STATE OF NEW HAMPSHIRE
ROCKINGHAM SUPERIOR COURT

No. 218-2019-CV-00398

Brent Tweed and G&F Goods, LLC
v.
Town of Nottingham

NOTTINGHAM WATER ALLIANCE'S MEMORANDUM OF LAW OPPOSING PLAINTIFFS' MOTION FOR SUMMARY JUDGEMENT

I. INTRODUCTION

The Nottingham Water Alliance (NWA) has been granted amicus curiae status to represent its members, residents of Nottingham, who drafted, promoted, and duly enacted the Freedom From Chemical Trespass Ordinance ("Ordinance") at Town Meeting on March 16, 2019. The Town of Nottingham ("Defendant") admits it has not, and indicates that it will not in the future, enforce the Ordinance. Neither does the Defendant intend to defend the Ordinance against the lawsuit and the pending motion for summary judgment requesting that this Ordinance be overturned.

II. ARGUMENT

This Ordinance, duly adopted as an exercise of New Hampshire's sacred democratic ritual, Town Meeting Day, was a valid exercise of New Hampshire's citizen initiative petition procedure outlined in NH RSA 39:3. This Court lacks jurisdiction to grant Plaintiffs' wish that the Ordinance be overturned, and furthermore the record is devoid of facts and law sufficient to overcome the presumption of validity that must be accorded to an ordinance upon its adoption.

A. This case should be dismissed at the outset because this Court lacks subject matter jurisdiction to issue an advisory opinion with no adverse party.

The Court has limited the NWA's role in these proceedings to that of an *amicus curiae*, and therefore the NWA is precluded from filing a counterclaim for summary judgement. However, the NWA need not bring such a claim to remind the Court of its obligation to dismiss a case forthwith upon determining that it lacks subject matter jurisdiction. *See*, *e.g., State v. Demesmin*, 159 N.H. 595, 597 (2010) ("Subject matter jurisdiction may be raised at any time in the proceedings, including on appeal, by the parties, or by the court *sua sponte*.").

Subject matter jurisdiction is "a tribunal's authority to adjudicate the type of controversy involved in the action." *Hemenway v. Hemenway*, 159 N.H. 680, 683 (2010). The uninjured Plaintiffs demand advisory answers from this Superior Court, which has no live controversy before it. Nor have Plaintiffs shown themselves to qualify for taxpayer standing, because they have failed to allege any unlawful government expenditures of taxpayer dollars.

1. Plaintiffs do not qualify for taxpayer standing pursuant to Article 8 of the New Hampshire Constitution, having failed to show municipal expenditures or any other actions in violation of law.

The New Hampshire Constitution provides that:

> "[A]ny individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or *political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision*. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer."

NH Const. Part I, Art. 8.

Plaintiffs fail to identify a single expenditure or approved expenditure in violation of any law, stating instead that "[t]he ordinance authorizes the Town to expend public funds enforcing

the ordinance." Complaint, ¶ 34. Nowhere in Plaintiffs' facts do they identify that Defendant has either pledged or spent funds, only that the citizen-initiative ordinance gives Defendant an option to someday pledge funds to enforce the Ordinance.

An available mechanism to allegedly violate a law does not equate to a pledge to violate a law. Defendant has neither enforced nor pledged to enforce the Ordinance at all, let alone has Defendant done so in an unlawful way. Def.'s Affidavit of Christian Sterndale, ¶ 5.

Even this future possibility is beyond remote, given that Defendant does not believe that the Ordinance authorizes it to do anything: "Plaintiffs apparently understood at the Town Meeting that the 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.'" *Def.'s Memo* at 4.

Plaintiffs fail to allege any unlawful activity, expenditure, or pledge of funds. Holding a Town Meeting was not unlawful, nor was submitting a ballot item to a vote as is required by state statute, although the town might have violated a law by refusing to allow a properly petitioned warrant article to be placed on the ballot. Defendant has not even posted the Ordinance on the Nottingham website, as it has with all other Ordinances in effect.[1]

Merely being a taxpayer of a town does not vest standing in a plaintiff to sue his town when the town has neither acted nor committed to acting in any way unlawfully.

