**STATE OF NEW HAMPSHIRE**
**SUPREME COURT**

No. 2020 - _____

Brent Tweed and G&F Goods, LLC.

v.

Town of Nottingham

**Appendix to the Nottingham Water Alliance, Inc.'s**
**Notice of Discretionary Appeal**

By: Kira A. Kelley, Esq.
NH Bar ID: 271359
21B Acme Street
Windsor, VT 05089
(802) 683-4086
kakelley436@gmail.com

*Attorney for the Nottingham Water Alliance, Inc.*

# APPENDIX

Selected Record of *Tweed v. Town of Nottingham*

Docket No. 218-2019-CV-00398

## TABLE OF CONTENTS


| **Document** | **Pages** |
|---|---|
| Complaint (Mar. 27, 2019) | 3 |
| Answer (May 6, 2019) | 27 |
| Motion to Intervene (May 16, 2020) | 36 |
| Order Denying Motion to Intervene (Aug. 6, 2019) | 44 |
| Motion to Reconsider and Denial Stamp (Aug. 16, 2019) | 61 |
| Notice of Intent to Reply (Aug. 28, 2019) | 67 |
| Motion for Summary Judgement (Jan. 13, 2020) | 69 |
| Memo in Support of Motion for Summary Judgement (Jan. 13, 2020) | 72 |
| Partial Objection to Motion for Summary Judgement (Feb. 10, 2020) | 115 |
| Memo in Support of Partial Objection (Feb. 10, 2020) | 117 |
| Renewed Motion to Reconsider (Feb. 21, 2020) | 122 |
| Objection to Renewed Motion to Reconsider (Mar. 2, 2020) | 128 |
| NWA's Amicus Brief (May 6, 2020) | 132 |

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT
218-2019-CV-00398

Brent Tweed
23 Fort Hill Road
Nottingham, New Hampshire 03290

and

G&F Goods, LLC
23 Fort Hill Road
Nottingham, New Hampshire 03290

v.

The Town of Nottingham
P.O. Box 114
139 Stage Road
Nottingham, New Hampshire 03290

and

Donna Danis
Chair, Nottingham Board of Selectmen
P.O. Box 114
139 Stage Road
Nottingham, New Hampshire 03290

## COMPLAINT

### I. Introduction And Statement of Interest

1. At its 2019 town meeting, the Town of Nottingham adopted an ordinance entitled "Freedom From Chemical Trespass Rights-Based Ordinance." See Attached Exhibit #1. The ordinance creates a civil penalty in the amount of $1000.00 "per day of violation." The ordinance also purports to make violators liable for damage, "measured by the cost of restoring the ecosystem or natural community to its state before the injury...."

2. The ordinance is not drafted in a manner that clearly identifies what actions create liability. However, the ordinance does identify five "statements of law," which purport to characterize certain rights held by residents of the Town and also separate rights purportedly held by "ecosystems and natural communities." The ordinance is also unclear as to what form the enforcement of this ordinance would take.

3. Brent Tweed is an individual who resides in the Town of Nottingham. G&F Goods, LLC, is a Delaware limited liability company registered to do business in New Hampshire. The sole shareholder of G&F stock is the plaintiff Brent Tweed.

4. Given the overbroad and vague legal standards, the failure to adhere to established law concerning the role and limits placed on political subdivisions, the potential for abuse, and the potential for a fine in the amount of $1000.00 per day, as well as liability "for any injury to an ecosystem or natural community," G&F Good's ability to conduct day-to-day activities of the small business is chilled by the existence of an ordinance that threatens substantial penalties.

5. Brent Tweed, as an individual taxpayer of the taxing district, has a right to have the business of government conducted in an orderly manner and not to have his tax money spent on enforcement of an *ultra vires* and unconstitutional ordinance. Accordingly, the plaintiff asks this Court to: (a) declare the ordinance unconstitutional; (b) contrary to New Hampshire law and (c) unenforceable.

6. The plaintiff also asks the Court to issue a temporary and permanent injunction against the Town of Nottingham barring the Town from taking any enforcement action, and to award the plaintiff reasonable attorney's fees based on the substantial public benefit conferred by this action.

**II. Parties:**

7. The plaintiff Brent Tweed is an individual and a taxpayer with an address of 23 Fort Hill Road, Nottingham, New Hampshire, 03290.

8. The plaintiff G&F Goods, LLC, is a business entity registered to do business in the State of New Hampshire, with an address of 23 Fort Hill Road, Nottingham, New Hampshire, 03290.

9. The defendant Town of Nottingham is a body corporate and politic, with a principal place of business

10. The defendant Donna Danis is the chair of the Board of Selectmen of the Town of Nottingham. The Nottingham Town Office is located at 139 Stage Road, Nottingham, New Hampshire, 03290. The business mailing address for the Town of Nottingham is P.O. Box 114, Nottingham, New Hampshire. Ms. Danis is sued in her official capacity.

