The State of New Hampshire

ROCKINGHAM **SUPERIOR COURT**

BRENT TWEED, ET AL.

V.

TOWN OF NOTTINGHAM, ET AL

NO. 218-2019-CV-0398

ORDER ON NOTTINGHAM WATER ALLIANCE'S MOTION TO INTERVENE

Plaintiffs Brent Tweed and G&F Foods, LLC, initiated this action against the Town of Nottingham (the "Town") to challenge the validity of a municipal ordinance. See Compl. (Doc. 1). Pending before the Court is Plaintiffs' motion for summary judgment. See Pls.' Mot. Summ. J. (Doc. 26). The Nottingham Water Alliance ("NWA") wants to support the ordinance and oppose Plaintiffs' motion. The only issue decided in this order is whether NWA should be allowed to intervene in support of the ordinance.

NWA moved to intervene early in the litigation, but was denied by the Court. See Mot. to Intervene (Doc. 11); Aug. 6, 2019 Order (Doc. 17). NWA sought reconsideration, which was denied. See Mot. Recon. (Doc. 18); id. (margin order dated Aug. 28, 2019).[1]

As noted above, Plaintiffs have moved for summary judgment. The Town has objected only to the extent that Plaintiffs are seeking legal fees. See Def.'s Obj. and Mem. (Doc. 29 and 30). As a result of the Town's limited objection, NWA has renewed its motion to intervene. See NWA's Second Mot. Intervene (Doc. 35). Plaintiffs object.

[1] NWA incorrectly asserts in its current filing that the Court never ruled on its prior motion to reconsider. See id.

See Pls.' Obj. (Doc. 37). For following reasons, NWA's renewed motion to intervene is **DENIED**. However, the Court invites NWA to participate in the litigation as amicus curiae consistent with the instructions in this Order.

FACTUAL AND PROCEDURAL BACKGROUND

On March 16, 2019, voters in Nottingham voted to enact the "Freedom from Chemical Trespass Rights-Based Ordinance" (the "Ordinance"). See Doc. 1, Ex. 1. Among other things, the Ordinance purports to recognize or impose certain obligations on business and government entities. A violation of those obligations would expose the violator to a fine of $1,000 per day. Id. § 2(a). The Ordinance further purports to create a right for any resident, ecosystem, or natural community "to intervene in any action concerning this Ordinance." Id. § 2(d).

Plaintiffs, an individual resident of Nottingham and a Delaware limited liability company doing business in New Hampshire, filed this action seeking a declaratory judgment against the Town declaring the Ordinance invalid. Doc. 1, Prayer A. Plaintiffs argued that the Ordinance "is contrary to United States and New Hampshire constitutional, statutory, and common law" because it is ultra vires, seeks to regulate a field preempted by state law, is constitutionally void for vagueness, and violates the separation of powers doctrine. Id. ¶ 32. After the Town filed an answer, NWA moved to intervene in the action. See Doc. 11.

In its motion, NWA argued that it had a right to intervene in the case because: (1) it had "catalyzed the adoption of the Ordinance"; (2) it has a right to "local self-government"; (3) the Ordinance "bestows upon resident[s] the right to enforce the lawsuit and to participate in lawsuits concerning its legality"; and (4) "the disputed

Ordinance applies distinctly to [] NWA and its individual members." Id. at 4–5. NWA further argued that it had a right to intervene because "the Town . . . does not adequately represent [] NWA's interests" and that the Town's reasons for defending the Ordinance are distinct from NWA's. Id. at 5.

The Court (Delker, J.) issued an Order denying NWA's motion to intervene on August 6, 2019 (the "August 6 Order"). See Doc. 17. In the August 6 Order, the Court determined that NWA did not have general standing to intervene in the action. Id. The Court ruled:

> A party must have a direct and apparent interest in the outcome of the case in order to intervene. Snyder [v. N.H. Sav. Bank, 134 N.H. 32, 35 (1991)]. NWA has no apparent legal rights at stake in the underlying litigation. Contrary to NWA's argument, playing an integral role in the passage of an ordinance by itself does not create a sufficiently direct and apparent interest in litigation involving said ordinance. See Doc. 11 at 4. Nor does the fact that an "unfavorable result … would waste the resources that the NWA invested in promotion and securing the right to local self-government" create a direct and apparent interest either. Id.; see Samyn-D'Elia Architects, P.A. v. Salter Cos., 137 N.H. 174, 177–78 (1993). Indeed, if this were the case, then it would open the flood gates for any number of special interest groups to intervene in litigation involving laws they lobbied for or against…. From a public policy perspective, and in the interests of judicial economy, this cannot be the intended purpose of intervention.