2. Plaintiffs also lack standing because Plaintiffs fail to show adversity between the parties and because the perceived dispute is hypothetical, not actual.

While Article 8 of the New Hampshire Constitution eliminates a taxpayers' burden of showing injury in order to establish standing, injury is only one element of standing.

[1] *See* Town of Nottingham Policies & Ordinances, available at: https://www.nottingham-nh.gov/node/2561/files

In addition to injury, 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." *State v. Actavis Pharma, Inc.*, 170 N.H. 211, 215 (2017) (*quoting Duncan v. State*, 166 N.H. 630).

Article 8 grants taxpayers standing to sue without showing injury, but two Constitutional standing requirements remain: parties must be adverse and the dispute must not be hypothetical.

"The Superior Court has no jurisdiction to give advisory opinions." *Piper v. Meredith*, 109 N.H. 328, 330 (1969). The *Piper* Court dismissed a petition for an injunction to prevent a town from enacting an ordinance, because issuing a "ruling that if the ordinance were enacted it would be invalid was not within the jurisdiction of the Superior Court." *Id*. at 329. Construing *Piper*, the Supreme Court stated that a plaintiff may not use the courts to "demand advice as to future cases." *Rochester Education Assn. v. City of Rochester*, 116 N.H. 402, 404 (1976).

Demanding an opinion on the validity of an ordinance is merely advisory when the ordinance has not yet been adopted by the town, as well as when the town's stated position is that the Ordinance is unenforceable.

Only the Supreme Court may give advisory opinions, and even then this body acts "not as a court but as the constitutional advisors" of either the Legislature or the Governor, but *not as an advisor to private litigants* such as Plaintiffs. *Piper*, 109 N.H. at 330.

An ordinance which is proposed, but not yet enacted, is the functional equivalent of an ordinance which was enacted but which the municipality has never, and will never, enforce. Disputes over its validity are hypothetical, and for that reason Plaintiffs here lack standing.

Additionally, because Defendant concedes all issues on the merits except for attorneys fees, Plaintiffs have no "adverse" party to bring claims against and thus lack standing.

Without the necessary controversy that an opposing party provides and with only an advisory opinion requested, this Court lacks jurisdiction over these proceedings.

3. Plaintiffs' claims are not yet ripe for judicial review because the Ordinance has never been applied, nor is its application imminent.

In addition to having standing to bring claims, either by virtue of suffering an injury or by qualifying for taxpayer standing, those claims must also be ripe for review.

"The ripeness doctrine prevents courts from 'entangling themselves in abstract disagreements and protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Appeal of State Employees' Assn.*, 142 N.H. 874, 878 (1998).

"Although we decline to adopt a formal test for ripeness at this time, we find persuasive the two-pronged analysis used by other jurisdictions that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue." *Id.* at 878.

The issue is unfit for judicial determination because: this Court cannot analyze the Constitutionality of the application of an Ordinance which has never been enforced, the issues are based on theoretical rather than factual applications, and the record is far from adequately developed with only one party litigating the merits. *Id*.

Plaintiffs argue that "a petition for declaratory judgement is peculiarly appropriate to determine the constitutionality of a statute." *Pls.' Memo Summ. Judg.* at 3, citing *Chronicle & Gazette Publishing Co. v. Attorney General*, 94 U.S. 148. A declaratory judgement action in this

instance would be inappropriate because this Ordinance has no effect on Plaintiffs or any other resident of Nottingham, and the Town shows no indication of ever enforcing it.

"The Court cannot be an umpire to debates concerning harmless, empty shadows." *Poe v. Ullman*, 367 U.S. 497, 508 (finding that Plaintiffs' challenges to contraceptives laws in Connecticut were not ripe for review because of the "fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication.").

Should the Court decline to rule on the constitutionality of an Ordinance that the Defendant plans never to enforce and no party to this action plans to defend, neither party will suffer any hardship whatsoever.

