

**STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

Case No. 2020 - 0260

Brent Tweed and G&F Goods, Plaintiffs

v.

Town of Nottingham, Defendant

**MOTION TO STAY SUPERIOR COURT PROCEEDINGS PENDING  
RESOLUTION OF APPEAL REGARDING INTERVENTION**

The Nottingham Water Alliance, Inc. (“NWA”), by and through its undersigned counsel and pursuant to New Hampshire Supreme Court Rule 7-A, hereby moves this Honorable Court to stay the Rockingham Superior Court order allowing summary judgement motions to fully resolve Brent Tweed, et al v. Town of Nottingham, No. 218-2019-CV-00398, without the NWA being a party to those proceedings and prior to the conclusion of this appeal.

The facts and law support this motion as follows:

1. The Rockingham Superior Court issued a margin order on November 1, 2019, establishing that it would decide the case based on the parties’ exchange of dispositive summary judgement motions in lieu of trial. A copy of this margin order is attached as Exhibit A.
2. The NWA’s Renewed Motion to Intervene included a request for relief that the Rockingham Superior Court “[h]old the summary judgement motion in abeyance pending the final resolution of the NWA’s Motion to Intervene, which final resolution includes ... any subsequent appeal that the NWA may timely pursue to the New Hampshire Supreme Court.” Exhibit B at 5.
3. The Rockingham Superior Court issued an order denying the NWA’s Renewed Motion to Intervene, implicitly also denying the NWA’s request to stay proceedings, of which Order the NWA perfected an appeal to this Court. Exhibit C.

4. A party may file a motion in the New Hampshire Supreme Court to stay an order or judgment of a lower tribunal after the movant has unsuccessfully sought similar relief from the lower tribunal. Sup. Ct. R. 7-A(1).

5. This motion must include “[1] the request for similar relief from the lower tribunal, [2] any objection filed thereto, ... [3] the lower tribunal’s order denying such relief [and 4] the order or judgment which the motion seeks to have stayed,” id., attached respectively as Exhibits B, D, C, and A.

6. The Superior Court lacks jurisdiction to proceed with matters arising from and directly related to, the issues presented by a perfected appeal to the Supreme Court. Comment to Sup. Ct. R. 7-A, citing Rautenberg v. Munnis, 107 N.H. 446 (1966). “The trial court is not in a position to act on such matters while an appeal is pending unless the case is remanded for that purpose.” Id.

7. Here, the one-sided summary judgment argument arises from and directly relates to the issue of the NWA’s right to intervene in those proceedings to provide an otherwise nonexistent defense of the Ordinance, and thus the Rockingham Superior Court lacks jurisdiction to issue a ruling on the summary judgment proceedings until the conclusion of this appeal.

8. Counsel for the NWA seeks to preserve the resources of all parties and both courts by obtaining a clear ruling from the State’s highest court that resolution of the case in the lower court must be put on hold until the issue of whether the NWA may intervene is fully resolved.

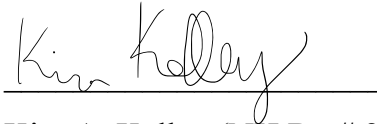
WHEREFORE, the NWA respectfully requests that this Court

- A. Issue a stay on the summary judgement proceedings in the Rockingham Superior Court pending the resolution of this Appeal and;

B. Grant any such relief as this Court deems necessary and just.

Respectfully submitted,

Dated: July 31, 2020



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Attorney at Law  
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phone: (802) 683-4086

*Attorney for Appellant 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; and Richard Lehmann, attorney for Brent Tweed and G&F Goods, LLC.

Dated: July 31, 2020



Kira A. Kelley (NH Bar# 271359)  
Attorney at Law  
21B Acme Street  
Windsor, VT 05089  
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*Attorney for Appellant Nottingham  
Water Alliance, Inc.*

**STATE OF NEW HAMPSHIRE  
SUPREME COURT**

No. 2020 - 0260

Brent Tweed and G&F Goods, Plaintiffs

v.

