

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2009-0745

Allianz Global Risks US Insurance Company & A.

v.

State of New Hampshire & A.

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BRIEF FOR THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF TRANSPORTATION

ON APPEAL FROM A JUDGMENT OF  
THE ROCKINGHAM COUNTY SUPERIOR COURT

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THE STATE OF NEW HAMPSHIRE

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## STATEMENT OF THE CASE

In July 2007, Allianz Global Risks US Insurance Company (“Allianz”), as subrogee of Henkel Corporation (“Henkel”), brought an action, along with Henkel, against the State of New Hampshire Department of Transportation (“the State”) for inverse condemnation, alleging a taking as a result of flooding that occurred during what has become known as the Mother’s Day Storm of 2006. [AA 141].<sup>1</sup> The decision being appealed is from an order of the Rockingham County Superior Court (McHugh, J.) dated September 16, 2009 on cross motions for summary judgment (“the Order”).<sup>2</sup>

Allianz contended in its amended writ that the State of New Hampshire’s deliberate design and construction of Interstate 95 resulted in an unconstitutional taking as it allowed surface water to back up onto property owned by its insured, Henkel Corporation. [AA 8-9]. The Commonwealth of Massachusetts was named as a third party defendant by the State of New Hampshire for its role in a portion of construction of the highway ramps on the states’ border. On August 3, 2009 the State filed a motion for summary judgment arguing that plaintiff could not meet its burden of proving inverse condemnation as a matter of law because there was no governmental “taking” of the Henkel property and plaintiffs have not alleged and cannot show diminution to the fair market value to the property. [AA 141-164]. Additionally, the State asserted five other grounds for summary judgment including that the flood event of May 2006 was an act of God and exceeded the design capacity for the culvert at issue. [AA 5-7].

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<sup>1</sup> “AA” refers to Plaintiff-Appellants’ Appendix on Appeal.

<sup>2</sup> The record in this case relates only to the parties’ pleadings on summary judgment. The Order on motions for summary judgment dated September 16, 2009 is attached to Appellants’ Brief.

The State's motion and accompanying memorandum of law [AA 141-164] contended that the gist of any inverse condemnation is that the government has to substantially interfere with or deprive a person of the use of his property. There was no governmental action that took Henkel property and put it to a governmental use. [AA 143]. Allianz filed its own motion for summary judgment on July 31, 2009, as against the State of New Hampshire only. [AA 17-36]. In that motion, Allianz indicated that there was a "dearth of case law" interpreting inverse condemnation in New Hampshire and pointed the court to other jurisdictions as a basis to fashion relief. [AA 32].

On August 31, 2009 the State filed an objection to plaintiffs' motion and brief in support of the motion for partial summary judgment. [AA 248- 257]. Likewise, on September 1, 2009, plaintiffs responded to the State of New Hampshire's motion for summary judgment. [AA 259-422].

The Rockingham County Superior Court (McHugh, J.) on September 16, 2009 issued a 9-page order on the motions for summary judgment ("the Order"). The court noted that the plaintiffs' attempt to obtain damages as a result of the May 2006 flood must rise or fall on its claim of inverse condemnation and that plaintiffs were not asserting a tort claim. [Order at p. 3]. It is this document on which the Allianz's appeal is founded.

## STATEMENT OF FACTS

Because the case is one where Allianz and Henkel claims inverse condemnation caused by the backup of water at the culvert running under Interstate 95, facts relevant to that highway and the Allianz/Henkel building itself were determined by the court. There was no genuine issue with regard to the material facts regarding these findings.

Interstate 95 (hereinafter I-95) is a class I state road maintained by the Department of Transportation. [Order at p. 2; AA 146]. The highway is a divided highway with north and southbound barrels. They were constructed in the late 1940's and 1960's respectively. [*Id.*] In 1998, in connection with the Commonwealth of Massachusetts' rest area/welcome center project, construction of a deceleration lane was performed. [AA 146].

The original building on what is now the Henkel site was constructed in 1970 on a wetland at the lowest point in the surrounding watershed. [AA 146, 180, 183]. The building was expanded in 1974 and 1985 prior to its purchase by Henkel Corporation. [AA 146.]

Appellants contend that the culvert, as constructed in 1948 and extended in 1967, was undersized for the amount of rain received on May 13, 2006. In the Appellants' brief (at p. 3), it is asserted that there is no support in the record for a finding that the Interstate 95 culvert in question met the 50-year design standard. Nevertheless, there is no genuine dispute of material fact on this issue. First, Appellants have produced no document that shows that the culvert in question was not designed and built to a 50-year standard. Second, but more importantly, Appellants produced no evidence to show that a New Hampshire culvert would have to be designed to an event that exceeded a 50 or 100-year event. Interstate highways are not designed for flood events over and above what is known as a 50 year storm. [AA 147-148]

The rain event in question<sup>3</sup> prompted the Governor to declare a state of emergency on May 14, 2006 and to request disaster assistance from President Bush on May 25, 2006. [AA 147, 208].

As a result of the rain event, Henkel suffered flood damage to the facility and equipment on Sunday, May 14, 2006. Flood waters had receded within hours of the high water mark. [AA 152]. Discovery revealed that the plant reopened on May 16; all employees had returned to work by May 17, and within three and ½ months all repairs to the facility were substantially completed. [AA 198-202; App. 25 (MA joinder)]<sup>4</sup> Plaintiffs have acknowledged that the fair market value of the property increased nearly \$2 million over the value immediately prior to the flood. [App. 25-26 (MA joinder)].