While Plaintiffs need not show injury, the complete absence of any effect whatsoever renders this Complaint nothing more than a disgruntled citizen's diatribe of theoretical opposition to a statute that the Town never intends to enforce.

With none of the prerequisites for subject matter jurisdiction present, this Court must dismiss the proceedings.

B. Should the Court explore this case on the merits, the Plaintiffs motion for Summary Judgement should nonetheless be denied.

Plaintiffs complaint and motion for summary judgement fail to allege not only standing but also viable claims for relief. While allowing the case to proceed with no party in opposition to the substantive requested relief seems unfathomable, Plaintiffs should not be permitted to commandeer the Court into enforcing a meritless but unopposed motion to dismiss and thus the NWA offers the following in regards to Plaintiffs allegations.

This analysis focuses on the substantive legal provisions, not the legal or personal qualms Plaintiffs have with the preamble: "the purposes stated in the preamble, while entitled to weight, are not determinative of the type or constitutionality of the ordinance." *Piper v. Meredith*, 110 N.H. 291, 296 (1970). These words may inform the intent of the Ordinance, but not its legal effect.

1. **The Ordinance is not ultra vires, because its potential applications fit within Nottingham's police powers and state-sanctioned authority.**

"[T]owns have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." *Piper v. Meredith*, 110 N.H. 291, 295 (1970).

Among these powers expressly granted are those in RSA 31:39, allowing towns and cities to legislate for public health, safety and welfare. Broad police powers at the municipal level have been integral to fabric of this state for centuries, with laws dating back to 1719 affirming that New Hampshire towns should "make and agree upon Such necessary Rules, orders and By Laws for the Directing Managing and ordering the Prudential affairs of Such Town as they Shall Judge most conducing to the Peace, Welfare, interest & good order of the Town And the Inhabitants thereof." *Id*. at 296.

"The police power is broad and includes such varied interests as public health, safety, morals, comfort, the protection of prosperity, and the general welfare. If it is to serve its purpose, it must be of a flexible and expanding nature to protect the public against new dangers and to promote the general welfare by different methods than those formerly employed. *Id*. at 294-95.

Municipalities can make bylaws for "the care, protection, preservation, and use of the public cemeteries, parks, commons, libraries, and other public institutions of the town" and "the collection, removal and destruction of garbage, snow and other waste." RSA 31:39(I)(a), (f).

These powers support town ordinances construing "commons" inclusively to refer to shared natural resources such as ecosystems and water. *Piper v. Meredith*, 110 N.H. at 297 (affirming an ordinance preserving a shoreline and lake in town "from unrestricted exploitation, despoliation and excessive concentration of population" through the authority to protect "parks, commons, and other public institutions of the town" conveyed by RSA 31:39.).

Through its Statements of Law in Section 1, the Ordinance identifies key resources held as "commons" by all residents of Nottingham: an accountable government that works to secure the health, safety, and welfare of its people; a healthy climate free from toxic waste; clean air, water, and soil; and flourishing natural ecosystems.

The ability to safeguard and steward life-sustaining shared natural resources and ecosystems is a police power that towns may exercise and which state law has approved.

In addition to support for the substance of the Ordinance, State law also supports its enforcement provisions: "towns may enforce the observance of the bylaws by suitable penalties not exceeding $1,000 for each offense to ensure to such uses as the town may direct." RSA 31:39(III).

Section 2(a) of the Ordinance explicitly caps penalties at $1,000 per offense (per day of willful violation) as authorized by this statute; the penalty provision follows a grant of state authorization and is not ultra vires.

Nor does the citizen enforcement provision, while it has never been utilized, violate any state law. RSA 31:39-c(I) allows a town to establish a system for administrative enforcement of violations of an ordinance, and while "such system *may* be administered by a police department or other municipal agency" state law does not require legislation to be enforced by police.

If State lawmakers wished police or municipal enforcement to be the only mechanism for enforcement, the imperative "must" would have been used instead of the permissive "may."