## III. Jurisdiction and Venue

11. This Court has jurisdiction over the plaintiffs' state law claims pursuant to Part I, Article 8 of the New Hampshire Constitution, RSA 491:7 and RSA 491:22.

12. Venue is proper in Rockingham County as it is the individual plaintiffs' county of residence, the county in which the plaintiff business entity is located, and the county in which the Town of Nottingham is located.

13. This Court has jurisdiction over the plaintiffs' federal constitutional claims pursuant to 42 U.S.C. §1983.

## IV. The Ordinance

14. The ordinance contains four parts, a preamble and three numbered sections, each of which is addressed in turn.

### A. The Preamble

15. The preamble starts by reciting two paragraphs inspired by the Declaration of Independence, which are edited for gender neutrality and to eliminate reference to God. The third paragraph asserts the view that the right of self-government is, "natural, fundamental, and unalienable," along with the assertion that the right of self-government is secured to us by the United States Constitution and the Constitution of the State of New Hampshire. Thus far, the preamble simply restates general principles which are, in the main, uncontroversial.

16. In preamble paragraph four, the ordinance asserts a right of the people of the Town of Nottingham to "to alter or replace" a system of local government as long as "the new system" does not "infringe other rights protected for us by state or federal law." As set forth below, this assertion of a municipal right to legislate in any manner that does not infringe upon other protected rights runs afoul of well-established state law.

17. Preamble paragraph five is a "legislative determination" that "chemical trespass" is detrimental to "our rights, health, safety, and welfare." This paragraph also identifies causes for this harm as "corporate activities," which are specified only as, "the physical deposition or disturbance of toxic wastes, including petroleum refining wastes, coal combustion wastes, sewage sludge, heavy metals, chemical residue from manufacturing processes, mining residuals, radioactive wastes, or any other waste that poses a present or potential hazards to human health or ecosystems...."

18. Paragraphs six and seven of the preamble are a statement of revolutionary intent and an acknowledgement that the ordinance violates existing law. Those paragraphs read:

> As we are purportedly constrained by state and federal law, which courts interpret to require us to accept such harmful corporate activity, we the people of Nottingham are unable

> under our current system of local government to secure our rights by banning said activity.
>
> Therefore, we deem it necessary to alter our system of local government, and we do so by adopting this Freedom of Chemical Trespass Rights-based Ordinance.

19. While the preamble to the ordinance seeks to cloak itself in the revolutionary spirit by borrowing the words of Thomas Jefferson, the ordinance is in fact a more familiar, pedestrian, and repeatedly rejected, attempt to introduce home rule by means of a vote on an *ultra vires* town ordinance.

**B. Section 1 - Statements of Law**

20. Following the preamble, the ordinance contains five assertions, each of which purports to be a "statement of law." None of these "statements of law," however, accurately states the law of the State of New Hampshire and none of these "statements of law" are consistent with, or fit within, the governmental structure of our state.

1. **Statement of Law (a): Right to Self-Government.**

21. The ordinance asserts that, "[a]ll residents of Nottingham possess a right of self-government, which includes...the right to a system of local government founded on the consent of the people of the municipality." This is incorrect as a matter of law. The residents of Nottingham possess a right of self-government as citizens of the State of New Hampshire. As such they have the right to participate in the election of our governor, and executive councilor, a state senator and members of the New Hampshire House of Representatives. They also have the right to choose among the various forms of town government available to them under state law. It is the State of New Hampshire that is the wellspring of these rights, not the Town of Nottingham.

2. **Statement of Law (b): Right To A Healthy Climate.**

22. The second "statement of law" is fashioned as a broad-but-undefined assertion of the existence of a right to "a climate system capable of sustaining human societies." This "statement of law" then states that it "includes" (but presumably is not limited to) "the right to be free from all corporate activities" that "infringe on that right...." (Emphasis added). The ordinance then contains a partial, but incomplete, list of undefined items, some of which may include within their definitions various forms of pollution as activities that presumably would violate the ordinance.

**3. Statement of Law (c): Right To Clean Air, Water, And Soil.**

23. The third "statement of law," just like the second, is fashioned as a broad-but-undefined assertion of the existence of a right to "clean air, water and soil." Like the second statement, this third "statement of law" states that it "includes" (but presumably is not limited to) "the right to be free from all corporate activities that release toxic contaminants into the air, water, and soil." (Emphasis added). The ordinance then specifies "chemical trespass resulting from the physical deposition or disturbance of toxic wastes" as one activity that presumably would violate the ordinance.

**4. Statement of Law (d): Rights Of Ecosystems And Natural Communities.**

24. The fourth "statement of law" purports to give legal rights to non-person entities. It states that broad-but-undefined "ecosystems and natural communities," possess the "right to naturally exist, flourish, regenerate, evolve, and be restored...." Under the ordinance, this right includes (but presumably is not limited to) "the right to be free from all corporate activities" (emphasis added) that threaten these rights, including (but presumably not limited to) chemical trespass resulting from the physical deposition or disturbance of toxic wastes.

