The State of New Hampshire

ROCKINGHAM **SUPERIOR COURT**

BRENT TWEED, ET AL.

V.

THE TOWN OF NOTTINGHAM

NO. 218-2019-CV-00398

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Brent Tweed and G&F Goods (the "Petitioners") brought this action against the Town of Nottingham (the "Town") to challenge a Town ordinance. The action seeks a declaratory judgment, injunctive relief, and attorney's fees. The Town contests any obligation to pay attorney's fees but has chosen not to defend the legality of the ordinance.

The Petitioners have moved for summary judgment on their request for declaratory relief. The Nottingham Water Alliance (the "NWA") has been permitted to participate as amicus curiae in defense of the ordinance. After considering the pleadings, arguments, and applicable law, the Petitioners' Motion for Summary Judgment is GRANTED.

Facts and Procedural History

The NWA is a nonprofit corporation whose stated purpose is to "educat[e] the residents of Nottingham about local self-government." Mot. Intervene at 2. As part of its education efforts, the NWA drafted a proposed Town ordinance (the "Ordinance") asserting various rights of Town residents, including the rights to self-government, to a

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healthy climate, and to clean air, water, and soil. Id.; Ordinance § 1.[1] The Ordinance calls for an amendment to the State Constitution and to the United States Constitution expressly recognizing a "right of local self-government [to be] free from governmental restriction, ceiling preemption, or nullification by corporate 'rights.'" Ordinance § 3. In addition, the Ordinance subjects any "business entity or government" that willfully interferes with the Ordinance's asserted rights to "$1,000 per day of violation" plus damages for "any injury to an ecosystem or natural community caused by the violation." Id. § 2. In the event that a court declares the Ordinance unlawful or the Town's elected officials fail to enforce it, its text purports to grant ordinary Town residents the power to personally "enforce the rights and prohibitions" asserted in the Ordinance. Id.

From March 2018 to March 2019, the NWA treated advocating for the adoption of the Ordinance as its "primary organizational goal." Mot. Intervene at 2. After a "year-long community education campaign," the NWA collected enough signatures to place the Ordinance before the Town electorate on the 2019 ballot. Id. At its annual town hall meeting, Town residents voted to enact the Ordinance. Compl. ¶ 1. To date, the Town's government officials have refrained from enforcing any of its provisions. Mot. Intervene at 2.

Within two weeks of the Ordinance's adoption, the Petitioners brought this action challenging the Ordinance on grounds that it is ultra vires, void for vagueness, preempted by state law, and violative of the federal and state constitutions. See generally Compl. Petitioner Mr. Tweed is the sole shareholder and director of G&F Goods, a company in the business of making mail order purchases and sales. Tweed

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[1] The Ordinance is attached as Exhibit 1 to the Petitioners' Complaint.

Aff. ¶ 4.[2] The Petitioners have occasion to burn fossil fuels in the transportation of deliveries and in providing heat for G&F Good's place of business. Id. They also have occasion to dispose of packaging and other waste material, including paint and cleaning supplies that may contain toxic substances in a landfill or other disposal sites within the Town. Id. The Petitioners allege the substantial penalties threatened by the Ordinance have chilled their ability to conduct the day-to-day activities of the business. Compl. ¶ 4.

The NWA sought to intervene in favor of the Town, but the Court denied the NWA's Motion to Intervene for lack of standing. Order on NWA's Mot. Intervene. The Court suggested, however, the possibility that the NWA could seek to participate as an amicus curiae if its rights were not adequately represented in the litigation. Id. at 14, 17. As stated above, the Town has chosen not to defend the Petitioners' challenge to the legality of the Ordinance, contesting the prayer for attorney's fees but conceding that "the place to enact the kind of legal, structural change" provided for in the Ordinance "is in the legislature, not in the superior court." Resp'ts' Obj. to NWA's Mot. Intervene at 13.

The NWA then renewed its request to intervene "so that its members' rights to local self government, to clean air and water, and to intervene in defense of th[e] Ordinance are not stripped without an actual dispute between the parties." NWA Renewed Mot. Reconsider ¶ 19. The Court denied that request but invited the NWA to participate as amicus curiae. The NWA filed an Objection to the Plaintiff's Motion for Summary Judgment, but also appealed the Court's denial of its intervention request,

[2] Petitioner Tweed's Affidavit is attached as Exhibit 4 to the Petitioners' Memorandum of Law in Support of the Motion for Summary Judgment.

which stayed this litigation. By order dated December 23, 2020, the Supreme Court affirmed this Court's intervention rulings.