Assigning an enforcement mechanism is "necessarily implied or incidental" to an effective law and thus state law conveys to towns this power.

For an ecosystem or a natural community to be a jural person with standing to enforce or defend the Ordinance is not such a "radical and bizarre proposition that flies in the face of existing law," as Plaintiffs allege. For example, should natural persons incorporate in the ecosystem's name that corporation would have standing to sue on its own behalf. The extension of personhood rights to a nonhuman entity is a familiar legal fiction that the law took readily to when Corporate personhood was first created by a headnote in *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396 (1886) ("Before argument Mr. Chief Justice Waite said: The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.")

While this Ordinance has never been applied and this analysis is premature, this Court could easily imagine applications remaining confined by state law and thus Plaintiffs have failed to overcome their burden of showing that the Ordinance exceeds its grant of legislative authority.

This Court must not search for hypothetical fact patterns to prove the law unconstitutional, as the presumption must be in favor of constitutionality.

2. **The Ordinance is not unconstitutionally overbroad, vague, or in violation of the 1st Amendment but rather creates a direct and simple mechanism for preserving the health, safety and welfare of Nottingham.**

As this Ordinance has never been enforced, the overbreadth and vagueness challenges to it are facial. Therefore the standard of law is as follows:

> In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications.

Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc. 455 U.S. 489, 489 (1982).

The Ordinance is explicitly crafted with the intent not to infringe upon constitutionally protected conduct, with the preamble stating that any evolving system of government must "not infringe other rights protected for us by state or federal law." More importantly than its intent, the Ordinance's substantive provisions do not reach any amount of protected conduct.

Yes, as Plaintiffs note, the right of access to courts for redress of wrongs is an aspect of the First Amendment. However, legislative bodies may create and limit these causes of action.

A law legalizing a previously actionable activity removes a person's previous right to file a cause of action to stop that activity. This is not a restriction on a person's right to access the courts to redress a wrong, because that legal activity is no longer wrong.

Nor does Section 2(e) present anything alarming or beyond the scope of existing, well-settled law. The protections for "direct action" echo provisions in New Hampshire State law allowing people to use peaceful means, those that do not add to harm or danger for others, in order to protect themselves or third parties from threats.

"Conduct which the actor believes to be necessary to avoid harm to themself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged." N.H. Crim. Code § 627:3.

No new defense for otherwise criminal conduct, nor any new prohibition on otherwise actionable claims, comes from Section 2(e). The Ordinance simply reiterates existing state law into its enforcement section with the reminder that people may decide to put the safety of their community above their personal self-interest.

The Ordinance infringes no discernable First Amendment activity, which means that its overbreadth challenge must fail.

The vagueness challenge must similarly fail if any application of the Ordinance is not vague. *Village of Hoffman Estates* at 489. To be vague, a law must either "fail to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or … authorize or even encourage arbitrary and discriminatory enforcement." *State v. Gatchell*, 150 N.H. 642, 643 (2004).

Many hypothetical applications of this law are not vague, and thus neither is this Ordinance, challenged only facially and not with regards to any specific application.

The Ordinance prohibits activities that harm ecosystems, impede clean air, or otherwise pollute or destroy the necessary commons of Nottingham; namely its air, water, soil, and climate.

Common law remedies of nuisance and trespass echo this analysis and have offered private citizens a remedy through the court for centuries to remedy the negative effects of otherwise lawful conduct.

The sole question any person must ask themselves when deciding whether or not their activity may violate the Ordinance is this: "am I doing anything with the reasonable potential to spoil not only the earth and air on my property but also the air, soil, and water for the rest of my community?"

No complicated measurements or analysis of "acceptable levels" of toxins need be taken - the question is simply whether an activity has been shown elsewhere or previously to destroy surrounding habitats. This is a question people who partake in such activities, especially as a business enterprise, have no excuse not to be able to answer.

And if this question is at all uncertain, any responsible and moral person of ordinary intelligence would err on the side of caution rather than take chances that put others at risk.

