

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

Case No. 218-2019-CV-00398

Brent Tweed, et al.

v.

Town of Nottingham et al.

THE DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR PARTIAL OBJECTION TO THE
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Introduction

The subject Ordinance was petitioned by residents of the Town of Nottingham and passed at the Town's Annual Meeting on March 16, 2019, by a narrow margin. *See Sterndale Affidavit* at ¶4; *see also* Exhibit A at 59-60 (Town's Response to Plaintiffs' Request for Production). In total, 56 residents voted in favor of the Ordinance's passage. *See* Ex. A at 59-60. The Plaintiffs' Complaint does not allege that since its passage, the Town or any resident has sought to enforce the Ordinance. There is no claim that the Plaintiffs' business has actually suffered damages or been ordered to cease any operations. Nevertheless, the Plaintiffs seek attorney's fees against the Town for the filing of this action.

Legal Analysis

New Hampshire adheres to the American Rule; that is, absent statutorily or judicially created exceptions, parties pay their own attorney's fees. *See Board of Water Comm'rs, Laconia Water Works v. Mooney*, 139 N.H. 621, 628 (1995). The New Hampshire Supreme Court has "never held that forcing the losing party to a strict adherence to the law is a sufficient benefit conferred on nonparties to justify awarding attorney's fees to the prevailing party." *Taber v. Town of Westmoreland*, 140 N.H. 613, 615 (1996). In fact, the Court has explained that "[i]f

adherence to the law were sufficient benefit conferred on nonparties, then any time a town sought to support its agencies and lost, the prevailing party should recover attorney's fees." *Taber v. Town of Westmoreland*, 140 N.H. 613, 615 (1996).

"An award of attorney's fees to the prevailing party where the action conferred a *substantial benefit* on not only the plaintiffs who initiated the action, but on the public as well, has been recognized as an exception to the American rule that each party must bear its own attorney's fees." *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 594-95 (1999) (emphasis added). "To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefitted from them and that would have had to pay them had it brought the suit." *Mills v. Electric Auto-Lite*, 396 U.S. 375, 396-97 (1970). The purpose of the fee award is not to penalize the municipality, but to compensate the plaintiff for their efforts on behalf of the public. *Claremont Sch. Dist. v. Governor*, 144 N.H. 590, 594-95 (1999).

Here, there is no allegation that the Town of Nottingham or any resident has sought to enforce the terms of the Ordinance against the Plaintiffs or any other person or entity. The Plaintiffs have not, and cannot, allege any specific damages resulting from the passing of the Ordinance. See *Sterndale Affidavit* at ¶5-6. In fact, the Town did not object to the Plaintiffs' request for a temporary injunction enjoining the enforcement of the Ordinance, which this Court granted on May 1, 2019.

The inquiry of Plaintiffs' request for attorney's fees should examine the alleged benefits conferred on the residents of the Town and the actions of the Town as was the case in *Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 271 (1985), and *Board of Water Commissioners, Laconia Water Works v. Mooney*, 139 N.H. 621 (1995). In *Irwin Marine*, other bidders who participated

in a public auction were directly harmed by the city's unfair public bidding procedures. *Irwin Marine*, 126 N.H. at 276. The Supreme Court ruled that invalidating the sale put all bidders "on an equal footing" to compete in a future sale of the property. *Id.*

In *Mooney*, the board of water commissioners assessed a development charge on all new users of the water system, which was found to be illegal. *Mooney*, 139 N.H. at 623. Not only was the defendant in that case injured but so were all new users of the water system. In *Irwin Marine* and *Mooney*, the focus was on the municipalities' actions. In this case, there is no allegation that Town action has resulted in damage to any resident, including the Plaintiffs. See *Sterndale Affidavit* at ¶5-6.

Because there was no enforcement of the Ordinance by the Town, attorney's fees in this case are being saddled on the Town as a penalty and not to "impose them on the class that has benefitted from them and that would have had to pay them had it brought the suit." *Mills v. Electric Auto-Lite*, 396 U.S. 375, 396-97 (1970). Simply put, had the Plaintiffs not brought this action, there would be no reason for any member of the public to file suit as the Ordinance was not being enforced.

In *Taber*, 140 N.H. 613, the Plaintiff was successful in overturning a Zoning Board of Adjustment decision applying the wrong legal standard in a variance case. The Superior Court awarded attorney's fees noting, in part, that the plaintiff had "conferred a substantial benefit on nonparties such as the citizens and taxpayers of the State by forcing the town and the ZBA to adhere to the correct formulation of the law." *Taber*, 140 N.H. at 615. The Supreme Court reversed, distinguishing *Irwin Marine, Inc.* and *Board of Water Commissioners* and explaining that these cases "present much more concrete benefits conferred on third parties by the lawsuit

than the general benefit that citizens and taxpayers receive when the town adheres strictly to the law.” *Taber* 140 N.H. at 616.

Importantly, the record in this case does not suggest that the Plaintiffs’ intended purpose was to rectify an injustice or unfairness with the selectmen's governance of the town's affairs. The Plaintiffs’ request for attorney’s fees in this case seeks to penalize the Town Meeting and does not compensate the Plaintiffs for their efforts on behalf of the public. The Plaintiffs have not alleged, and cannot allege, that the Ordinance was enforced against the Plaintiffs or the public. *See Sterndale Affidavit* at ¶5-6. The Plaintiffs apparently understood at the Town Meeting that supporters of the Ordinance were explaining: “in order for the Ordinance to have legal effect, change would have to occur at the state level and that municipalities simply were not empowered to do what the Ordinance purports to do.” *Plaintiff’s Objection to NWA Motion to Intervene* ¶18. Accordingly, the Plaintiffs do not confer a benefit, and certainly not a *substantial* one, on the public by bringing this action.

Conclusion

For the reasons stated in this memorandum, the Town respectfully requests that this Court deny the Plaintiffs’ request for attorney’s fees.

Respectfully submitted,
TOWN OF NOTTINGHAM
By its attorneys,
UPTON & HATFIELD LLP

Dated: February 10, 2020

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded this day to all counsel of record via the Court's e-file system.

Dated: February 10, 2020

/s/ Michael P. Courtney
Michael P. Courtney