With the case back from the NWA's procedural appeal, it is time for the Court to rule on the Plaintiffs' motion for summary judgment.

Analysis

As stated above, the Petitioners' motion for summary judgment argues the Ordinance is ultra vires, void for vagueness and overbroad, preempted by state and federal regulation, and violative of separation of powers principles enshrined in Part I, Article 37 of the State Constitution and the First Amendment to the Federal Constitution. The NWA contends the Court lacks subject matter jurisdiction to adjudicate this matter and argues, in the alternative, that the Ordinance is entirely lawful. See NWA's Mem. L. in Opp'n Pls.' Mot. Summ. J. ("Amicus Brief").

A. Subject Matter Jurisdiction

The Court first turns to whether it has subject matter jurisdiction to provide declaratory relief. The NWA contends the Court lacks subject matter jurisdiction to grant any relief because the Petitioners lack standing. It argues the Petitioners lack standing under Part I, Article 8 of the New Hampshire Constitution because they have failed to show municipal expenditures or other actions in violation of law. Amicus Brief at 2–3. It also argues the Petitioners lack standing under RSA 491:22 because they have failed to show adversity and an actual, not hypothetical, dispute between the parties. Id. at 3–5. Finally, the NWA argues the Petitioners' claims are not yet ripe for review because the Ordinance has never been applied, nor is its application imminent. Id. at 5–6.

Part I, Article 8 of the State Constitution was amended in November 2018 "to allow taxpayer standing" to secure declaratory relief "under certain circumstances." Petition of Guillemette, 171 N.H. 565, 569 n.1 (2018). To establish standing pursuant to the amendment, a petitioner must be able to show, among other things, that he or she is a "taxpayer" and that "the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds" pursuant to a challenged "law, ordinance, or constitutional provision." N.H. CONST. pt. I, art. 8 (emphasis added). "[S]tanding to bring suit is a question of subject matter jurisdiction," such that, without proof by the petitioner of the actual expenditure of public funds pursuant to legislative action, the Court lacks subject matter jurisdiction to issue declaratory relief. Eby v. State, 166 N.H. 321, 334 (2014); N.H. CONST. pt. I, art. 8. Here, because the Town has not spent any public funds enforcing the Ordinance, the Petitioners lack standing to seek declaratory judgment pursuant to Part I, Article 8 of the State Constitution.

For the Court to issue a declaratory judgment pursuant to RSA 491:22, by contrast, a petitioner is not required to show "proof of a wrong committed by one party against the other." Avery v. N.H. Dep't of Educ., 162 N.H. 604, 607 (2011). Rather, the "distinguishing characteristic" of declaratory judgment is that it "can be brought before an actual invasion of rights has occurred." Carlson, Tr. v. Latvian Lutheran Exile Church of Boston and Vicinity Patrons, 170 N.H. 299, 303 (2017) (citing Portsmouth Hosp. v. Indemnity Ins. Co., 109 N.H. 53, 55 (1968)) (emphasis added); cf. 26 C.S.J. § 30 (declaratory judgment may be sought as "a prophylactic measure before a breach [of duty] occurs.") Moreover, where a "present legal right" raises issues concerning "the validity of [legislative action] as [an] exercise of the police power," a declaratory

judgment may be sought "either generally or in application to the plaintiffs." Woolf v. Fuller, 87 N.H. 64, 67 (1934). The Court will not, however, award declaratory relief where a petitioner has a "purely subjective or speculative fear of future harm." Carlson, 170 N.H. at 304 (citing Prasco, LLC v. Medicis Pharmaceutical Corp., 537 F.3d 1329, 1339–42 (Fed. Cir. 2008)). A petitioner must assert a right "inherently adverse" to the respondent's and show that the respondent is "likely to overburden or otherwise interfere with [the petitioner]'s right." Id. at 303 (emphasis added). Ultimately, "standing requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Censabella v. Hillsborough County Atty., 171 N.H. 424, 427 (2018).