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<sup>3</sup> In *Tarbell v. City of Concord*, 157 N.H. 678, 681 (2008) the court found that the State of New Hampshire endured a record amount of rainfall during May, 2006.

<sup>4</sup> “App. refers to the attached filings below of record of the Commonwealth of Massachusetts.

## SUMMARY OF THE ARGUMENT

Appellants have failed to demonstrate that the trial court committed reversible error by granting summary judgment on the inverse condemnation claim against New Hampshire. The temporary and transient flooding of the Henkel property during a rare and severe 100-year rainfall event as plead does not constitute a “taking” under the New Hampshire Constitution, even if arguably combined with a similar but more severe rain event some ten years prior in 1996 before Henkel owned the property. None of the facts raised by Appellants in the effort to reverse summary judgment below are *material* facts under the substantive law of inverse condemnation. Appellants’ theory of unrestricted and open-ended State liability based upon the occurrence of any adverse weather event that is “foreseeable” is not the law in New Hampshire. Moreover, the measure of damages for inverse condemnation in New Hampshire essentially remains the diminution in property value, not repair and restoration costs and lost business expenses. Henkel does not even seek damages for “diminution of property value” as an indispensable element of an inverse condemnation claim. Rather, its claim appears to rest solely upon consequential or tort-related damages.

At the core of Appellants’ argument lies a simple yet flawed goal: avoid the insurmountable burdens of proving a lack of reasonable care by the State, the sovereign immunity defense, and the statutory \$475,000 per claimant cap on State tort damages under New Hampshire law. RSA 541-B:14, I. Nothing in the Appellants’ summary judgment pleadings provides the court with a legal basis for avoiding the application of these otherwise applicable doctrines. Therefore, Appellants’ challenge to the order granting summary judgment should be denied as a matter of law.

## ARGUMENT

### **A. The Applicable Standard of Review on Appeal of Summary Judgment Order.**

The State acknowledges the basic tenets for reviewing an order granting summary judgment on appeal as noted in the Appellant's Brief, with certain qualifications.

While weighing competing *material facts* may be improper, there is nothing inappropriate about a trial court indicating its findings regarding undisputed material facts in summary judgment proceedings when limited to determining whether a "genuine issue of material fact requiring a formal trial" exists. *See Baker v. Wilmot*, 128 N.H. 121, 123 (1986) (citation omitted). A disputed fact is deemed "material" for purposes of summary judgment if it affects the outcome of the litigation under applicable substantive law. *Sandford v. Town of Wolfeboro*, 143 N.H. 481, 484 (1999). As in this case, when the parties file cross-motions for summary judgment on a set of undisputed material facts, this Supreme Court need only review, *de novo*, the trial court's application of the law to the facts. *Cricklewood on the Bellamy Condominium Association v. Cricklewood on the Bellamy Trust*, 147 N.H. 733, 736 (2002). As indicated below, the *material facts* submitted by the parties were undisputed and the trial court properly determined that there were no genuine issues of material fact requiring a formal trial.

Lastly, a summary judgment decision that is correct but relies on erroneous grounds will be sustained if valid alternative grounds can be found in the record to support it. *See Schoff v. City of Somersworth*, 137 N.H. 583, 589 (1993); *Quinlan v. City of Dover*, 136 N.H. 226 (1992).

**B. No Genuine Issue Of Material Fact Exists To Support A Constitutional “Taking.”**

In reviewing the cross-motions for summary judgment, the trial court essentially determined that the undisputed material facts were as follows: (1) the Appellants’ inverse condemnation claim was based upon a flooding of its property arising from a single, severe rainstorm that constituted a 100-year event in May, 2006 (“Mother’s Day Storm”) [Order, at pp. 4, 6]; (2) the only other severe rainstorm event that reportedly caused flooding to the subject property prior to Henkel’s ownership was in October 1996, which was likewise a 100-year event [Order, p. 6]; (3) both rain events were “rare” [Order, p. 6]; (4) Henkel’s facilities were constructed over an existing brook requiring a culvert to channel water underneath its building [Order, p. 5]; (5) the State first constructed I-95 and the highway culvert in 1948 which were subsequently extended in 1967 – before the subject buildings were initially constructed in 1970, expanded in 1974 and 1985 and then purchased by Henkel many years later in August 2000 [Order, at p. 2]; and (6) the Henkel property suffered no diminution of property value from the flooding [Order, at p. 5]. Simply stated, there was no dispute that this inverse condemnation claim was based upon flooding arising from a single “rare” storm, and not on a series of events that caused flooding of the Henkel property on multiple occasions. [Order, p. 7]. The record, when read in the light most favorable to the Appellants, supports these findings. [AA 146-148; AA 23-26]