**5. Statement of Law (e): Right to Protection from Governmental and Corporate Interference.**

25. The fifth, and final, "statement of law" purports to establish a right held by all residents of Nottingham to enforce this ordinance "free from interference of corporations, other business entities, and governments." It is unclear whether this provision is intended to preclude corporations, other business entities and governments from mounting a defense to an action brought against them in court, or whether it merely seeks to upend the political structure of the state and country by asserting the town's supremacy over New Hampshire and the United States of America.

26. This "statement of law" also seeks to establish something it identifies as "ceiling preemption," a term unknown in New Hampshire law. In the context of the statute it appears that "ceiling preemption" represents a belief by the Town that the ordinance merely "expands rights," and that this expansion of rights has no corresponding reduction on the rights of others. As set forth below, long-established and well-understood New Hampshire law defining state preemption prevents the Town from engaging in "ceiling preemption" in the field of environmental law and regulation.

**C. Section 2 – Enforcement**

27. Subsections (a) and (b) of Section 2 of the ordinance establish the penalties and damages for violation. Subsection (a) states that a business entity or government that willfully violates any provision of the ordinance shall be subject to a civil penalty in an amount of $1000 per day of violation and subsection (b) states that a business entity or government is liable for damages for any injury to "an ecosystem of natural community" for damages. Damages are to be measured by the cost of restoring the "ecosystem or natural community" to its state before the injury. The ordinance has no upper limit on the damages for which a business or government entity may be

responsible under the ordinance. The ordinance has no provision for holding individuals responsible for prohibited acts.

28. Subsection (c) establishes the novel concept that "ecosystems and natural communities" within Nottingham may enforce or defend this ordinance through an action brought in the name of the ecosystem or natural community as the real party in interest." The ordinance does not provide any standard by which a court may determine what actions constitute injury or what are the interests of the "ecosystem or natural community" or who decides among potentially competing interests held by the same "ecosystem or natural community," which of the competing interests will prevail.

29. Subsection (d) purports to establish a right for any resident "to enforce or defend" the ordinance "through an action brought in the resident's name." Further, this section purports to give any resident the "right to intervene in any action concerning this ordinance in order to enforce or defend it."

30. Subsection (e) states that if the Town fails to enforce or defend the ordinance, or if a court "fails to uphold this law or purports to declare it unlawful, the law shall not be affected." The ordinance then states that regardless of municipal inaction or judicial declaration or construction of the law, "any resident may then enforce the rights and prohibitions of the law through non-violent direct action."

31. "Direct action" is defined as "any non-violent activities or actions carried out to directly enforce the rights and prohibitions contained within this law." (Emphasis added). Finally, section (e) concludes with what purports to be a command to the judicial branch, which reads, "If an action is filed in violation of this provision the applicable court must dismiss the action promptly, without further filing being required of direct-action participants." (Emphasis added).

## V. Claims For Relief

32. The ordinance is contrary to United States and New Hampshire constitutional, statutory, and common law in at least four different and distinct ways, each of which would entitle the plaintiffs to relief. First, the ordinance purports to regulate conduct beyond that approved by the legislature and is therefore *ultra vires*. Second, the ordinance purports to regulate a field in which state law has already spoken and therefore is preempted by state law. Third, the ordinance is unconstitutional because it is both overbroad and void for vagueness and violates the First, Fifth and Fourteenth Amendments. Fourth, the ordinance expressly violates the New Hampshire Constitution in that is violates the separation of powers doctrine.

**A. Declaratory Judgment**

33. For the reasons set forth below, the plaintiffs are entitled to a declaratory judgment in which this Court declares that the provision of the ordinance are unconstitutional, violate New Hampshire statutory law, and are therefore unenforceable.

**1. The Plaintiffs' Have Standing To Pursue These Claims.**

34. In 2018, New Hampshire voters approved the following Amendment to N.H. Const. Part I, Art.8:

> The public also has a right to an orderly, lawful, and accountable government. Therefore, any 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.

The ordinance authorizes the Town to expend public funds enforcing the ordinance. Accordingly, the plaintiffs have standing to pursue a declaratory judgment in this court under the doctrine of taxpayer standing.

35. Further, pursuant to RSA 491:22:

> the taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

The plaintiffs thus have standing under the additional statutory ground as set forth in RSA 491:22.

36. Finally, The plaintiff G&S Goods, LLC, is a limited liability corporation engaged in business of buying and selling recreational equipment. As such, the ordinance subjects G&S Goods, LLC to fines of up to $1000 per day.

**2. The Town Lacks Statutory Or Other Authority To Adopt The Ordinance And The Ordinance Is Thus *Ultra Vires***

37. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

38. Pursuant to RSA 31:39, towns such as Nottingham have limited authority to adopt ordinances and bylaws. The ordinance exceeds the authority granted to the municipality by statute, as RSA 31:39 contains no provision authorizing the Town to engage in widespread environmental regulation. The legislature has:

> plenary power over municipalities [that is] limited only by provisions of our State Constitution which grants municipalities only the right to control the form of their local government as enacted in their charters. N.H. Const. pt.1, art. 39.... Otherwise the legislature may grant, withhold, or withdraw local control as it sees fit.