The Court concludes that the Petitioners have standing to seek declaratory relief pursuant to RSA 491:22. The Petitioners' asserted right to emit fossil fuels and dispose of waste within Town limits in the conduct of business is directly adverse to the Town's assertion, through the Ordinance, of broad legal rights to, among other things, clean air, water, and soil, a healthy climate, and the flourishing of ecosystems. Censabella, 171 N.H. at 427. The Petitioners face an imminent risk of extrajudicial demands for thousands of dollars in penalties by ordinary Town residents who may deem the Petitioners' activities to violate the Ordinance by causing "any injury" to the Town's ecosystem. Ordinance § 2 (emphasis added); compare Carlson, 170 N.H. at 304 (finding lack of standing where petitioner did not show likelihood of interference with claimed right). Moreover, the Petitioners assert the Ordinance infringes on their present legal interests to carry on their business and appeal to the judiciary for the resolution of legal disputes, challenges which directly concern whether the Ordinance is a valid

exercise of the police power. They accordingly need not wait for the Town or its residents to enforce the Ordinance's provisions against them prior to seeking declaratory relief. Fuller, 87 N.H. at 67; Portsmouth, 109 N.H. at 56 ("If the controversy be one that would be justiciable under the law, provided either party had violated the right claimed by the other, it is justiciable under [RSA 491:22] as soon as the essential facts arise."). Accordingly, the Court has subject matter jurisdiction to adjudicate the substantive issues raised by the Petitioners' Motion for Summary Judgment, as the Petitioners have standing to seek declaratory judgment pursuant to RSA 491:22. Eby, 166 N.H. at 334.

B. Motion for Summary Judgment

To prevail on a motion for summary judgment, the moving party must establish that there is "no genuine issue as to any material fact" and that it is "entitled to judgment as a matter of law." Sabato v. Fed. Nat'l Mortg. Ass'n, 172 N.H. 128, 131 (2019). The Court looks to the "affidavits and other evidence" and to "all inferences properly drawn from them, in the light most favorable to the nonmoving party." Clark, 171 N.H. at 650. In deciding the motion, the Court assesses "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed by the parties." RSA 491:8-a, III.

1. Ultra Vires

The Petitioners argue that municipalities like the Town have only such legislative powers as are delegated to them by the General Court, which has never granted the Town the authority to issue what they term "a sweeping environmental regime by municipal ordinance." Mem. L. in Supp. Mot. Summ. J. at 9. The police power lies in

the State, and towns and municipalities “have only such powers as are . . . delegated to them by statute.” Bisson v. Milford, 109 N.H. 287, 288–289 (1969). An ordinance enacted by a municipality for “purposes not embodied in an enabling act” will be “held invalid . . . as an ultra vires enactment.” K.L.N. Constr. Co. v. Town of Pelham, 167 N.H. 180, 184 (2014). RSA 31:39 delegates only limited, enumerated powers over which municipalities may issue ordinances and bylaws. State v. Lilley, 171 N.H. 766, 784 (2019). The State’s “plenary power over municipalities,” by contrast, “is limited only by” the State Constitution, which grants municipalities “only the right to control the form of their local government as enacted in their charters.” Seabrook Citizens for Defense of Home Rule v. Yankee Greyhound Racing, 123 N.H. 103, 108 (1983); see N.H. CONST pt. I, art. 39.

Nothing in the plain language of RSA 31:39 can be read to authorize the Town to enact the broad governmental, economic, and environmental regulation provided for in the Ordinance. The Ordinance purports to assert a “right of local self-governance” independent from the State or Federal Constitution, stating that “the people of Nottingham have the right to alter or replace th[eir] system of government with one that secures and protects [the] rights” asserted in the Ordinance. Ordinance, Preamble. It purports to regulate the economic activity of corporations without reference to an enumerated power in RSA 31:39 and imposes fines in excess of the maximum “$1,000 per violation” allowed by the statute, including damages for unspecified “injur[ies]” to the Town’s “ecosystems.” Ordinance § 2. While RSA 31:39 permits the Town to protect “parks, commons,” and other “public institutions,” and to regulate in limited areas such as garbage removal, the lighting of fires, or the emission of noise, the statute does not

grant the Town the power to engage in the kind of broad regulatory activity which an Ordinance prohibiting all "corporate activities that release toxic contaminants" would involve. Ordinance § 1(c). The Court must conclude that the Ordinance's regulation of areas unenumerated in RSA 31:39 was enacted for "purposes not embodied in an enabling act" of the State legislature and is, therefore, ultra vires. Pelham, 167 N.H. at 184.

