

**STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH, SS  
NORTHERN DISTRICT**

**SUPERIOR COURT**

Pamela D. Kelly, et al.

v.

Town of Nottingham

Docket No. 218-2020-CV-00008

**ORDER**

Plaintiffs have brought this action seeking declaratory relief, alleging that Defendant improperly classified the roads by which the plaintiffs access their properties as emergency lanes. Plaintiffs filed this case as a class action lawsuit pursuant to Super. Ct. R. 16. The Court has not yet ruled on whether the plaintiffs may be certified as a class. Nevertheless, Defendant now moves to strike the class action designation. Plaintiffs object. For the reasons that follow, the Court will consider the Defendant's as an objection to the request for certification.

The requirements for certification of class actions are set forth in New Hampshire Superior Court Civil Rule 16. Pursuant to that rule:

One or more members of a class may sue or be sued as representative parties on behalf of all if:

- (1) The class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
- (2) There are questions of law or fact common to the class which predominate over any questions affecting only individual members;
- (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (4) The representative parties will fairly and adequately protect the interests of the class;
- (5) A class action is superior to other available methods for the fair and efficient adjudication of the controversy; and

(6) The attorney or non-attorney representative for the representative parties will adequately represent the interests of the class.

“Because the pertinent provisions of [Rule 16] are comparable to Federal Rule of Civil Procedure 23, federal cases constitute an appropriate aid for the Court to employ in interpreting the New Hampshire Rule.” Prive v. New Hampshire-Vermont Health Servs., No. 98-E-20, 1998 WL 375294, at \*1 (N.H. July 1, 1998).

“Under Federal Rule of Civil Procedure 23, trial courts ‘must conduct a rigorous analysis of the prerequisites established by [the] Rule . . . before certifying a class.’” Cantwell v. J&R Props. Unlimited, Inc., 155 N.H. 508, 511 (2007) (quoting Smilow v. Southwestern Bell Mobil Sys., Inc., 323 F.3d 32, 38 (1st Cir. 2003)). “Such a ‘rigorous analysis’ ordinarily involves looking beyond the allegations of the plaintiff’s complaint.” Id. “Therefore, most federal circuit courts of appeal have ruled that when deciding a motion for class certification, the trial court does not, as with a motion to dismiss, accept all of the plaintiff’s allegations as true.” Id.

“In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 178 (1974) (quoting Miller v. Mackey Int’l, 452 F.2d 424, 427 (5th Cir. 1971)). Due to the need for rigorous analysis noted above, the court’s inquiry “may entail some overlap with the merits of the plaintiff’s underlying claim.” Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds, 568 U.S. 455, 464–55 (2013). However, “[m]erits questions may be considered to the extent—and only to the extent—that they are


relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” Id. at 466.

Because the Court has not yet certified a class in this case, Defendant’s motion to strike the designation is premature; the Court cannot strike that which does not exist. Moreover, as Defendant notes in its reply, Plaintiffs bear the burden of establishing all six elements under Rule 16, and they have not yet had an opportunity to do so. The analysis of whether Plaintiffs are entitled to class certification will requires an examination of facts beyond those stated in the complaint. Therefore, a hearing is necessary to resolve the current issue. Accordingly, the parties shall confer and inform the Court of the time they will require for this matter to be heard, at which time the Court will schedule a hearing on class certification.

**SO ORDERED.**

November 6, 2020

Date

  
Judge Diane M. Nicolosi

Clerk's Notice of Decision  
Document Sent to Parties  
on 11/09/2020