The trial court properly granted summary judgment because there was no genuine issue of material fact to allow a jury to legally conclude that a “taking” of property under the New Hampshire Constitution by the State had occurred in this instance. *See* N.H. Const. Pt. 1, Art. 12. [Order, pp. 7-10]. In order to rise to the level of a compensable claim for inverse

condemnation under New Hampshire law, the restriction or government invasion must be found either arbitrarily or unreasonably to substantially deprive the owner of the economically viable use of its land in order to benefit the public in some way. *Burrows v. City of Keene*, 121 N.H. 590, 598 (1981). Where an entire property retained a viable economic use, government action is not compensable absent a compelling reason to analyze discrete segments of a property differently. See *Quirk v. Town of New Boston*, 140 N.H. 124 (1995) (holding that perimeter buffer zones do not constitute impermissible takings where the property as a whole remains viable); see *Pennichuck Corp. v. City of Nashua*, 152 N.H. 734 (2005) (no “taking” occurs where plaintiff continues to operate business); *Cannata v. Town of Deerfield*, 132 N.H. 235 (1989) (requiring either a deprivation of all economic use of land or that the value has been substantially destroyed to properly allege a taking); *Burrows v. City of Keene*, 121 N.H. 590 (1979) (inverse condemnation occurs when a landowner’s ability to use its land in a economically viable manner has been substantially impaired); *Moaratty v. Town of Hampton*, 110 N.H. 479 (1970) (fact that unusual and unexpectedly severe storm overtaxes drainage system is insufficient to establish fault against a government entity). No New Hampshire case imposes open-ended and unlimited liability against a government entity merely because a rare and severe rainstorm is “foreseeable.” Moreover, the cases cited by the Appellants are all factually distinguishable from the subject case on a singular key point: none support recovery against the State under New Hampshire law for inverse condemnation based upon a single rain event resulting in flooding without some evidence of inevitable recurrence.

Inverse condemnation occurs only when a landowner’s ability to use its land in an economically viable manner has been substantially impaired. See *Burrows v. City of Keene*,

121 N.H. at 598-601. Here, there are no allegations that Henkel's ability to use its land (real property) has been substantially impaired, except for the few hours that water was backed up. It is widely recognized that a "temporary interference with a private property right, which is not continuous nor likely to be recurring, does not constitute condemnation without compensation." See *Ridge Line Incorporated v. United States*, 346 F.3d 1346, 1357 (C.A. Fed. 2003) (citations omitted) ("Isolated invasions such as one or two floodings ..., do not make a taking ..., but repeated invasions of the same type have often been held to result in an involuntary servitude."). Damage is considered "permanent" if the property may not be restored to its original condition. *Pande Cameron and Company of Seattle, Inc, et al v. Central Puget Sound Regional Transit Authority*, 610 F. Supp. 2d 1288, 1302 (W.D. Wash. 2009) (citations omitted); see also *Northern Pacific Railway Company v. Sunnyside Valley Irrigation District*, 540 P.2d 1387 (WA. 1975) ("[A] constitutional taking is a permanent (or recurring) invasion of private property.... Temporary interference with private property right, which is not continuous nor likely to be recurring, does not constitute condemnation without compensation."); *Hawkins v. City of La Grande*, 843 P.2d 400, 406 (Or. 1992) ("[P]roperty is not 'taken' if it is simply damaged."); *Bensch v. Metropolitan Dade County*, 541 So.2d 1329 (Fla. Dist. Ct. App. 1989) (no constitutional taking where complaint did not assert that enactments deprived property owners of all beneficial use); *Arneson v. City of Fargo*, 331 N.W.2d 30 (N.D. 1983). See generally *Sundell v. New London*, 119 N.H. 839, 845 (1979) ("Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain.") (quoting *Ferguson v. Keene*, 108 N.H. 409, 410 (1968)).

Appellants have neither alleged nor provided a record of a fundamental requirement of inverse condemnation: that the flooding is likely to recur, especially given the magnitude and severity of the Mother's Day Storm with the related State of Emergency Declaration. Appellants must plead and show that the flooding of the Henkel facility is a continuous condition — that they will inevitably suffer future flooding that would not otherwise occur. *Hartwig v. United States*, 485 F.2d 615, 620 (Ct.Cl. 1973) (and cases cited therein). While the property reportedly flooded once previously back in 1996 before Henkel's ownership, one, or even two floodings, does not constitute a taking. *Fromme v. United States and Victoria County Navigation District*, 412 F.2d 1192, 1196 (Ct.Cl. 1969) (citations omitted); *see also Pinkham v. Lewiston Orchards Irr. Dist.*, 862 F.2d 184 (9<sup>th</sup> Cir. 1988) (flooding must be frequent and inevitably recurring); *National By-Products, Inc. v. United States*, 405 F.2d 1256, 1273 (Ct.Cl. 1969) (no taking where plaintiffs failed to establish flooding would inevitably recur).

Appellants' Brief fails to reference any supportive federal case law where inverse condemnation was determined based upon a single, rare flooding event. Most notably, there is no mention of the landmark flooding case of *Sanguinetti v. United States*, 264 U.S. 146 (1924), which is instructive here. *Sanguinetti* affirmed the rejection of an inverse condemnation claim based upon flooding that was neither permanent nor of sufficient duration to prevent its use for business purposes. Instead, it held that "in order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of land, amounting to an appropriation of and not merely an injury to property." *Id.* at 149. Because of the temporary nature of the flooding, "liability sought to be enforced was one sounding in tort."

