STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.	**SUPERIOR COURT**
BRENT TWEED, et al, Plaintiffs,	Case No. 218-2019-CV-00398
v.	
TOWN OF NOTTINGHAM, et al, Defendants.	

MOTION TO RECONSIDER

Nottingham Water Alliance, Inc ("NWA"), pursuant to New Hampshire Superior Court Civil Rule 12(e), requests that this Honorable Court reconsider the NWA's Motion to Intervene in this litigation. The undersigned counsel respectfully wishes to rearticulate for this Court the legal support allowing the NWA to defend the Freedom from Chemical Trespass Rights-Based Ordinance (the "Ordinance"). This pleading asks the Court to find that state and federal precedent create a slightly different standard than the requirements that this Court identified in its original order denying NWA's intervention.

Specifically, the NWA requests that this court:

A. Reconsider the legal support for NWA's contention that intervenor-defendants must show state and federal Constitutional standing.

B. Find that the NWA has a "right" and "direct and apparent interest" in the litigation sufficient to satisfy New Hampshire Superior Court Civil Rule 15.

C. Find that the NWA need not prove that the Town will vigorously defend the right to local self governance, because only federal intervention requires a showing that the existing parties will not adequately represent the intervenor's interest.

1. **The NWA does not need to meet the same state or federal constitutional standards as an initiating plaintiff would, both under state and federal precedent.**

A party may intervene even if the trial court explicitly finds that party to lack standing. *Prof'l Fire Fighters of N.H. v. State of N.H.*, 167 N.H. 188, 191 (2014). The Supreme Court opinion in *Prof'l Fire Fighters* accepted the trial court's procedure of "dismiss[ing] the four non-individual plaintiffs for lack of standing, but allow[ing] them to proceed as intervenors," implying that a separate set of standing requirements apply to intervenors: "[t]hus, we assume, without deciding, that the non-individual plaintiffs have standing to be intervenors." *Id.* If this "intervenor standing" was jurisdictional, the way that standing is for plaintiffs, the New Hampshire Supreme Court would have either had to dismiss the *Prof'l Fie Fighter* intervenors or overturn the trial court ruling that the intervenors lacked standing. If a party can be dismissed for lack of Article III standing, but nevertheless allowed to proceed as an intervenor, then intervenors do not need to have Article III standing.

A court can always rule on its own lack of jurisdiction *sua sponte*, notwithstanding failure of parties to brief that issue; thus should waiver constitute the reason that a court does not decide an issue, that issue must not be jurisdictional. *Am. Fed'n of Teachers v. State*, 167 N.H. 294, 299 (2015) (Finding the challenge to intervenors' standing to be waived, and proceeding without overturning the trial court ruling that allowed a party without Constitutional standing to proceed as an intervenor).

A general statutory right to a remedy in court is sufficient for intervention. *In re Keene Sentinel*, 136 N.H. 121, 125 (1992) (Allowing a newspaper to intervene in a case pursuant to its statutory right to request access to court records, despite having "no direct and apparent interest as would a party in the subject matter of the underlying litigation.")The NWA, on behalf of its membership comprised entirely of Nottingham residents, has a statutory right to intervene as

specifically outlined in the Ordinance. § 2(d). This right belongs to all residents of Nottingham, just as the newspaper's right to request court documents belonged to "any member of the public." *Sentinel*, 136 N.H. 121 at 125.

Federal precedent affirms this interpretation. *See*, *e.g.*, *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079 (10th Cir. 2007) (intervenors do not need to show "Article III standing so long as another party with constitutional standing on the same side as the intervenor remains in the case."). We agree with the court's summation that "the federal courts are split on the issue of whether a prospective intervenor must establish [Article III] standing." Order at 5. However, the weight of the split strongly favors the NWA's assertion that an intervenor need not show Article III standing.

A subsequent Supreme Court cast doubt on the three Circuits that found intervention requires Article III standing. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, (2003) (finding that because the original defendant had standing, the court "need not address the standing of the intervenor-defendants") (overruled in part by *Citizens United v. FEC*, 130 S. Ct. 876 (2010)). The *McConnell* case does not explicitly settle the issue, but does firmly align with the reasoning in the majority of Circuits: "so long as there is a 'case or controversy' between the primary litigants, the potential intervenor does not need to establish it has independent standing to pursue a judicial remedy." Order at 5.