*Seabrook Citizens for Defense of Home Rule v. Yankee Greyhound Racing, Inc.*, 123 N.H. 103, 108 (1983)(quoting *Region 10 Client Mgt., Inc. v. Town of Hampstead*, 120 N.H. 885, 888 (1980)). Stated otherwise, "[t]owns are merely subdivisions of the State and have only

such powers as are expressly or impliedly granted to them by the legislature." *Hooksett v. Baines*, 148 N.H. 625, 628 (2002)(quoting *Public Serv. Co. v. Town of Hampton*, 120 N.H. 68, 71 (1980).

39. Further, the Town has no authority to authorize independent enforcement action by individual citizens. RSA 31:39-c reads:

> Any town may establish, by ordinance adopted by the legislative body, a system for the administrative enforcement of violations of any municipal code, ordinance, bylaw, or regulation and for the collection of penalties, to be used prior to the service of a formal summons and complaint. Such a system may be administered by a police department or other municipal agency.

Thus, to the extent that the ordinance purports to authorize individual residents to enforce the provisions of the ordinance, the ordinance adopts an enforcement mechanism that impermissibly extends beyond the legislatively-authorized methods and should be declared contrary to New Hampshire law and unenforceable.

40. New Hampshire law contains no provision allowing Towns to enact ordinances which would allow "ecosystems and natural communities" to be treated as parties to a lawsuit. To the extent that the ordinances purports to permit "ecosystems and natural communities" to be treated as parties to a lawsuit, the ordinance should be declared to be contrary to New Hampshire law and unenforceable.

41. The ordinance includes a provision allowing for damages that exceeds the maximum penalty. RSA 31:30, III establishes the maximum penalty for violation at $1000 per violation. To the extent that the ordinance purports to allow for money damages to "be paid to the Town of Nottingham to be used exclusively for the full and complete restoration of the ecosystem or natural community," the ordinance impermissibly increases the maximum penalty authorized by statute, and should be declared to be contrary to New Hampshire law and unenforceable.

42. The ordinance purports to create "ceiling preemption," a doctrine unknown to New Hampshire law. Even if the doctrine was known to New Hampshire law, the legislature has not authorized towns to incorporate the concept in the regulation of the environment at the municipal level. Accordingly, this part of the ordinance should be declared to be contrary to New Hampshire law and unenforceable.

**3. The Town Is Precluded From Regulating The Subject Matter Of The Ordinance By The Doctrine Of Preemption.**

43. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

44. It is well settled that towns cannot regulate a field that has been preempted by the State. *Town of Salisbury v. New England Power Co.*, 121 N.H. 983, 985 (1981). "The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law." *Casico v. City of Manchester*, 142 N.H. 312, 315 (1997). Thus, preemption will occur when local legislation either expressly contradicts a statute or otherwise runs counter to the legislative intent underlying a statutory scheme.

45. That the State has created a comprehensive statutory scheme governing environmental regulation can hardly be disputed. Pursuant to RSA 21-O, the state has established the Department of Environmental Services. RSA 21-O:1, states that, "the department of environmental services, through its officials, shall be responsible for the following general functions; (a) water pollution control; (b) water supply protection; (c) regulation of waste disposal generally, and as it affects water quality; (d) maintenance of state owned dams; (e) inspection of dams; (f) flood control; and (g) air pollution control.

46. Each of these areas, and well as other subject matters ancillary to these areas of authority, are governed by a state-wide, detailed scheme of statutes and administrative rules that govern environmental protection in New Hampshire. Under this statutory scheme, the duty of enforcement ultimately rests with the Office of the Attorney General, Bureau of Environmental Protection, created by RSA 7:8-a.

47. The ordinance proposes different, vague, and overbroad standards that are contrary to the state-created scheme of environmental protection. For example, the ordinance repeatedly purports to prohibit "all corporate activities" (emphasis added) that: (a) "infringe" the right to a "healthy climate"; (b) "release toxic contaminants into the air, water, and soil,"; or (c) "threaten" the "rights of ecosystems and natural communities". To the extent that these provisions purport to ban all such activity, the ordinance is contrary to state law, is preempted, and must be declared invalid.

**4. The Ordinance Is Unconstitutionally Overbroad and Void For Vagueness.**

48. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

49. A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *State v. Gatchell*, 150 N.H. 642, 643 (2004).

50. The structure and plain language of the ordinance causes the ordinance to fail both of these tests. The ordinance completely fails its obligation to define the rights and responsibilities of Nottingham residents. Rather than seeking to define the line between permissible and impermissible conduct, the ordinance merely creates a non-exhaustive list of some of the actions which constitute a violation. Indeed, each of the

operative provisions contain sentences which use the word "include" twice in identifying some, but clearly not all, of the illegal conduct.