*Id.* at 147. And *Sanguinetti* has been cited favorably in over one hundred federal and state cases to the present.<sup>5</sup>

The logical result of Appellants' interpretation of the law is that where New Hampshire adopts a design policy based upon a weather event of 50 years, *every* rain event that exceeds that design criteria and causes damage to a landowner will result in the State paying damages for a "taking" for public use under principles of inverse condemnation, just because it was arguably "foreseeable" that storms of a greater magnitude might someday occur. Such a result is absurd. Both parties agree that the subject two rainfalls were "rare events." [AA 255, fn. 3]. Also, the evidence of record does not contradict that the State's culvert design followed standard design procedures and practices and both storms exceeded the standard design capacity. Otherwise, not only the Department of Transportation but also every municipality in the State of New Hampshire would be required to design and re-design continually all culverts for the maximum rainfall that might ever occur, as it is "foreseeable" that "rare" rain events may eventually happen. This position not only envisions open-ended and unrestricted strict liability, but would require government to rip out and replace its bridges, culverts and related structures periodically in response to historically rare weather events. Such an undertaking would not only rob the State of its executive discretionary function in addressing its highway risks and needs, but of its finances as well.

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<sup>5</sup> For a further review of federal cases rejecting inverse condemnation claims under analogous circumstances, see also *Cary v. United States*, 552 F.3d 1373 (Fed.Cir. 2009) (modern federal case addressing need to show permanent or intermittently but inevitably recurring event for valid inverse condemnation claim); *Bartz v. United States*, 633 F.2d 571, 577 (Ct.Cl. 1980) (listing cases where plaintiffs could not recover because "they failed to prove the element of inevitably recurring floods").

**C. Alleged Tort Damages Are Not An Element Of Inverse Condemnation.**

The State does not contend that a constitutional “taking” of *personal property* may never form a basis for compensation. The State does maintain, however, that a damage claim comprised solely of tort, or consequential, damages fails to constitute inverse condemnation as a matter of law. The alleged damages may support a tort claim for negligence, nuisance or trespass. However, these are claims that the Appellant was expressly provided an opportunity to pursue, but declined. [Order, p. 3]. Appellants do not rely upon a single New Hampshire case defining inverse condemnation damages based solely upon tort or consequential damages, or endorsing its viewpoint.

Nowhere in the record do Appellants assert that their recovery is based upon a diminution in property value of the subject premises. In fact, as noted above, the evidence is uncontradicted that the Henkel property value actually increased since the flooding. The New Hampshire Constitution and numerous related case authorities consistently maintain that the measure of damages for taking of land is the difference between the value of the land remaining after the taking and what the land would have been worth on the day of taking, if a taking had not occurred. In other words, the “before and after” valuation method. *See Daly v. State of New Hampshire*, 150 N.H. 277, 280 (2003); *Berry v. State of New Hampshire*, 103 N.H. 141, 143 (1961); *Wright v. Pemigewasset Power Co.*, 75 N.H. 3, 6 (1908) (early case applying “before and after” valuation approach in inverse condemnation case); *see also State of New Hampshire v. 3M Nat’l. Advertising Co.*, 139 N.H. 360, 362 (1995) (discussing the “before and after” valuation of property damages required in condemnation cases); *Dow v. State of New Hampshire*, 107 N.H. 512 (1967) (same); *Emmons v. Utilities Power Co.*, 83

N.H. 181 (1928) (inverse condemnation case); *Philbrook v. Berlin-Shelburne Power Co.*, 75 N.H. 599 (1909) (same).

By contrast, a tortious interference or trespass occurs where a property owner has suffered damage as a result of negligence or similar tort, but has not lost exclusive control over his property. *See Estate of Kirkpatrick v. City of Olathe*, 178 P.3d 667 (Kan. Ct. App. 2008); *see also Aleman v. Sewerage and Water Board of New Orleans, et al.*, 199 So. 380 (La. 1940) (noting that a claim for compensation for a “taking” is properly measured by the diminution in value before and after the taking, whereas the measure of damages for tortious injury to private property is the cost of restoration and the value of lost use); *see also Sanguinetti v. United States*, 264 U.S. at 147 (temporary flooding supports potential tort liability).

In this instance the flooding, while allegedly causing temporary damage to Henkel’s building, equipment and facility, was in no way permanent or inevitably recurring, nor did it deprive Henkel of the full use and enjoyment of its property. *See Cannata v. Town of Deerfield*, 132 N.H. 235 (1989) (requiring either a deprivation of all economic use of land or that the value of land has been substantially destroyed to properly allege a taking). This is clearly evidenced by Henkel’s ability to submit a damage claim to Allianz, repair or replace their equipment, and continue production. Amended Petition, at para. 12; *see Pennichuck Corp. v. City of Nashua*, 152 N.H. at 734 (no “taking” where claimant continues to operate business); *see also Northern Pacific Railway Company*, 540 P.2d at 1387 (Wa. 1975) (where repairs were made after flooding, no permanent damage, and hence, no taking).

Appellants’ claim for “damages” additionally supports the contention that Appellants have not suffered a “taking,” as damages for inverse condemnation cases envision the

difference in the fair market value before and after the flooding, and Appellants have submitted a claim for an amount that appears to be limited to repairs and restoration only. [AA 152], Deposition of Herbert Novell, Exhibit 4 [AA 186] at pp. 192, 219-23 & 248-52 (discussing damage claim limited to one lost day of shop time, flood repairs, and replacement related expenses); [AA 232], Plaintiff Answers to State's Interrogatories, at Items 30, 31, Exhibit 11 [AA 236-237]. ("Plaintiffs believe that all damages have been repaired or replaced.") (Excerpts); [AA 231]Exhibit 10 at No. 8.