When a corporation undertakes a venture involving serious disturbances of earth, discharges of effluent, clear-cutting or substantial paving, or withdrawals of groundwater, this clearly risks destroying the drinking water for a community or contaminating the soil of a neighborhood. A reasonable person of ordinary intelligence operating through the corporation to do these acts should be aware of the harm this corporate industry does and the threats to life sustaining resources these activities pose and should find ways to ensure their activity is safe.

On the other hand, consider the dribble of oil from a corporate truck, the wind blowing particles of metal or dust away from a workbench, the placement of rodent poison in a store, or the chopping of a handful of trees to expand a building or yard. These activities hardly go so far as to destroy the commons and construing the Ordinance to apply to such negligible impacts would be laughable.

The Ordinance is not meant to instigate nor would it support “abusive enforcement” or any other type of retaliatory, petty, or litigious behaviour as Plaintiffs suggest. Should anyone attempt to use the Ordinance as justification for a lawsuit to make a point or harass a defendant, Courts can and should dismiss such a case outright.

However, just because some plaintiffs may seek to abuse the judicial system, does not mean that all laws which could be twisted into a basis for frivolous claims are themselves frivolous laws.

3. Neither State nor Federal laws preempt the Ordinance, which neither erodes nor interferes with state and federal environmental protections.

Conflict preemption is not at issue in this debate: Plaintiffs identify no instance where a person or entity could not comply with both the Ordinance and any other state or federal environmental regulation. The Ordinance does not erode or excuse compliance with any protections in the Clean Water and Air Acts, Department of Environmental Services operations, or any other federal or state environmental law. Nor does the Ordinance impose a duplicative system of permitting or oversight that would confuse the landscape of environmental laws.

Thus, the contention between Plaintiffs and the *amicus curiae* hinges on whether the Ordinance is field preempted by state or federal environmental laws.

State laws preempt local ordinances when both regulate the same subject and local laws are “inconsistent with the state’s transcendent interest, whether or not the terms of the local law actually conflict with the statewide legislation.” *JTR Colebrook*, 149 N.H. 767, 773 (2003). Inconsistency is any overlap by municipal regulation of a specific activity or industry when the state has “devised a comprehensive and detailed program of statewide regulation” over that same activity. *Stablex Corp. v. Town of Hooksett*, 122 N.H. 1091, 1102 (1982). However, local laws

adopted with a grant of state authority "to which any industrial facility would be subjected and which are administered in good faith and without exclusionary effect, may validly be applied to a facility [otherwise] approved by a state permitting agency." *Id*. at 1104.

Laws promulgated by a town under their police powers and authority from RSA 31:39 may protect common resources such as water, air, and soil notwithstanding that state or federal laws might also limit certain pollutants in emissions and effluents flowing into that same water, air, or soil. The local law protects the health, safety, and welfare of a community and is universally applicable to all threats to a communal ecosystem; the state and federal regulations govern specific industries, pollutants, and other threats.

A generally applicable ordinance is not preempted simply for applying to a facility that is also governed by a state or federal law regulating a more specific function of that facility. For example, an ordinance may protect a town's groundwater, (per RSA 205-C:2); establish noise restrictions (per RSA 47:17); or regulate the excavation of gravel and other minerals (per RSA 155-E) even when activities affected by those laws must also comply with State environmental regulations and when compliance with the local ordinance also benefits the environment.

As Plaintiffs note, the municipal regulations in the cases Plaintiffs cite are all "drawn far more narrowly than the Nottingham ordinance," and more specifically target areas already covered by state statutes. Pls.' Memo. at 20. For example, unlike in *Bio Energy, LLC v. Town of Hopkinton*, 153 N.H. 145 (2005), the municipal law at issue here is not an emissions standard but a law protecting the common resources of water, soil, air and ecosystem health.

This Ordinance, unlike the more specific and duplicative environmental regulations in the cases Plaintiffs draw upon, protects common resources from all forms of dangerous or polluting activities rather than regulating any one specific dangerous or polluting activity itself.