Id. at 7. The Court then went on to determine that NWA did not have standing under Part I, Article 8 of the New Hampshire Constitution:

> The plain language of the constitutional amendment states that it grants tax payers the standing to petition the court to determine whether a state or political subdivision has spent or allocated funds "in violation of a law, ordinance or constitutional provision." N.H. Const. pt. I, art. 8 (emphasis added). Alone, this language establishes that taxpayers in New Hampshire would have standing to seek a declaratory judgment when there is an allegation that a town acted unlawfully. The plain language of the provision does not support the proposition that a taxpayer can seek a declaration that an ordinance is a lawful exercise of power—which is NWA's position here.

Id. at 10 (emphasis in original).

In the August 6 Order, the Court also considered whether NWA "should be allowed to participate in this litigation as amicus curiae." Id. at 12. As the Superior Court's rules do not set forth guidelines for amicus participation, the Court set forth a detailed analysis as to the propriety of accepting arguments from a putative intervenor who has fallen short of establishing a right to intervene. Id. at 12–17. The Court ultimately concluded that it would not invite NWA to file an amicus brief because NWA was unable to demonstrate that the Town would not adequately defend the constitutionality of the Ordinance. Id. at 17.

On January 13, 2020, Plaintiffs moved for summary judgment. See Doc. 26. Although the Town filed an objection, it did not defend the constitutionality of the Ordinance, but rather limited its objection to Plaintiffs' request for attorney's fees. See Doc. 29; see also Doc. 30. As a result of the Town's limited objection, NWA renewed its motion to intervene.

ANALYSIS

NWA argues that it should now be allowed to intervene as a full party to the action because the Town has demonstrated that it will not defend the constitutionality of the Ordinance. See Doc. 35 ¶¶ 9–19. In particular, NWA asserts that it should be allowed to intervene "so that the Court may see two sides to the discussion of the Ordinance's validity before ruling on the Plaintiffs' motion for Summary Judgment." Id. ¶ 9. It further argues that it has a "direct and apparent interest" in the litigation because "[The Town] seek[s] now to denounce NWA members' right to local self-government and to simultaneously deprive them of this right by allowing the Ordinance to be

overturned without the Court hearing from the perspective of those who hold this right and stand to lose it." Id. ¶ 13. In so arguing, NWA analogizes itself to the litigants in G2003B, LLC v. Town of Weare, 153 N.H. 725 (2006), which the Court analyzed in the August 6 Order. NWA asserts that because the facts now resemble those of G2003B, it has standing to intervene as a party. Id. ¶ 15 (citing Doc. 17 at 16).

While, the Court agrees that the facts in this case are now more in line with G2003B than they were at the time the Court issued the August 6 Order, it appears NWA misunderstands the Court's discussion of G2003B. In the August 6 Order, the Court considered G2003B to determine the propriety of inviting NWA to join as an amicus curiae, not as a full party to the case. As the August 6 Order has great bearing on its decision on this motion, the Court reproduces it in relevant part here:

> An amicus curiae, or literally a "friend of the court," is not a party to a lawsuit but either (1) petitions the Court or (2) is requested by the Court to file a brief because that entity has a strong interest in the subject matter. See Black's Law Dictionary at 102 (10th ed. 2014). … [W]here the amicus falls short of a right to intervene but still has a "special interest that justifies [its] having a say," the Court in its discretion may extend the invitation. See [Strasser v. Doorly, 432 F.2d 567, 569 (1st Cir. 1970)].
>
> Indeed, New Hampshire courts appear to have implicitly adopted this principle in G2003B, LLC V. Town of Weare. In that case, the Supreme Court upheld the trial court's decision to allow residents to intervene in a limited role. G2003B, 153 N.H. at 726–28. In G2003B, citizens passed an ordinance by ballot initiative that imposed a historic overlay district which encompassed the plaintiff's property and that prevented its subdivision and development. Id. at 726. Both the Weare board of selectmen and the town planning board opposed the ordinance. Id. After the plaintiff sued alleging an unconstitutional taking, the town invited those citizens who circulated the petition to intervene because it "did not intend to expend the amount of money from the town budget necessary for a vigorous defense of the action." Id. While the trial court granted intervenor status to the citizens, it did so in a limited role, and they did not have step in and legally represent the party defendants. Id. at 726–28. Indeed, the intervening citizens conceded on appeal that they could not act as a true party, and therefore could not block a consent decree between the town and the

plaintiff. Id. at 728. Nonetheless, the trial court allowed the intervenors to argue why the overlay district was constitutional as to the subject parcel. Id. Although the decision describes the taxpayers in G2003B as having limited standing as intervenors, it appears that their role was more akin to amicus curiae to provide legal arguments in support of the constitutionality of the taxpayer-initiated ordinance where the town did not intend to do so.

. . .