In this case, nowhere in the original or Amended Petitions or discovery responses have Appellants alleged the recovery they seek is based on a diminution in their property value. Therefore, they do not seek recovery for inverse condemnation damages. *See also* Plaintiff's Responses to Commonwealth's Interrogatories [App. 28-30 (Exhibit 10, Interrogatories 6a, 6c, 9) (showing no diminution to market value of property)]. Indeed, Appellants' claim for damages includes a claim for overtime costs to pay its employees. [AA 194-198]. As shown above, such a claim is not compensable in a condemnation case. *See generally, U.S. v. Bodcaw*, 440 U.S. 202 (1979) (just compensation is for the property and not the owner).

Lastly, Appellants do not have a claim for inverse condemnation because there was no requisite "taking." Henkel's petition as amended repeatedly asserts a claim for "a 'taking' and/or damages." [AA 3-4, at ¶¶ 16, 17, 21; AA 146]. Appellants may not, in the *same count*, allege **both** a takings claim and a claim for damages to the property that was allegedly taken. *Cannata v. Town of Deerfield*, 132 N.H. 235, 245 (1989) (dismissing on summary judgment plaintiff's counts alleging taking as a result of flooding from recently installed culvert); *see also Estate of Kirkpatrick v. City of Olathe*, 178 P.3d 667 (Kan. Ct. App. 2008)

("There is a great difference between intentional taking of land in the exercise of governmental power and injury resulting to land as a consequence therefrom. A consequential injury is not a taking of private property for public use with the meaning of the Fifth Amendment.") (citations omitted).

In this instance, it is undisputed that the Appellants' basis for recovery is limited to repair and replacement costs and associated loss of revenue resulting from a temporary, single flooding of the Henkel property. As such, the Appellants do not claim damages recoverable in their constitutional "inverse condemnation" claim based upon the diminution of property value. Inferentially, they have thereby acknowledged that such a claim simply does not exist. As such, summary judgment should be affirmed accordingly

**D. Alternative Grounds Exist For Supporting Summary Judgment.**

**1. Plaintiffs Cannot Recover For An "Act of God."**

The trial court also based its order granting summary judgment on the alternative ground that the loss was due to an "act of God." The record and New Hampshire law supports the "act of God" defense.

Acts of God are a recognized defense in New Hampshire. *See, e.g., Moaratty v. Town of Hampton*, 110 N.H. 479 (1970) (water damage to plaintiff's property due to severe storm, not town's maintenance of culvert); *Zwiercan v. International Shoe Co.*, 87 N.H. 196 (1935) (noting a trend of denying compensation where injury is due solely to weather conditions); *Rixford v. Smith*, 52 N.H. 355 (1872) ("[S]uch act as could not happen by the intervention of man, as storms, lightning, and tempests."). The act of God defense applies to inverse condemnation claims. *Aasmundstad v. State of North Dakota*, 763 N.W. 2d 748 (N.D. 2009) (unprecedented wet weather constituted an act of God barring inverse condemnation claim

against state); *Yates v. Elmer*, 948 So. 2d 1092 (La.App. 2006) (heavy rains constituted act of God defense to inverse condemnation claim); *see also Bettinger v. City of Springfield*, 158 S.W.3d 814, 820 (Mo. App. 2005) (governmental entities are not liable in inverse condemnation when the damage is the result of natural forces such as the “record levels” of rainfall); *Resse v. Scott County*, 927 S.W.2d 518 (Mo. App. 1996) (no inverse condemnation cause of action when the damage resulted from natural forces and not an affirmative government act).

It is well established in other jurisdictions that governmental entities are not liable in inverse condemnation when the damage is the result of natural forces. *See Bettinger v. City of Springfield*, 158 S.W.3d at 820. An act of God is a rainstorm which does not occur seasonally and is of unprecedented magnitude. *See Huber v. Oliver County*, 602 N.W.2d 710, 713 (N.D. 1999). The 2006 Mother’s Day storm was clearly of unprecedented magnitude, causing the Governor of New Hampshire to declare a State of Emergency. The Mother’s Day storm was an “act of God.” The uncontroverted testimony was that Henkel’s facility likely would have flooded regardless of any acts by the State of New Hampshire, [AA 183, 224-226], and the State of New Hampshire should not be held liable.

As in *Moaratty v. Hampton*, this is a case where the surface waters were insufficiently drained off allegedly by a drainage system installed by the governing authority. *See Moaratty*, 110 N.H. at 479-80 (drainage system overtaxed by 200-year storm event). There was no factual dispute raised below that the subject I-95 culvert was designed to handle a fifty-year storm event, but was overtaxed by storm flows far exceeding that design value. [AA 222, 227-228]. It remains undisputed that the prevailing design standard is a 50-year design event for interstate roads. Thus, this Court should affirm the order granting summary

judgment on grounds that the Mother's Day Storm 2006 was an act of God, and that the flooding was due only to "the unusual and unexpected severity of the storm which overtaxed the system." *Moarraty* 110 N.H. at 479, 481.

**2. The State Is Entitled To Summary Judgment Based Upon Its Sovereign Immunity Defense.**

Alternatively, the record supports granting summary judgment in favor of the State based upon sovereign immunity.