51. For example, statement of law (b) states that Nottingham residents have a "right to a climate system capable of sustaining human societies, which shall include the right to be free from all corporate activities that infringe on that right, including chemical trespass...." The language of the ordinance strongly suggests that the use of the word "including" is non-exhaustive, meaning there is unenumerated conduct outside of the laundry list of "included" activities which also causes liability to attach. However, a reasonable person reading the ordinance would have no idea what that conduct might consist of.

52. By its express terms, the ordinance does not define a level of activity at which liability attaches, nor does it describe specific actions which cause liability to attach. For example, the ordinance does not identify an activity or a level of "deposition" or "chemical trespass" which renders a "climate system" incapable of "sustaining human societies."

53. Likewise, the ordinance does not identify an activity or a level of "release of toxic contaminants" or "chemical trespass" that would render air, water or soil "unclean" and thus violative of the ordinance.

54. The ordinance does not identify a level or degree of "corporate activities" or "chemical trespass" that would infringe the rights of "ecosystems and natural communities" to "exist, flourish, regenerate, evolve and be restored." Indeed, the ordinance does not even define "ecosystems and natural communities."

55. An ordinary person reading the ordinance would have no idea what activities could bring him or her, or a corporation on whose behalf he or she acts, within the purview of the ordinance. It is well established that operating a motor vehicle

releases some "toxic contaminants" into the air. If a person drives a motor vehicle in the town, while acting as an agent of a corporate entity, then that person likely acts in violation of the ordinance and could be required to pay a $1000 fine for each day that he or she operates the motor vehicle.

56. This is but one example of an activity protected by state law that this ordinance could be construed to ban. As such, the ordinance is unconstitutionally vague on its face and must be declared unconstitutional.

57. Further, when an ordinance bans so much protected activity, it is also subject to arbitrary and discriminatory enforcement. The ordinance provides no standards by which to assess which activities violate the ordinance.

58. The ordinance is also overbroad and must be declared unconstitutional. "A statute is void for overbreadth if it attempts to control conduct by means which invade areas of protected freedom." *State v. MacElman*, 154 N.H. 304, 309 (2006)(quoting *State v. Pike*, 128 N.H. 447, 450-51 (1986)).

59. The purpose of the overbreadth doctrine is to protect persons who, although their speech or conduct is constitutionally protected, may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Id.* A municipal ordinance can be overbroad if it has this same chilling effect on state created rights.

60. The ordinance is overbroad for the same reasons set forth above addressing issues related to pre-emption, and those paragraphs are expressly incorporated herein by reference.

**5. The Ordinance Violates the First And Fourteenth Amendments**

61. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

62. The First Amendment to the United States Constitution provides that no law shall abridge the "right of the people ... to petition the Government for a redress of grievances." U.S. Const. Amend. I.

63. The First Amendment is made applicable to the states by the Fourteenth Amendment.

64. The ordinance purports to divest corporations and other business entities of their constitutional right to petition the government for redress of grievances in that it strips corporations of: (a) their status as "persons" under the law; (b) their power to assert that state or federal laws preempt the ordinance; and (c) their power to assert that the Town of Nottingham lack the authority to adopt the ordinance.

65. Thus, the ordinance suppresses the plaintiff's right to make a complaint to, or seek the assistance of, the government for redress of grievances related to the ordinance.

**6. The Ordinance Violates The Fourteenth Amendment's Equal Protection Clause.**

66. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

67. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV, §1.

68. The ordinance denies the plaintiffs equal protection because it arbitrarily restricts the activities of corporate persons while imposing no similar restriction on similar activities undertaken by natural persons or unincorporated associations.

69. Arbitrary and irrational discrimination violates the Equal Protection Clause. See, *Bankers Life and Casualty Company v. Crenshaw*, 468 U.S. 71 (1988).

70. The distinction in the ordinance between corporate entities and natural persons bears no reasonable relationship to the apparent intent of the ordinance. Assuming that the purpose of the ordinance is to prevent pollution and despoliation of natural resources, drawing a distinction between natural persons and corporate entities, each of whom may commit the damage to the environment, is completely irrational.

71. Further, to the extent that the ordinance seeks to establish "ecosystems" and "natural communities" as jural persons, there is no rational basis to conclude that these entities would have an interest in having their "right to naturally exist, flourish, regenerate, evolve, and be restored" impaired by corporate entities, but would somehow accept the same treatment if performed by natural persons.

72. Imposing this type of liability on corporations alone, to the exclusion of natural persons or unincorporated associations, bears no rational relationship to any legitimate governmental interest. Instead, the ordinance's exclusion restriction on the activities of business entities is unreasonable, arbitrary, and capricious.

**7. The Ordinance Violates The Takings Clause Of The Fifth And Fourteenth Amendments To The United States Constitution.**

73. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

74. The Fifth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation.

75. Regulation that deprive a property owner of all beneficial use of his or her property requires compensation under the Takings Clause.

76. The striking breadth of the conduct prohibited by the ordinance constitutes a taking that deprives private property owners of beneficial use of their land to such an extent that the ordinance constitutes a taking.

