STATE OF NEW HAMPSHIRE
ROCKINGHAM SUPERIOR COURT

No. 218-2019-CV-00398

Brent Tweed and G&F Goods, LLC
v.
Town of Nottingham

NOTTINGHAM WATER ALLIANCE'S REPLY TO PLAINTIFFS' RESPONSE TO AMICUS CURIAE MEMORANDUM

Nottingham Water Alliance, Inc. ("NWA"), by and through its undersigned attorney, hereby submit this reply to Plaintiffs' Response to the NWA's Memorandum of Law Opposing Plaintiffs' Motion for Summary Judgment. Plaintiffs' response warrants brief corrections to the following points:

1. **The Plaintiffs lack taxpayer standing because the Town has neither approved spending for, engaged nor proposed to engage in conduct relating to the Ordinance.**

The Ordinance's existence does not constitute "approval to expend public funds enforcing it." Pls.' Resp. at 2. The possibility of future enforcement in no way meets the requirement that the town has *allocated funds* to enforcing the Ordinance. Plaintiffs show no budget line, no meeting minutes, no documentation whatsoever that the Town has pledged resources towards the creation or enforcement of the Ordinance.

While the Town could someday completely reverse its current position and decide to allocate funding in order to enforce the Ordinance, at the time of this filing Plaintiffs fail to identify any funds actually pledged or spent on creating or enforcing the Ordinance. The remote possibility of an occurrence should not be treated as the legal equivalent of that occurrence transpiring.

Plaintiffs argue that they qualify for standing because the *Ordinance* is not hypothetical. Resp. at 3. This is irrelevant; the salient point is that any alleged *conflict* between Plaintiffs and Defendant is nonexistent and completely hypothetical. Defendants have not engaged in litigation beyond defending against attorneys fees, which are unrelated to the substantive "dispute."

The mere passage of an Ordinance does not give rise to a dispute when the Town took no affirmative actions to adopt the Ordinance, took no official acts to ratify the Ordinance, makes no "claims [of] right to control the conduct of the plaintiffs" (Pls.' Resp. at 3) and through its position in litigation demonstrates that it considers the Ordinance to be without legal effect.

2. Plaintiffs additionally lack standing because any plaintiff, taxpayer or not, must sue an adversarial defendant and may not raise purely hypothetical issues.

Part I, Article 8 and NH RSA 491:22 explicitly erase injury as a prerequisite to standing, but by naming injury as the specific element to be erased these provisions imply that courts must still find the remaining elements of standing present in order to have jurisdiction over a case. *Gentry v. Warden*, 163 N.H. 280, 282 ("*[E]xpressio unius est exclusio alterius*.").

> Any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.
>
> NH RSA 491:22.

Plaintiffs ask this Court to stretch taxpayer standing beyond recognition; not only by assuming that taxpayers may sue to assuage hypothetical fears but also by construing "his or her [taxpayers'] rights" to belong to business associations -- thus granting G&F Goods not only standing but also gender.

Taxpayer standing does not obviate the requirements that parties must be adversarial and a dispute must not be hypothetical. *State v. Actavis Pharma, Inc.*, 170 N.H. 211, 215 (2017). Without an actual dispute between the two parties[1], and with any potential violation of state or federal law being purely speculative in nature, Plaintiffs lack standing to bring these claims.

Plaintiffs, who have the means to bring a lawsuit, would suffer no hardship from waiting until and unless the Ordinance was enforced against them to make these same claims. In fact, this endeavor would be easier because Plaintiffs would not have to argue standing with an *amicus*.

Without an adverse party to present alternate viewpoints, this Court must decline to resolve any substantive issues in the case. Courts may not weigh the merits of the case on the basis of arguments discussed only between a party and a nonparty. *United States v. Sinenery-Smith*, 590 U.S. __ (2020). Should this Court wish to deliberate the Ordinance's validity as Plaintiffs demand, this Court should admit the NWA as a full party to the case.

3. The Ordinance could be applied in ways that render it a valid exercise of state-delegated police powers pursuant to NH RSA 31:39.

If the NWA were a party to this case, the NWA would engage whole-heartedly in a debate over the limits of municipal police powers. Here the NWA limits itself to emphasizing pieces of its *amicus* brief that Plaintiffs treated as a party's and honored with a full-fledged response.

States also have broad police powers. Towns also have police powers, such as those that the state legislature explicitly grants to them and such powers that are necessarily implied or incidental thereto. *Piper v. Meredith*, 110 N.H. 291, 295 (1970). The State of New Hampshire

[1] The municipality vigorously litigated in favor of the Ordinance at issue in *Drewes Farm Partnership v. City of Toledo*, rendering the fact pattern distinctly different and the parties indeed adversarial rather than in complete agreement on all substantive issues.

granted powers to municipalities to "protect the commons." NH RSA 31:39. The Ordinance identifies several resources held in common.

The power to protect the commons is a delegated police power. This power "must be interpreted and construed in the light of the police powers of the State which grants them," which State powers are broad and evolving. *Piper*, 110 N.H. at 295. As the NWA quoted at length, the State's police powers, when delegated, retain this protective breadth in those areas of authority.

Deciding now, without a concrete application to assess, what the scope of state-authorized regulations for the safekeeping of "commons" might include is improper. A hypothetical future application of the Ordinance barring chemical trespass from all the air in Nottingham, for example, warrants a different argument than a hypothetical future application barring chemical trespass in the airspace over a public park or building yard space. Similarly, the prospective intervention of an ecosystem or of residents intervening on behalf of an ecosystem, is premature when the only hypotheticals for how this might occur are posited by the parties with a vested interest in devising invalid scenarios for the application of this Ordinance.

4. The Ordinance is neither vague nor overbroad, nor does it violate the First Amendment.

The NWA need not remind this Court further that parties at times elect to abuse the judiciary with lawsuits brought under contorted legal theories. This is no fault of the theories, just of the parties wishing to contort them-- parties whom the court can and should dismiss.

5. State and Federal laws leave ample room for this Ordinance to operate outside the scope of their preemptive reach.

Plaintiffs concede that municipalities can regulate the same projects as are also regulated by state and federal environmental laws: "A permitee's conduct continues to be circumscribed by the laws of the United States, the State of New Hampshire, and even municipalities to the extent

that the municipality had adopted ordinances actually within the scope of its proper authority." This is (or could be, in any number of hypothetical scenarios) an ordinance within the scope of the Town's lawful authority.

A hypothetical effect on economic activity that State laws also regulate, just like a hypothetical controversy without adversarial parties, is an improper subject of judicial study.

Respectfully submitted,

Dated: May 28, 2020

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically delivered this date to all counsel of record, specifically: Michael Courtney, attorney for Defendant Town of Nottingham; Richard Lehmann, attorney for Brent Tweed and G&F Goods, LLC.

Dated: May 28, 2020

Kira A. Kelley