Appellants assert the State "designed, constructed, owned, controlled, maintained, operated, repaired and replaced Interstate 95,"[AA 10 (Amended Petition at paragraph 15)]; that "but for the design and construction of Interstate 95 in and around 167 Batchelder Road in Seabrook, Plaintiffs would not have suffered a flood on May 13, 2006," [AA 10 (Amended Petition at paragraph 16)]; and, finally, that "New Hampshire had no program or method for analysis, inspecting, evaluation, and/or modifying the capacity of culverts under Interstate 95 in the area to compensate for upstream development of Interstate 95 such that the design of the public project cause significant damage to Plaintiffs," [AA 10 (Amended Petition at paragraph 17)]. This claim should be dismissed because the State has discretionary function immunity on all aspects of the design, construction, and maintenance of I-95. To the extent such allegations indeed sound only in tort, the State is immune from suit pursuant to the doctrine of sovereign immunity.

Discretionary function immunity applies

[w]hen the particular conduct which caused the injury is one characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning....

*Opinion of the Justices*, 126 N.H. 554, 563 (1985) (quoting *Whitney v. Worcester*, 366 N.E.2d 1210, 1216 (Mass. 1977)); see also *DiFruscia v. N.H. Dept. of Pub. Works & Highways*, 136 N.H. 202, 205 (1992), *Bergeron v. City of Manchester*, 140 N.H. 417, 421 (1995). The discretionary function exception applies and immunity attaches when a decision entails governmental planning or policy formulation, involving the evaluation of economic, social, and political considerations, rather than a mere ministerial function. See *Bergeron*, 140 N.H. at 422-23; *Opinion of the Justices*, 126 N.H. at 563.

The retention of sovereign immunity for discretionary functions stems from the separation of powers doctrine. *Bergeron*, 140 N.H. at 424; *Gardner v. City of Concord*, 137 N.H. 253, 256 (1993); see *Peavler v. Monroe County, Bd. of Comm'rs*, 528 N.E.2d 40, 44 (Ind. 1988). Discretionary function immunity reflects a judicial reluctance to evaluate the wisdom of an executive choice of the means to accomplish public policy goals; for a jury or court to determine “the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations.” *Gardner*, 137 N.H. at 256 (quotation and brackets omitted); see also *Tarbell v. City of Concord*, 157 N.H. 678, 684-85 (2008) (“Subjecting the City to potential liability for a negligence claim in response to this decision would be tantamount to judicial interference with legislative or executive decision making.”); *Rockhouse Mt. Property Owners Assoc. v. Town of Conway*, 127 N.H. 593, 600 (1986). “Certain essential, fundamental activities of government must remain

immune from tort liability so that our government can govern.” *Tarbell v. City of Concord*, 157 N.H. at 684 (quoting *Hacking v. Town of Belmont*, 143 N.H. 546, 549 (1999)). Further, fault by the State is not to be presumed from the fact of the plaintiffs’ damages. *Anglin v. Kleeman*, 140 N.H. 257 (1995).

While the legislature, through RSA chapter 541-B and RSA 230:78 - 82, permits claims to be filed against the State for its failure to follow the appropriate standard of care when that duty is owed to the person making the claim, immunity has not been waived for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary executive or planning function or duty by the state or any state agency or officer. RSA 541-B:19, I(c). Moreover, in this case, the State followed the appropriate standard of care; the culvert met the applicable design standard when it was installed, and there is no duty to upgrade or improve a culvert. *Walden v. City of Hawkinsville, Georgia*, 2005 WL 2304398 at \*3-\*4 (M.D. Ga. 2005); *McClellan v. Ohio Department of Transportation, et al.*, 517 N.E.2d 1388 (OH. App. Ct. 1986). The decision to upgrade or improve public works is entitled to discretionary function immunity because it is inherently a question of how to best allocate resources. *Mitchell v. United States*, 225 F.3d 361, 365-66 (3<sup>rd</sup> Cir. 2000). *Cf. Kawebelum v. Thornhill Estates Homeowners Ass’n.*, 801 So.2d 1015, 1016 (Fla. Dist. Ct. App. 2001) (no duty to upgrade canal).

The fact that the culvert was arguably unable to handle the immense amount of rain it received during the Mother’s Day Storm is not proof of anything but a severe rainstorm, and is certainly not legal proof of fault. *See also Hickey v. City of Berlin*, 78 N.H. 69 (1915) (“The test to determine the sufficiency of the culvert is not to inquire whether it caused the [damage], but whether it was such a culvert as the ordinary man would have maintained ... in

a similar situation.”); *Moaratty v. Town of Hampton*, 110 N.H. at 481 (fact that “unusual and unexpected severity of the storm” overtaxed drainage system causing flooding alone insufficient to establish fault against town).

The construction and maintenance of a highway system have traditionally been immune from liability in the State of New Hampshire. *Cannata*, 132 N.H. at 241 (citing *Fournier v. Berlin*, 92 N.H. 142, 144 (1942)). This immunity extends to the discretionary decision to install storm drains and sewers. *Id.* at 242; see also *Tarbell v. City of Concord*, 157 N.H. at 685-87 (design and control of reservoir protected by discretionary function immunity where reservoir overflowed and plaintiffs property was flooded).

The design and construction of I-95 necessitated weighing many competing social and economic factors, including the concerns of upstream and downstream landowners, as well as the operation of I-95. See, e.g., *Tarbell v. City of Concord*, 157 N.H. at 678 (noting that design and management of drainage systems are highly discretionary and involve management of competing factors); *Cannata v. Town of Deerfield*, 132 N.H. at 235 (noting immunity traditionally granted to construction of highways). It is undisputed that the legislature, including governor and the special commission, approved the highway layout at the time of its design and construction. It is precisely decisions such as these that should be entitled to discretionary function immunity, so as not to impair the functioning of the government.