77. The ordinance contains no provision that allows for compensation to be paid based on taking of property.

78. Further, the ordinance includes "ecosystems" and "natural communities," which necessarily include privately held land, as jural persons capable of litigating in court against the owner of the land. Governmental creation of a right of property to litigate against its owner amounts to a Fifth Amendment taking.

**8. The Ordinance Violates Part I, Article 37 of the New Hampshire Constitution.**

79. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

80. Part I, Article 37 of the New Hampshire Constitution reads as follows:

> Separation of Powers. In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.

81. The separation of powers doctrine is "violated when one branch usurps an essential power of another." *Petition of Mone*, 143 N.H. 128, 134 (1998).

82. The essential power and core function of the judicial branch of government is to decide cases coming before it.

83. The ordinance states that if "a court fails to uphold this law or purports to declare it unlawful, the law shall not be affected...."

84. This bold assertion, if permitted to remain in place, would assert the right of the Town and its people to ignore rulings of this court. Further, the ordinance purports to grant "[a]ny resident, and any ecosystem or natural community, ...the right to intervene in any action concerning" the ordinance.

85. The legislative body for the Town of Nottingham – the town meeting – has no authority to deprive, reduce, or in any way affect the rulings of this Court.

86. Further, the Town of Nottingham has no authority to pass a rule granting a right of intervention in cases being heard in the judicial branch. Intervention in superior court cases is permitted pursuant to Superior Court Rule 15. The Town has no authority to alter, amend, or ignore the Superior Court Rules.

**B. Temporary And Permanent Injunction.**

87. All preceding and following paragraphs are hereby restated and incorporated herein by reference.

88. In addition to the relief requested above, and for the reasons set forth above, the plaintiff also asks this court to impose a temporary and permanent injunction barring the Town of Nottingham from taking any action to enforce the ordinance.

**VI. Request For Attorney's Fees**

89. The plaintiffs ask this Court to award reasonable attorney's fees under the substantial public benefit doctrine. Enforcement of this unconstitutional and illegal ordinance has the potential to harm all residents of the Town of Nottingham. Accordingly, if successful, the plaintiff's effort to have the ordinance declared unconstitutional, illegal, and invalid benefits all members of the Town of Nottingham community.

WHEREFORE, the plaintiffs respectfully ask that this Honorable Court:

A. Issue a declaration that the ordinance is invalid for the reasons set forth in this Complaint; and

B. Issue a temporary and permanent restraining order barring the Town of Nottingham from taking any enforcement action against any resident of the Town of Nottingham and any business entity located there; and

C. Order the defendants to pay reasonable attorney's fees; and

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

Respectfully Submitted

BRENT TWEED
and
G&F Goods, LLC

By their attorneys,
Lehmann Law Office, PLLC

March 27, 2019

/s/*Richard J. Lehmann*
Richard J. Lehmann (Bar No. 9339)
835 Hanover Street, Suite 301
Manchester, N.H. 03104
(603) 731-5435
rick@nhlawyer.com

# EXHIBIT #1

# FREEDOM FROM CHEMICAL TRESPASS RIGHTS-BASED ORDINANCE

## ESTABLISHING A COMMUNITY RIGHTS-BASED ORDINANCE FOR NOTTINGHAM, NH, THAT PROHIBITS ACTIVITIES AND PROJECTS THAT WOULD VIOLATE RIGHTS SECURED BY THE ORDINANCE

**Preamble**

We hold these truths to be self-evident, that all people are created equal, that they naturally are endowed with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, the people institute governments, which derive their just powers from the consent of the governed.

Further, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

This right of self-government, as stated in the Declaration of Independence, is natural, fundamental, and unalienable. It is also secured to us by the United States Constitution and the Constitution of the State of New Hampshire.

Pursuant to that right of self-government, if our current system of local government infringes our rights, we, the people of Nottingham, have the right to alter or replace that system with one that secures and protects our rights, as long as the new system does not infringe other rights protected for us by state or federal law.

It is our legislative determination that chemical trespass resulting from the following corporate activities, namely the physical deposition or disturbance of toxic wastes, including petroleum refining wastes, coal combustion wastes, sewage sludge, heavy metals, chemical residue from manufacturing processes, mining residuals, radioactive wastes, or any other waste that poses a present or potential hazard to human health or ecosystems, is detrimental to our rights, health, safety, and welfare.

As we are purportedly constrained by state and federal law, which courts interpret to require us to accept such harmful corporate activity, we the people of Nottingham are unable under our current system of local government to secure our rights by banning said activity.

Therefore, we deem it necessary to alter our system of local government, and we do so by adopting this Freedom from Chemical Trespass Rights-based Ordinance.

**Section 1 – Statements of Law**

*(a) Right of Self-Government.* All residents of Nottingham possess a right of self-government, which includes, but is not limited to, the following rights: first, the right to a system of local government founded on the consent of the people of the municipality; second, the right to a system of local government that secures their rights; and third, the right to alter any system of local government that lacks consent of the people or fails to secure and protect the people's rights, health, safety, and welfare.