Town of Nottingham, Defendant

**[PROPOSED] ORDER GRANTING APPELLANT’S MOTION TO STAY  
SUPERIOR COURT PROCEEDINGS PENDING RESOLUTION OF APPEAL  
REGARDING INTERVENTION**

Upon consideration of Motion to Stay Superior Court Proceedings Pending Resolution of Appeal Regarding Intervention, put forth by the Nottingham Water Alliance, Inc., and any response thereto as well as the record herein, it is hereby

ORDERED that the Nottingham Water Alliance’s Motion to Stay is GRANTED; and it is

FURTHER ORDERED that all Superior Court proceedings in *Tweed v. Nottingham*, No. 218-2019-CV-00398, are stayed pending resolution of the appeal to this Court, No. 2020-0260.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2020

\_\_\_\_\_

**LIST OF EXHIBITS**

**Exhibit A**

November 1, 2019, Margin Order Granting Plaintiffs’ Assented-to Motion to Continue Trial and Reschedule Dispositive Motion Deadline (Delker, J) ..... 6-7

**Exhibit B**

February 21, 2020, Renewed Motion to Reconsider and Request for Stay of Proceedings (Nottingham Water Alliance, Inc.) ..... 8-13

**Exhibit C**

April 16, 2020, Order On Renewed Motion to Intervene (Honigberg, J) ..... 14-21

**Exhibit D**

March 2, 2020, Objection to Renewed Motion to Reconsider (Brent Tweed and G&F Goods, LLC) ..... 22-24

# Exhibit A

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

Brent Tweed, et al

v.

The Town of Nottingham, et al

Docket No. 218-2019-CV-00398


**ASSENTED-TO MOTION TO CONTINUE TRIAL AND RESCHEDULE**  
**DISPOSITIVE MOTION DEADLINE**

NOW COME the plaintiffs, Brent Tweed and G&F Goods, LLC, and hereby request that this Honorable Court:

1. This matter is scheduled for a bench trial to be held on December 23, 2019, with a trial management date to be held December 11, 2019.
2. Due to a calendaring oversight, undersigned counsel did not meet the dispositive motion deadline.
3. Counsel for the parties agree that it would be a waste of judicial, municipal, and private resources for this matter to be treated as a dispute to be resolved at a trial. The parties are in general agreement that the complaint raises legal issues that are best resolved by summary judgment.
4. Accordingly, the plaintiff moves that this Honorable Court continue trial in this matter and set a new summary judgment deadline.
5. Counsel for the defendant, Michael Courtney, assents to this requested relief.
  - A. Grant this motion to continue and schedule trial in the ordinary course; and
  - B. Set a dispositive motion deadline of January 6, 2020; and

C. Grant such other relief as may be just and proper.

**Granted**



Honorable N. William Delker  
November 1, 2019

Respectfully Submitted  
By his attorneys,  
Lehmann Law Office, PLLC

**Clerk's Notice of Decision**      October 31, 2019  
**Document Sent to Parties**  
on 11/01/2019

*/s/Richard J. Lehmann*  
Richard J. Lehmann (Bar No. 9339)  
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**CERTIFICATION**

I hereby certify that a copy of this pleading was this day forwarded to opposing counsel via the court's electronic case filing system.

*/s/Richard J. Lehmann*  
Richard J. Lehmann

# Exhibit B

## STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

_____ )	Case No. 218-2019-CV-00398
BRENT TWEED, et al, Plaintiffs, )	
)	
v. )	
)	
TOWN OF NOTTINGHAM, et al, Defendants. )	
_____ )	

### **NOTTINGHAM WATER ALLIANCE’S RENEWED MOTION TO RECONSIDER**

Nottingham Water Alliance, Inc (“NWA”), by and through the undersigned counsel, respectfully renews the Motion to Reconsider the Order Denying the Motion to Intervene based on new evidence showing that the Town of Nottingham and Donna Danis (“Defendants”) will not defend the Freedom From Chemical Trespass Rights-Based Ordinance (“Ordinance”), and requests that this Honorable Court hold the proceedings for summary judgement in abeyance until intervention has been fully resolved. The grounds for this motion are as follows:

1. After the NWA filed the first Motion to Reconsider, events of material importance to the issue of intervention transpired, to which the NWA now invites this Court’s attention.
2. Plaintiffs filed a Motion for Summary Judgement asking the Court to declare the Ordinance invalid and to award attorneys fees to the Plaintiffs. *Pls.’ Mot. Summary Judgement.*
3. Defendants’ sole timely response to Plaintiffs Motion for Summary Judgement was to file a Partial Objection, disputing only the issue of whether Plaintiffs are entitled to attorneys fees. *Defs.’ Partial Objection ¶ 2.*



4. Defendants Memo in Support of their Partial Objection cited with approval Plaintiffs'

argument that the Ordinance is invalid:

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.'