The State is also immune from liability pursuant to RSA 230:80, IV. It is well established that the State of New Hampshire (or its municipalities) is not a guarantor of the safety and welfare of the public, “nor guarantors of any particular condition or standard of construction or maintenance, nor should they be held liable under a standard of ordinary

negligence.” *See Laws* 1991, 385:1. The State is therefore also immune from liability pursuant to RSA 230:80, IV. The setting of construction, repair or maintenance standards is a discretionary function for which the department of transportation “shall not be held liable in the absence of malice or bad faith.” *Id.* Here, there are no allegations, nor is there any evidence that supports malice or bad faith in the initial construction of I-95, its subsequent widening, or the widening of the deceleration lane into the Commonwealth of Massachusetts Welcome/Rest Area.

Negligence is also not to be presumed simply because Appellants suffered damages. *Anglin v. Kleeman*, 140 N.H. 257, 261 (1995). The construction of the culvert or of any part of I-95 is characterized by engineering judgment. Appellants contend that the undersized culvert can be remedied by outright replacement with a larger structure or even by constructing a bridge over the brook. There is nothing, however, that would require such an exercise. In *Baum v. United States*, 986 F.2d 716 (4<sup>th</sup> Cir. 1993), the court recognized the implausibility of replacing roadway facilities and recognized that such decisions were well within the discretion of the state. It noted,

The decision of how and when to replace a major element of a substantial facility is ... at bottom a question of how to allocate resources. Such a decision is inherently bound upon considerations of economic and political policy, and accordingly is precisely the type of governmental decision that Congress intended to insulate from judicial second guessing....

*Id.* at 724.

As such, any claim for negligence cannot be maintained as the State is immune either from suit or from liability, given the Appellants’ allegations and the evidence. The State discretionary planning function determined the appropriate drainage

configuration regarding the I-95 culvert and there is no claim or evidence that the implementation of this plan was deficient.

**CONCLUSION**

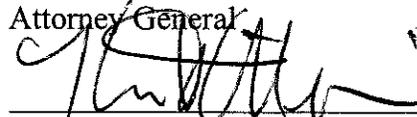
For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the decision of the trial court.

The State requests a 15-minute oral argument, to be presented by Kevin H. O'Neill, Assistant Attorney General.

Respectfully submitted,

The State of New Hampshire  
By its attorneys,

Michael A. Delaney  
Attorney General



Kevin H. O'Neill (NH Bar #4108)  
Assistant Attorney General  
Transportation and Construction Bureau  
33 Capitol Street  
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(603) 271-3675

February 26, 2010

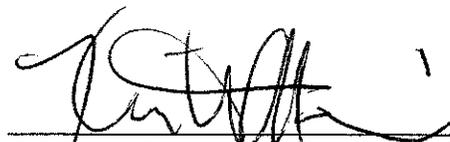
**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing were mailed this day, first class mail, postage prepaid, to

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Kevin H. O'Neill

**APPENDIX**

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THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

07-C-584

Allianz Global Risks US Insurance Company a/s/ Henkel Corporation  
and Henkel Corporation

v.

The State of New Hampshire and the Commissioner of the  
Department of Transportation  
and the Commonwealth of Massachusetts

**COMMONWEALTH OF MASSACHUSETTS' JOINDER  
IN STATE'S MOTION FOR SUMMARY JUDGMENT AND OBJECTION  
TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES the third party defendant, the Commonwealth of Massachusetts (Commonwealth), by and through its attorneys, and (1) joins in the State's motion for summary judgment and (2) joins in the State's objection to the plaintiffs' motion for partial summary judgment. The Commonwealth adopts the State's memorandum in support of its summary judgment motion and the State's objection to the plaintiffs' motion.

The Commonwealth adds the following to the factual record in support of the State's argument that the plaintiffs have failed to show diminution in the value of the Henkel property (see State's objection at 8-9). In their answers to interrogatories propounded by the Commonwealth (see attached excerpt), the plaintiffs admitted that the repairs of all the damages from the Mother's Day 2006 flood had been substantially completed within 3-1/2 months (by August 31, 2006, per answer to Interrogatory #8), and that the fair market value of the Henkel property after the flood did not decrease, but in

fact *increased* by nearly \$2 million over its value immediately before the flood – i.e., that the post-flood value was \$5,999,700, as compared to \$4,249,900 immediately before the flood (answers to Interrogatories #6a & #9).

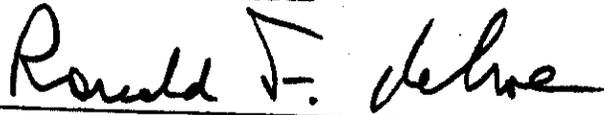
For the reasons stated in the State's motion papers, the plaintiffs' motion for partial summary judgment should be denied and the State's motion for summary judgment should be granted

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

By its Attorney admitted *pro hac vice*

MARTHA COAKLEY  
ATTORNEY GENERAL



Ronald F. Kehoe, Mass. BBO#264260  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has this day been forwarded to all counsel of record by first class mail, postage prepaid, at their respective addresses of record.