Any action to annul, amend, alter, or overturn this Ordinance shall be prohibited unless such action is approved by a prior Town vote at which a majority of the residents of the Town voting approve such action.

*(b) Right to a Healthy Climate.* All residents of Nottingham possess a right to a climate system capable of sustaining human societies, which shall include the right to be free from all corporate activities that infringe that right, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes, which, for purposes of this ordinance, includes petroleum refining wastes, coal combustion wastes, sewage sludge, heavy metals, chemical residue from manufacturing processes, mining residuals, radioactive wastes, or any other waste that poses a present or potential hazard to human health or ecosystems.

*(c) Right to Clean Air, Water, and Soil.* All residents of Nottingham possess the right to clean air, water, and soil, which shall include the right to be free from all corporate activities that release toxic contaminants into the air, water, and soil, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes.

*(d) Rights of Ecosystems and Natural Communities.* Ecosystems and natural communities within Nottingham possess the right to naturally exist, flourish, regenerate, evolve, and be restored, which shall include the right to be free from all corporate activities that threaten these rights, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes.

*(e) Right to Protection from Governmental and Corporate Interference.* All residents of Nottingham and the Town of Nottingham possess the right to enforce this Ordinance free of interference from corporations, other business entities, and governments. That right shall include the right of residents to be free from ceiling preemption, because this Ordinance expands rights and legal protections for people and nature above those provided by less-protective state, federal, or international law.

**Section 2 – Enforcement**

(a) Any business entity or government that willfully violates any provision of this Ordinance shall be subject to a civil penalty in an amount of $1,000 per day of violation.

(b) Any business entity or government that willfully violates any provision of this Ordinance also shall be liable for any injury to an ecosystem or natural community caused by the violation. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Town of Nottingham to be used exclusively for the full and complete restoration of the ecosystem or natural community.

(c) Ecosystems and natural communities within Nottingham may enforce or defend this Ordinance through an action brought in the name of the ecosystem or natural community as the real party in interest.

(d) Any resident of Nottingham may enforce or defend this Ordinance through an action brought in the resident's name. Any resident, and any ecosystem or natural community, also shall have the right to intervene in any action concerning this Ordinance in order to enforce or defend it, and in such an

action, the Town of Nottingham shall not be deemed to adequately represent their particularized interests.

(e) If the Town of Nottingham fails to enforce or defend this law, or a court fails to uphold this law or purports to declare it unlawful, the law shall not be affected, and any resident may then enforce the rights and prohibitions of the law through non-violent direct action. If enforcement through non-violent direct action is commenced, this law shall prohibit any private or public actor from filing a civil or criminal action against those participating in such non-violent direct action. If an action is filed in violation of this provision, the applicable court must dismiss the action promptly, without further filings being required of direct-action participants. "Direct action" as used by this provision shall mean any non-violent activities or actions carried out to directly enforce the rights and prohibitions contained within this law.

**Section 3 – State and Federal Constitutional Changes**

Through the adoption of this Ordinance, the people of Nottingham call for amendment of the New Hampshire Constitution and the federal Constitution to recognize expressly a right of local self-government free from governmental restriction, ceiling preemption, or nullification by corporate "rights."

ENACTED AND ORDAINED this _____ day of _____, 20_____, by the Town of Nottingham, in Rockingham County, New Hampshire.

By:

Signature _____ Print _____

Signature _____ Print _____

Signature _____ Print _____

Signature _____ Print _____

Signature _____ Print _____

*Attest:* _____

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.

**DEFENDANTS' ANSWER**

The Town of Nottingham and Donna Davis, by and through their attorneys, Upton & Hatfield LLP, respectfully answer the Plaintiffs' Complaint, as follows:

1. Admitted that this is a partial quote of the Ordinance. Defendants respectfully refer the Court to the Ordinance, which speaks for itself. To the extent this paragraph contains legal conclusions, no response is required.

2. Admitted that this is a partial quote of the Ordinance. Defendants respectfully refer the Court to the Ordinance, which speaks for itself. To the extent this paragraph contains legal conclusions, no response is required.

3. Defendants are without sufficient information, knowledge or belief as to the factual allegations contained in paragraph 3 and therefore deny the same.

4. Paragraph 4 contains legal conclusions to which no response is required. To the extent a response is required, the defendants are without sufficient information, knowledge or belief and therefore deny the same.

5. Paragraph 5 contains legal conclusions to which no response is required.

6. Paragraph 6 contains legal conclusions to which no response is required.

7. Paragraph 7 contains identifying information of the Plaintiff which does not require a response.

8. Defendants are without sufficient information, knowledge or belief to admit or deny the factual allegations contained in paragraph 8 and therefore deny the same.

9. Admitted.

10. Defendants deny the factual allegations contained in the first sentence of paragraph 10. Defendants admit the reaming allegations in paragraph 10.