*Defs. ' Memo at 4, citing Pls. ' Objection NWA Mot. Intervene ¶ 18.*

5. Plaintiffs similarly recognize a lack of adversity between the two existing parties: "[t]he [D]efendants' partial objection appears to concede the legal issues raised in the plaintiffs' motion for summary judgment." *Pls' Resp. Defs. ' Partial Objection ¶1.*

6. Evidence that Defendants agree with the Plaintiffs on the substantive issue in this case, the validity of the Ordinance, bears on this Court's analysis of whether the NWA may intervene to defend its members' rights that an otherwise unanswered challenge to the Ordinance threatens.

7. The decision to grant or deny intervention hinges on whether: "(1) the aspiring intervenor [has] a direct and apparent interest to be vindicated through the court process and (2) the potential intervenor [has] a right that is involved in the litigation already pending in court."

*Order Den. Mot. Intervene at 4.*

8. The direct and apparent interest element echoes the principle of State Constitutional standing requiring "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."

*Id.*, quoting *Petition of Guillemette*, 171 N.H. 565 (2018).

9. The existing parties in *Tweed v. Nottingham* have no substantive issues in dispute and no rights adverse to one another other than the payment of attorneys fees; the NWA seeks 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 Judgement.

10. Defendants, as a municipal corporation and its representative, have no reason to defend a right that the municipality as a corporation does not hold and cannot exercise.

11. The right to local self government belongs not to the governing body but to the residents of that governing body, who exercise this right collectively by structuring themselves in and conveying power to overlapping and expanding levels of governing bodies: "All government of right *originates from the people*, is founded in consent, and instituted for the general good." N.H. Const., Part I, Art I, (*emphasis added*).

12. State and municipal governments are the results, but not themselves the holders, of the right to local self government that the Ordinance enshrines and which the lawsuit now threatens.

13. Defendants seek 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 who stand to lose it.

14. This Court recognized that residents may intervene to defend citizen initiative legislation when the municipality's governing boards oppose the challenged ordinance. Court Order at 12, *citing G2003B, LLC v. Town of Weare*, 153 N.H. 725, 726 (2006).

15. This Court distinguished the NWA from the residents that were intervenors in *G2003B*:

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.

*Order Denying Mot. Intervene* at 16.

16. In *G2003B*, the Selectboard “sent a letter to certain residents of Weare, particularly those residents who circulated the petition to place the [contested ordinance] on the March 2002 ballot, [stating that] the Town did not intend to expend the amount of money from the town budget necessary for a vigorous defense of the action, but notified the recipients of the letter that they could intervene.” 153 N.H. at 726.

17. The Town of Nottingham has not sent the NWA a formal letter inviting intervention, but has nonetheless put its residents, the Plaintiffs, and this Court on notice that the Town of Nottingham’s only interest in this case is not paying attorneys fees and that Defendants are content to let the Court and the Plaintiffs settle the validity of the Ordinance.

18. Like the Town of Weare in *G2003B*, the Town of Nottingham has indicated their unwillingness to expend resources to provide vigorous litigation over citizen initiative legislation in which the municipality has no interest, showing a similar need for an intervenor in this case.

19. The NWA asks this Court for permission to intervene so that its members’ rights to local self government, to clean air and water, and to intervene in defense of this Ordinance are not stripped without an actual dispute between the parties and without a chance for the holders of these rights to dispute this deprivation in accordance with the due process of law.

20. In addition to being necessary to serve the interest of justice and to ensure vigorous litigation, granting the requested relief upholds the interest of judicial efficiency and would not unduly prejudice any existing party or this Honorable Court.

21. The NWA filed the first Motion to Reconsider on August 16th, 2019, upon which this Court has not yet ruled, and since this filing the original Defendants and the Plaintiffs have readily assented to and initiated delays in this case. *See, e.g., Assented-to Motion to Continue*

*Trial and Reschedule Dispositive Motion Deadline*, filed October 31, 2019 and *Assented to Motion to Extend Time for Filing of Dispositive Motions*, filed January 6, 2020.

22. As of the date of this filing the Court has issued no rulings on substantive motions except for the Order denying the first Motion to Intervene.

23. Holding in abeyance the proceedings on any exchange of dispositive motions will preserve the existing parties' and the Courts' resources on litigating issues that might otherwise have to be revisited with the NWA added as a party.

24. Counsel for the NWA sought assent to this motion from Plaintiffs and Defendants on February 19, 2020 and received a negative answer from Plaintiffs and no answer from Defendants after 48 hours.

