trial). *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). New Hampshire law appears to require PCA to show that its "own rights have been or will be directly affected." *Actavis Pharma*, 170 N.H. at 214 (quoting *Eby*, 166 N.H. at 321). PCA's facts and expert opinion satisfy the state and federal standard.

While MA suggests the harms will not happen, they also argue that PCA can sue for damages after an injury, so its due process rights remain intact. MA Br. at 30. The argument acknowledges that PCA's claimed injuries may happen. The argument fails to acknowledge PCA's right to seek redress before the injurious work or operations occur. *Actavis Pharma*, 170 N.H. at 214 (quoting *Eby*, 166 N.H. at 321) (standing exists when rights "have been or *will be* directly affected."); *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972) (hearing for redress must happen "at a time when the deprivation can still be prevented . . . .").

PCA's injuries and risks are not speculative. *See* MA Br. at 13, 27 and 32. The wetland's importance, preexisting contamination, PCA's

downgradient location, and MA's proposed construction and operations) are established.

D. The Bureau's public listening session does not replace Council review.

The Bureau's public listening session did not satisfy PCA's due process rights. *See* MA Br. at 33-34. The hearing was before the Wetlands Bureau—not the Wetlands Council. The Bureau's administrators decide whether to issue a permit, RSA 482-A:3, I(a), and the Council is the sole forum to appeal the Bureau's permitting decisions. RSA 21-O:5-a, V.

The Bureau only holds hearings "for projects with significant impact on the resources protected by this chapter or of substantial public interest." RSA 482-A:8. There are no adjudications of fact. Env-Wt 202.03 (department applies rules for non-adjudicative proceedings to hearings held pursuant to RSA 482-A:8). The Bureau is free to accept, reject, or simply ignore the public's submissions.

The Council, in composition and purpose, is fundamentally different. Unlike the Bureau, the Council has an adjudicatory and appellate function. RSA 21-O:5-a. Unlike the Bureau, the Council is comprised of representatives from other state agencies outside of DES, along with eight members of the public coming from prescribed associations and industries. RSA 21-O:5-a, I. The Council's hearing process requires formal factfinding. RSA 21-O:5-a, V; RSA 21-O:14, I-a(b).

The Bureau has not had an adjudicatory hearing, and the Council has not had any hearing—just logistical conferences with the Hearing Officer.

Agencies are empowered to allow persons without standing to participate in their processes without conferring standing to appeal. MA Br. at 29 (citing *Ruel v. New Hampshire Real Est. Appraiser Bd.*, 163 N.H. 34, 40-41 (2011)). But PCA was not that kind of participant: it has appellate rights because of the injury caused by the permit.

CONCLUSION

When the legislature crafted RSA chapter 482-A, it chose not to define the term "landowner," inviting this Court to apply a broad definition the way it did in *Michele*. A statute creating a sole avenue of redress for permitting decisions should allow a broad range of impacted persons to appeal.

Ruling otherwise would mean that tenants at Pease Tradeport and elsewhere could propose projects that injure abutting, long-term tenants, and those abutters would have no recourse. Similarly, of two similarly situated parties facing injury—one holding many sticks of ownership and the other a fee holder—only one could appeal to the Council. That outcome would deny due process to injured parties.

The Court should broadly define "landowner" as used in RSA 482-A:9, to allow PCA standing to appeal to the Council. In the alternative, the Court should rule that RSA 482-A's exclusion of PCA from the Council's appellate process violates PCA's due process rights. Either way, the Court should reverse the Council's orders dismissing PCA's appeal, and remand for further proceedings.

CERTIFICATE OF COMPLIANCE WITH RULE 16(11)

The undersigned hereby certify that this brief complies with the 3,000-word limitation and that the relevant sections of this brief contain 2973 words.

Respectfully submitted,
PORT CITY AIR LEASING, INC.

By and through its attorneys,

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Dated: December 19, 2023

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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.

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