The Clean Water Act and other existing state and federal acts and regulations that constitute traditional environmental law operate in a field quite distinct from the Ordinance. Traditional environmental statutes create "acceptable levels" of harm and immunize polluters from liability for causing that harm.

Once a project has a Department of Environmental Services permit and/or if a project stays below predefined concentrations of specific pollutants, all activity done within those confines is legal regardless of how much destruction that project does to surrounding air, water, soil, and ecosystem.

The prohibitions in the Ordinance focus on activity that harms the protected commons, not whether activity complies with scores of technical criteria that purportedly attempts to quantify ecosystem health but in reality is nothing more than negotiated limits with no real connection to the levels of pollutants an ecosystem can withstand.

If state and federal regulations are sufficient to adequately protect the health, safety and welfare of Nottingham residents and to preserve the vitality of Nottingham's vital ecosystems from the pollutants and activities governed by those state and federal, then no violations of the Ordinance would occur except in areas outside the preempted fields of state and federal environmental regulation.

4. The Ordinance is not a violation of the Separation of Powers, but rather is a careful exercise of governmental reform by the consent of the governed and for the benefit of the public good.

The Ordinance is an enacted democratic expression of the will of a legislative body, and by no means does it undermine the power of the judicial branch. Rather, it offers fodder for the judiciary to interpret and apply just like any other law.

Laws may create new offenses, or define other conduct as permissible. Laws may create rights to intervene in proceedings and vest those rights in certain classes of people. *See*, *e.g.*, RSA 162-H:7-a(VI) (granting intervention rights to state agencies). These prescriptions do not usurp judicial power but rather allow parties to submit facts to the judiciary to decide whether a person, entity, or action amounts to what the law has described.

The Ordinance does not purport to legalize any conduct otherwise illegal and unjustifiable, with Section 2(e) being nothing but a restatement of the Competing Harms justification in N.H. Crim. Code § 627:3. As is proper for a law, the Ordinance outlines protections, codifies rights and principles, and specifies a class of qualifying intervenors.

The serious harm here to our system of separation of powers is from this lawsuit, not from this Ordinance. Justiciability requirements are principally a protection from judicial overreach, and may not be abrogated even in perceived self-defense. The Court should, sua sponte, dismiss this case for lack of subject matter jurisdiction.

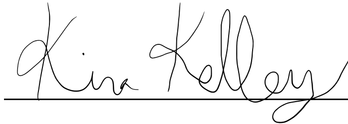
III. CONCLUSION

If the Court or the Plaintiffs are unsure about how this Ordinance shall play out, the NWA counsels all parties involved to wait. Wait to see if the Town develops concrete policies to implement this Ordinance, or for a concrete application of the Ordinance, to clarify how it may

be used and to illuminate the confines of its reach. And, in all likelihood this waiting will turn into weeks, weeks turns into months, and months into years with no enforcement or actions taken pursuant to the Ordinance. Judicial resources to decide upon Plaintiffs' one-sided arguments will have been conserved rather than co-opted by a citizen wishing to undermine the democratic values of his neighbors and his community.

Respectfully submitted,

Dated: May 6, 2020



Kira A. Kelley (NH Bar# 271359)
Attorney at Law
21B Acme Street
Windsor, VT 05089
phone: (802) 683-4086
kakelley436@gmail.com

Attorney for Intervenor-Defendant Nottingham Water Alliance, Inc.

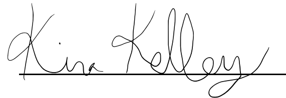
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically delivered this date to all counsel of record, specifically:

Michael Courtney, attorney for Defendant Town of Nottingham

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

Dated: May 6, 2020.



Kira A. Kelley (NH Bar# 271359)
Attorney at Law
21B Acme Street
Windsor, VT 05089
phone: (802) 683-4086
kakelley436@gmail.com

Attorney for Intervenor-Defendant Nottingham Water Alliance, Inc.