2. Vagueness

The Petitioners also challenge the Ordinance as unconstitutionally vague. A legislative enactment is impermissibly vague where "(1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." Id. A legislative enactment may be challenged either "on its face [or] as applied." State v. MacElman, 154 N.H. 304, 307 (2006). "Where a vagueness claim does not involve a fundamental right, a facial attack on the challenged statutory scheme is unwarranted." State v. Hynes, 159 N.H. 187, 200 (2009). A party challenging legislative action as void for vagueness must overcome a "strong presumption favoring [the enactment's] constitutionality." State v. Wilson, 169 N.H. 755, 767 (2017).

The Petitioners attack the Ordinance on its face, prior to enforcement by the Town or its residents, so they must assert an underlying violation of a fundamental constitutional right. State v. Hynes, 159 N.H. 187, 200 (2009). Here, the Petitioners explicitly claim the Ordinance implicates their right to petition for grievances pursuant to the Petition Clause of the United States Constitution.[3] See U.S. CONST amend. I.

[3] See § B(4), infra.

Because the right to petition is a federally recognized fundamental right, the Court proceeds to consider the merits of the facial challenge. See Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575, 585 (D.C. Cir. 1972) (describing the right to petition as a "fundamental right."); compare In re N.B., 169 N.H. 265, 270 (2016) (describing a "fundamental right to free speech" under the First Amendment to the Federal Constitution) with McDonald v. Smith, 472 U.S. 479, 485 (1985) (The "rights protected by the First Amendment are inseparable and . . . no sound basis exists for according greater protection to one right over another."). For those reasons, a facial challenge to the Ordinance is appropriate.

The Court finds that the Ordinance does not provide a person of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits. While Section 2 of the Ordinance imposes penalties for violations of its "provisions," the Ordinance does not specify what conduct constitutes a violation. Instead, the Ordinance asserts five "rights," each loosely defined: self-governance; a healthy climate; clean air, water, and soil; protection from "governmental" and corporate interference; and the right of "ecosystems" and "communities" to, among other things, "exist," "flourish," and "evolve." Ordinance § 1(a–e). While the Ordinance specifies activities that clearly constitute violations, such as the deposit of "petroleum refining wastes" or "sewage sludge" within the Town, it also states that violations merely "include" such enumerated activities. That is, the extent of conduct falling within the purview of a violation of the Ordinance is far from clear to a person of ordinary intelligence. Accordingly, the Court must conclude the Ordinance is unconstitutionally vague and cannot be enforced. Wilson, 169 N.H. at 767.

3. Preemption

The Petitioners argue the Ordinance is preempted by state and federal regulation. Mem. L. in Supp. Mot. Summ. J. at 17–21. The doctrine of preemption renders "municipal legislation . . . invalid if it is repugnant to, or inconsistent with, State law." Forsberg v. Kearsarge Reg'l Sch. Dist., 160 N.H. 264, 269 (2010). "Thus, preemption will occur when local legislation . . . runs counter to the legislative intent underlying a statutory scheme." Id. "[A] detailed and comprehensive State statutory scheme governing a particular field" is generally, but not necessarily, "demonstrative of the State's intent to preempt that field." Town of Hooksett v. Baines, 148 N.H. 625, 627 (2002). In the face of a comprehensive regulatory scheme, the Court must determine whether the State has authorized "additional municipal regulation" in the particular field. Id.

Local regulation of much of the activity sought to be regulated in the Ordinance has already been found to be preempted by the New Hampshire Supreme Court. For example, Section 1(c) of the Ordinance seeks to regulate air pollution, a field that is preempted from local regulation by RSA chapter 125-C. Bio Energy, LLC v. Town of Hopkinton, 153 N.H. 145, 154 (2005) ("'We regard it as highly improbable that the legislature, after establishing detailed guidelines,' intended to leave the ultimate regulation of air pollution 'to the vagaries of local regulation.'") Section 1(d) of the Ordinance seeks to regulate "the physical deposition or disturbance of toxic wastes," which, like all other regulation of "hazardous waste disposal," has been preempted by RSA chapters 147-A through 147-D. Stablex Corp. v. Hooksett, 122 N.H. 1091, 1101-02 ("We find that the legislature . . . devised a comprehensive and detailed