Sept. 2, 2009

  
Ronald F. Kehoe

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Docket No. 07-C-584

_____	
Allianz Global Risks US Insurance	)
Company As Subrogee of Henkel	)
Corporation, and Henkel Corporation,	)
	)
Plaintiffs,	)
	)
v.	)
	)
The State of New Hampshire and The	)
Commissioner of the Department of	)
Transportation,	)
	)
Defendants.	)
_____	

**PLAINTIFFS' ANSWERS TO THE COMMONWEALTH OF MASSACHUSETTS' INTERROGATORIES**

Pursuant to Rule 36 of the Rules of the Superior Court, Plaintiffs Allianz Global Risks US Insurance Company and Henkel Corporation submit the following Answers to Interrogatories as follows:

**GENERAL OBJECTIONS TO INTERROGATORIES**

1. Plaintiffs object to the Defendant's interrogatories to the extent that they contain undefined terms and phrases on the grounds that such demands are vague and ambiguous.
2. Plaintiffs object to the Defendant's interrogatories to the extent that they seek proprietary or other confidential information.
3. Plaintiffs object to the Defendant's interrogatories to the extent that they call for the disclosure of information protected by the attorney-client privilege, work product doctrine, or any other privilege or rule of confidentiality.
4. Plaintiffs further object to the Defendant's interrogatories insofar as they seek information related to mental impressions, legal conclusions, opinions, or theories of any attorney or other representative of Plaintiffs. Plaintiffs reserve the right to request the

Massachusetts Highway Department, that relate in any way to the subject matter of this litigation.

**ANSWER:**

None.

**INTERROGATORY NO. 5:**

State the purchase price paid by the Henkel Corporation for the property at 167 Batchelder Road in Seabrook, NH.

**ANSWER:**

The purchase price of the building purchased from Dexter Corporation was not broken out in the sales documents; however, attached is a Henkel Journal Entry showing the building acquisition cost as \$5,329,133.48, accumulated depreciation of \$2,547,174.63 and a net book value of \$2,781,958.85.

**INTERROGATORY NO. 6:**

State the fair market value of said property on each of the following dates:

- (a) immediately prior to the flooding that occurred on or about May 13, 2006;
- (b) immediately after said flooding; and
- (c) currently.

**ANSWER:**

- (a) \$4,249,900.00.

- (b) \$4,249,900.00 less the flood damage to the building.
- (c) The tentative value of the building for 2009 is \$6,105,000.00.

**INTERROGATORY NO. 7:**

State the basis for each value listed in your answer to the preceding interrogatory, and PRODUCE COPIES of any appraisals and other documents relating to said value.

**ANSWER:**

(a)-(c) The bases for the fair market values are the assessments of the Town of Seabrook. See attached documents.

**INTERROGATORY NO. 8:**

As of what date or dates had all damages from said flooding been repaired or replaced, as stated in plaintiffs' answer to the State of New Hampshire's interrogatory #31?

**ANSWER:**

The repairs were substantially completed by August 31, 2006.

**INTERROGATORY NO. 9:**

State the fair market value of said property immediately after each date listed in your answer to the preceding interrogatory.

**ANSWER:**

The fair market value of the Henkel property in 2007 was \$5,999,700.00.

**INTERROGATORY NO. 10:**

State the basis for each value listed in your answer to the preceding interrogatory, and PRODUCE COPIES of any appraisals and other documents relating to said value.

**ANSWER:**

The 2007 assessment from the Town of Seabrook. See attached correspondence.

**INTERROGATORY NO. 11:**

Has any flooding occurred at the Henkel property after May 2006, such that water invaded the plaintiff Henkel Corporation's building?

**ANSWER:**

Yes.

**INTERROGATORY NO. 12:**

If your answer to the preceding interrogatory is affirmative, provide a complete, fully detailed description of each such flooding event, including the identities of all persons having knowledge thereof.

**ANSWER:**

INTERROGATORY NO. 30:

If your answer to the preceding interrogatory is affirmative, state the basis of your contention in complete detail and cite all statutory and case law support for your contention.

ANSWER:

Not applicable.

I HEREBY CERTIFY, under oath, that the answers to these Interrogatories are true to the best of my knowledge and belief.

HENKEL CORPORATION

July 9, 2009  
Date

By: Gregory E. Ryan  
(Authorized Representative)

Print Name: Gregory E. Ryan  
Senior Litigation Paralegal  
Title

STATE OF Connecticut

COUNTY OF Hartford

On the 9<sup>th</sup> day of July, 2009, before me, Betty L. Proulx, the undersigned officer, appeared Gregory Ryan, known to me (or satisfactorily proven) to be the persons whose names appear above, and they subscribed their names to the foregoing instruments.

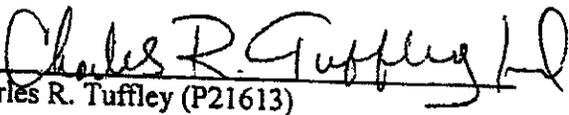
Betty L. Proulx  
Notary Public/~~Justice of the Peace~~  
My Commission expires: July 31, 2013

As to objections:

The Plaintiffs,

**ALLIANZ GLOBAL RISKS US INSURANCE  
COMPANY AND HENKEL CORPORATION**

By their Attorneys,



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Dated: June 29, 2009

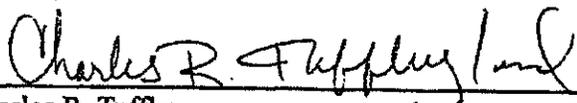
**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served on counsel of record by mail on June 29, 2009 as follows:

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