WHEREFORE, the NWA respectfully requests that this Court

- A. Grant this Renewed Motion to Reconsider the Motion to Intervene highlighting facts now on the record that did not exist when the NWA filed the original Motion to Reconsider;
- B. Hold the summary judgement motion in abeyance pending the final resolution of the NWA's Motion to Intervene, which final resolution includes a decision on the NWA's currently pending Motion to Reconsider and any subsequent appeal that the NWA may timely pursue to the New Hampshire Supreme Court; and
- C. Grant any such relief as this Court deems necessary and just.

Respectfully submitted,

Dated: February 21, 2020



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*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 Defendants Town of Nottingham and Donna Danis

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

Dated: February 21, 2020.



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Water Alliance, Inc.*

**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).<sup>1</sup>

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.

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<sup>1</sup> 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 (10<sup>th</sup> 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

# Exhibit D

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

Brent Tweed, et al

v.

The Town of Nottingham, et al

Docket No. 218-2019-CV-00398

## OBJECTION TO NOTTINGHAM WATER ASSOCIATION'S MOTION TO INTERVENE

NOW COME the plaintiffs, Brent Tweed and G&F Goods, LLC, and respectfully object to the motion to reconsider filed by putative intervener Nottingham Water Alliance, and in support thereof states as follows:

1. In a detailed and well-reasoned opinion, the Court (Delker, J.) denied Nottingham Water Alliance's motion to intervene in this matter.
2. The Court based this denial of NWA's motion to intervene on several grounds.
3. First, the court found that NWA had to have "general standing" to intervene in the case, and that NWA lacked such general standing as, "NWA has neither any legal rights at stake nor a 'direct and apparent' interest in the outcome of this litigation." Order On Nottingham Water Alliance's Motion To Intervene at 9.
4. Second, the Court correctly found that NWA lacked standing under Part I, Art. 8 of the New Hampshire Constitution. Order on Nottingham Water Alliance's Motion To Intervene at 11-12.
5. Third, the Court considered, *sua sponte*, the question of whether to allow NWA to intervene in a limited capacity as *amicus curiae*. The Court decided against granting NWA *amicus curiae* status, but authorized NWA to renew its motion if it can demonstrate that the

Town of Nottingham, “will not adequately defend the constitutionality of the ordinance.” Order at 17.

6. In the prayer for relief in its original motion to intervene, NWA did not seek to be permitted to enter this case as *amicus curiae*. Likewise, the present motion does not ask that NWA be permitted to participate in this case as *amicus curiae*. Rather, it asks the court to reconsider its decision to deny NWA’s motion to intervene as a full party.

7. The Court’s findings that NWA had neither “general standing” nor standing under Part I, Article 8 are not affected in any way by the progress of this litigation and nothing in NWA’s motion to reconsider argues that these standing rulings are based on any misapprehension of facts or law.

8. Further, the Court should not allow NWA to participate as *amicus curiae*. Nothing in the town’s defense of this matter suggests that defense counsel’s has been inadequate.

9. Counsel in any legal matter have a, “limitless variety of strategic and tactical decisions that counsel must make....” *State v. Thompson*, 161 N.H. 507, 529 (2011)(discussing standard for ineffective assistance of counsel in criminal cases).

10. In this case the decisions made by counsel are well grounded, given the obvious weakness of the town’s case and the absurd propositions advanced in the ordinance. Further, actions (or inactions) taken by the town at the meeting at which the ordinance was adopted, and the nature of the case generally, may expose the town to liability for payment of legal fees.

11. At the town meeting, the plaintiff Mr. Tweed asked the selectboard whether the town attorney had an opinion as to the legality of the ordinance. A video file of the meeting can be viewed at <https://www.youtube.com/watch?v=c89V8Wyda7k&t=7801s>. Despite the presence of

Attorney Courtney at the meeting and the ease with which a legal opinion could have been provided to the town meeting, the select board specifically rejected the suggestion that such an opinion be provided

12. The plaintiffs incorporate by reference all arguments presented in their original objection to NWS's motion to intervene.

13. Simply stated, the Court should not allow NWA and its legal supporters to use this Court as a forum to argue what they think the law should be, rather than argue what the law is. As set forth in the plaintiffs' prior objection, the place to enact the kind of legal, structural change is in the legislature, not in the superior court.

14. It would be particularly unfair to require the plaintiffs to absorb the legal costs involved in responding to NWA and its CELDF allies arguments for revolutionary change in order to obtain legal relief that it is obviously entitled to.

WHEREFORE, the plaintiffs respectfully ask that this Court:

- A. Deny NWA's motion to reconsider; and
- B. Grant such other relief as may be just and proper.

Respectfully Submitted  
By his attorneys,  
Lehmann Law Office, PLLC

*/s/Richard J. Lehmann*

March 2, 2020

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