program of statewide regulation, which on its face must be viewed as preempting any local actions having the intent or the effect of frustrating it[s] . . . [regulation of] hazardous wastes.") Similarly, the State has preempted local regulation of "pesticide and defoliant" chemicals, and the local regulation of landfill closures, both activities falling within the purview of the Ordinance's "Right to Clean Air, Water, and Soil." Salisbury v. New Eng. Power Co., 121 N.H. 983, 985 (1981); Town of Pelham v. Browning Ferris Indus., 141 N.H. 355, 363 (1996). However, the Court need not reach whether and to what extent additional regulatory activity covered by the Ordinance is preempted by State or Federal legislation, as the Court finds the Ordinance unlawful on other grounds.

4. Separation of Powers

Finally, the Petitioners argue the Ordinance violates the Separation of Powers Doctrine and interferes with their federal First Amendment right to resort to the judiciary for resolution of legal disputes. Mem. L. in Supp. Mot. Summ. J. at 21–23. Part I, Article 37 of the State Constitution provides that the "Legislative, Executive, and Judicial" branches of our government "ought to be kept . . . separate from, and independent of, each other." The concept of the separation of powers was "designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government." Opinion of Justices, 121 N.H. 552, 556 (1981). Recognizing that a complete separation of the branches was not practical, the drafters of the constitution nevertheless provided in its text that the branches ought to be kept separate, as much "as the nature of a free government will admit." Id.; N.H. CONST. pt. I, art. 37.

The Petition Clause of the First Amendment provides that the people have a right to "petition the government for a redress of grievances."[4] U.S. CONST. amend. I. As incorporated against the State by the Fourteenth Amendment to the United States Constitution, the Petition Clause protects not only the right of New Hampshire residents to petition the State legislature for a redress of wrongs, but also a right of access "to courts" and to "other forums established by [the State] government for resolution of legal disputes." Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011).

Section 2(e) of the Ordinance purports to prohibit the right of Nottingham residents to enforce their rights in state court in violation of the Petition Clause of the United States Constitution and of Part I, Article 37 of the State Constitution. Section 2(e) provides that where "a court fails to uphold [the Ordinance] or purports to declare it unlawful, the [Ordinance] shall not be affected." It further provides that any "resident" of Nottingham may enforce the Ordinance's provisions "through nonviolent direct action," regardless of the courts' pronouncements on the lawfulness of such action. Yet the federal and state courts are "the final arbiter" both of the intent of state legislatures and of "constitutional disputes." Petition of State, 172 N.H. 493, 496 (2019); HSBC Bank USA, Nat'l Ass'n, Inc. v. MacMillan, 160 N.H. 375, 376 (2010). It is the power of the judiciary "to interpret the constitution and say what the law is," and the Town of Nottingham has no authority to usurp that power unto itself or its residents. Claremont Sch. Dist. v. Governor, 143 N.H. 154, 158 (1998). The Court must, therefore, find that Section 2(e) of the Ordinance violates the Petitioners' First

[4] The Court notes that, while the Petitioners do not invoke it, the Petition Clause of the New Hampshire Constitution similarly provides that "[t]he Legislature shall assemble for the redress of public grievances and for making such laws as the public good may require." N.H. CONST. pt. I, art. 31.

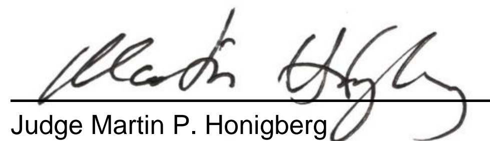
Amendment rights to petition for access to the courts for the resolution of legal disputes. Guarnieri, 564 U.S. at 387. It must also find that, through the Ordinance, the Town seeks to enlarge its legislative powers at the expense of those of the State judiciary, in violation of Part I, Article 37 of the State Constitution.

CONCLUSION

Based on the nature of the relief sought and after consideration of the pleadings, arguments, and applicable law, the Court **GRANTS** the Plaintiffs' motion for summary judgment.

SO ORDERED.

February 7, 2021
Date



Judge Martin P. Honigberg

Clerk's Notice of Decision
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