From a policy standpoint, the Seventh Circuit's concern that "an intervenor may be seeking relief different from that sought by any of the original parties" does not apply to an intervenor-defendant seeking to oppose a plaintiff's requested relief. *City of Chicago v. Fed. Emergency Mgmt. Agency*, 660 F.3d 980, 985 (7th Cir. 2011). The *McConnell* decision addressed a similar fact pattern, where an intervenor sought to defend a challenge to a law. 540 U.S. at 233. This concern lacks merit; an intervenor may not present new issues for litigation

beyond those brought by initial parties, without showing standing to litigate beyond these issues. *See, e.g.*, *Mangual v. Rotger-Sabat*, 317 F.3d 45, 61 (1st. Cir. 2003) ("It is clear that an intervenor … must have Article III standing in order to continue litigating if the original parties do not do so."). Here, the NWA seeks to intervene to defend the RBO, which is at issue already in the challenge between the existing parties.

2. The NWA has a right and a direct and apparent interest in the pending litigation, as granted by the Ordinance itself and by virtue of NWA members' status as property owners within the town of Nottingham.

Movants accept this Court's finding that playing an integral role in the passage of the Ordinance does not by itself create a "direct and apparent interest" in the outcome of a suit seeking to overturn that act of legislation. However, beyond a general commitment to wanting the Ordinance upheld and enforced, the NWA also has distinct legal rights at stake. Should this Court grant the Plaintiffs' requested relief, NWA members will lose the Ordinance that enumerates these rights. Ordinance § 1(a)-(e).

NWA members are residents of Nottingham who rely on the protections of the Ordinance to protect their clean air and water. These residents live and breathe within the jurisdiction of the Ordinance, and assert that without the Ordinance the "people of Nottingham are unable … to secure [their] rights by banning [harmful corporate] activity." *Id*, Preamble. The right to secure clean air and water beyond the local government's existing environmental protections, which the terms of the Ordinance deem inadequate, constitutes a direct and apparent interest in defending the Ordinance.

The municipal corporation of Nottingham does not share in all of these rights and thus does not stand in the shoes of the residents or their advocacy groups for the purpose of defending, for example, the Right to Clean Air, Water, and Soil, that "all residents of Nottingham possess." *Id*. at § 1(c).

As with the intervenors in *Sentinel*, Nottingham residents and their advocacy organizations have a right to intervene as a result of a general statute creating a right of access to court. 136 N.H. at 125. The NWA, as an organization dedicated to the right to local self-government as well as to clean ecosystems, would be acutely set back should an unfavorable court ruling revoke these rights.

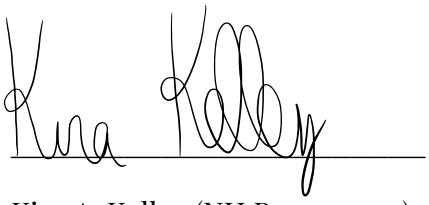
3. Only the federal rules and case law explicitly condition intervention on a showing that existing parties will not vigorously defend the intervenor's threatened interest.

While the Court cites federal precedent to state that intervenors must "demonstrate adversity of interest," the NWA wishes to note that the Federal intervention standard is more onerous than the one that New Hampshire state courts apply, and that only the Federal standard mentions adequate representation by existing parties as a bar to intervention. *Compare* Fed. R. Civ. Pro. 24(a)(2) with Super. Ct. Civ. R. 15.

Unlike the guardian ad litems in *In re Stapleford*, who the law obligates to represent a minor's best interests throughout the terms of the engagement, the Town of Nottingham has no legal obligation to seek the relief that the NWA is asking for; that the Ordinance be upheld. 156 N.H. 260, (2006).

The NWA's direct and apparent interest in upholding the ordinance would enhance the vigor of litigation should the NWA be allowed to intervene in the proceedings to defend the Ordinance codifying the NWA's raison d'être. This interest stems from the need to defend the codified rights in the Ordinance belonging exclusively to the residents and at the heart of the NWA's organizational purpose.

Respectfully submitted,



Dated: August 16, 2019

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Denied. The putative intervenor has not identified any point of fact or law that this Court overlooked or misapphrehended in its original order.

Honorable N. William Delker
August 28, 2019

Clerk's Notice of Decision
Document Sent to Parties
on 08/28/2019

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 Defendants Town of Nottingham and Donna Danis

Richard Lehmann, attorney for Brent Tweed and G&F Goods, LLC.

Dated: August 16, 2019.

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