The issue of whether to allow a potential intervenor the opportunity to participate even in a limited role depends on whether the prospective intervenor's rights are already adequately represented in the litigation. See In re Stapleford, 156 N.H. 260, 262–63 (2006). In Stapleford, the Supreme Court affirmed the denial of a motion filed by two minor children to intervene in their parent's divorce. Id. at 263. The Court agreed with the marital master that the guardian ad litem (GAL) "represented the children's best interests and had adequately reported their preferences." Id. at 262. The Court also refused to apply the traditional intervention test, finding that as minors who lacked legal capacity, the appointment of a GAL is the traditional way to ensure that their interests were legally represented. Id. at 263; but see In re Goodlander and Tamposi, 161 N.H. 490, 506 (2011) (allowing the intervention of adult children in their parents' divorce proceedings to protect their interests as the beneficiaries of a trust).

Generally, an intervenor's rights are adequately represented by government. Public Service Co. of New Hampshire v. Patch, 136 F.3d 197, 207 (1st Cir. 1998); Acra Turf Club, LLC v. Zanzuccki, 561 Fed.Appx. 219, 222 (3rd Cir. 2014) (affirming the trial court's denial of an organization's intervention as of right because its interests in the validity of the statute being challenged were sufficiently represented by the New Jersey Attorney General) … "[T]he burden of persuasion is ratcheted upward," and the would-be intervenors must overcome a rebuttable presumption of adequate representation. Id. To overcome this presumption, intervenors must "demonstrate adversity of interest, collusion, or nonfeasance" in the representation. Moosehead Sanitary Dist. v. S. G. Phillips Corp., 610 F.2d 49, 54 (1st Cir. 1979); but see Daggett v. Comm'n on Gov't Ethics and Election Practices, 172 F.3d 104, 111 (1st Cir. 1999) (clarifying that Moosehead does not create an exclusive list of considerations). These cases illustrate the general principle that elected government officials adequately represent the interests of their constituents in litigation.

At this stage of the present litigation there is no evidence in the record that the residents' interests are not adequately represented by the Town government. Unlike the Town of Weare in G2003B, the Town of Nottingham has given no indication that it does not intend to vigorously

> defend the Ordinance. Indeed, the Town timely filed both an appearance and an answer to the complaint. See Docs. 3, 8. Furthermore, the burden is on NWA to overcome the presumption of adequate representation when a government representative defends a law on behalf of taxpayers. Other than alleging that the "municipal corporation" does not in fact represent the taxpayers of Nottingham—an assertion which is not in alignment with universally accepted constitutional principles—NWA brings forth no argument as to why the town's representation is inadequate. It has made no specific allegations of any "adversity of interests, collusion, or nonfeasance" on the part of the town. See Moosehead, 610 F.2d at 54. Moreover, NWA does not allege that the Town does not have the resources to vigorously defend the Ordinance. Absent such a showing, NWA's motion to intervene may be denied as the residents of Nottingham are adequately represented by the Town of Nottingham.

Doc. 17. at 12–16.

At the time the Court issued the August 6 Order, there was no indication that the Town would not adequately represent NWA's interests by defending the constitutionality of the Ordinance. At this point, the circumstances have changed, and it is clear the Town does not intend to contest Plaintiffs' position. See Doc. 30. Although NWA avers that this development gives them standing to join the lawsuit as a party, the Court disagrees. The August 6 Order clearly stated that if circumstances in the litigation changed, the Court would reconsider allowing NWA to file an amicus brief in support of its position—not join the action as a party. Doc. 17 at 17.

Plaintiffs' argue that the Town's decision to contest only the attorneys' fees claim does not amount to an inadequate defense on the merits because the Town's position is relatively weak. See Doc. 37 ¶¶ 8–10 The issue here, however, is not whether defense's counsel has adequately represented the Town, but rather whether NWA's interest have been adequately represented by the Town. See Doc. 17 at 16, supra.

As NWA correctly points out, the Town does not intend to litigate the constitutionality of the Ordinance and instead seeks only to limit its exposure to

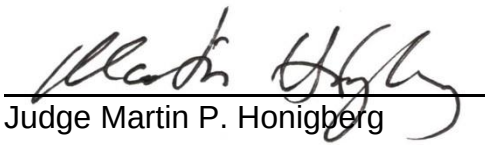
attorney's fees. See Doc. 30. As a result, the Court finds that NWA's interest in defending the constitutionality of the Ordinance is no longer being adequately represented by the Town. Accordingly, the Court invites NWA to participate in the litigation as amicus curiae. NWA has twenty (20) days from the date this Order is issued to file a memorandum with the Court, which it will review when considering Plaintiffs' motion for summary judgment. The Court notes that Plaintiffs are under no obligation to respond to NWA's amicus memorandum. Should they wish to respond, Plaintiffs will have ten (10) days from the date the amicus memorandum is filed to do so.

CONCLUSION

For the reasons stated above, NWA's renewed motion to intervene is **DENIED**. However, the Court invites NWA to participate in the litigation as amicus curiae consistent with the above instructions.

SO ORDERED.

April 16, 2020
Date



Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 04/16/2020