11. This paragraph contains legal conclusions, which do not require a response.

12. This paragraph contains legal conclusions, which do not require a response.

13. This paragraph contains legal conclusions, which do not require a response.

14. The Ordinance speaks for itself.

15. The Ordinance speaks for itself.

16. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, no response is required.

17. The Ordinance speaks for itself.

18. The Ordinance speaks for itself.

19. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, no response is required.

20. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

21. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

22. The Ordinance speaks for itself.

23. The Ordinance speaks for itself.

24. The Ordinance speaks for itself.

25. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

26. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

27. The Ordinance speaks for itself.

28. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

29. The Ordinance speaks for itself.

30. The Ordinance speaks for itself.

31. The Ordinance speaks for itself.

32. This paragraph contains legal conclusions which do not require a response.

33. This paragraph contains legal conclusions which do not require a response.

34. This paragraph contains legal conclusions which do not require a response.

35. This paragraph contains legal conclusions which do not require a response.

36. Defendants are without sufficient information, knowledge or belief to admit or deny the factual allegations contained in paragraph 36 and therefore deny the same. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

37. All preceding and following paragraphs are hereby restated and incorporated by reference.

38. This paragraph contains legal conclusions which do not require a response.

39. This paragraph contains legal conclusions which do not require a response.

40. This paragraph contains legal conclusions which do not require a response.

41. This paragraph contains legal conclusions which do not require a response.

42. This paragraph contains legal conclusions which do not require a response.

43. All preceding and following paragraphs are hereby restated and incorporated by reference.

44. This paragraph contains legal conclusions which do not require a response.

45. This paragraph contains legal conclusions which do not require a response. Moreover, RSA 21-O speaks for itself.

46. This paragraph contains legal conclusions which do not require a response.

47. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

48. All preceding and following paragraphs are hereby restated and incorporated by reference.

49. This paragraph contains legal conclusions which do not require a response.

50. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

51. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

52. The Ordinance speaks for itself.

53. The Ordinance speaks for itself.

54. The Ordinance speaks for itself.

55. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

56. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

57. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

58. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

59. ]This paragraph contains legal conclusions which do not require a response.

60. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

61. All preceding and following paragraphs are hereby restated and incorporated by reference.

62. The First Amendment speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

63. The Fourteenth Amendment speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

64. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

65. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

66. All preceding and following paragraphs are hereby restated and incorporated by reference.

67. The Fourteenth Amendment speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

68. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

69. This paragraph contains legal conclusions which do not require a response.

70. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

71. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

72. This paragraph contains legal conclusions which do not require a response.

73. All preceding and following paragraphs are hereby restated and incorporated by reference.

74. The Fifth Amendment speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

75. This paragraph contains legal conclusions which do not require a response.

76. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

77. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

78. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

79. All preceding and following paragraphs are hereby restated and incorporated by reference.

80. Part I, Article 37 of the New Hampshire Constitution speaks for itself.

81. This paragraph contains legal conclusions which do not require a response.

82. This paragraph contains legal conclusions which do not require a response.

83. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

84. The Ordinance speaks for itself. To the extent this paragraph contains legal conclusions, such conclusions do not require a response.

85. This paragraph contains legal conclusions which do not require a response.

86. This paragraph contains legal conclusions which do not require a response.

87. All preceding and following paragraphs are hereby restated and incorporated by reference.

88. This paragraph contains legal conclusions which do not require a response.

89. This paragraph contains legal conclusions which do not require a response. By way of further answer, the defendants affirmatively state that attorney's fees in this matter are unwarranted.

**AND, BY WAY OF AFFIRMATIVE DEFENSE:**

90. The Complaint, and each count thereof, fails to state a claim upon which relief may be granted.

91. The Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations.

92. The Plaintiffs lack standing.

93. The Plaintiffs' claims are barred, in whole or in part, by their failure to exhaust administrative remedies.

94. The Plaintiffs are not entitled to declaratory, equitable, or extraordinary relief from this Court.

95. The Plaintiffs' damages, if any, were caused by, or were the fault of, itself or others.

96. The Plaintiffs have failed to mitigate their damages.

**RESERVATION OF RIGHTS**

Defendants reserve the right to add such other and additional responses, allegations and/or affirmative defenses as may become evident as the case progresses, on reasonable notice to plaintiffs.

**PRAYER FOR RELIEF**

WHEREFORE, Defendants respectfully request that this Honorable Court:

A. Deny all claims included in Plaintiffs' Complaint;

B. Deny Plaintiffs' request to recover attorney's fees;

C. Enter judgment in favor of the defendants on all counts; and

D. Grant such further relief as may be just and proper.

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

Date: May 6, 2019

By: /s/ Michael P. Courtney

Michael P. Courtney (NHBA #21150)
Susan Aileen Lowry (NHBA #18955)
10 Centre Street
Concord, NH 03302
Telephone: 603 224-7791
mcourtney@uptonhatfield.com

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was hand delivered this date to all counsel of record.

Dated: May 6, 2019

By: /s/ Michael P. Courtney
Michael P. Courtney

**STATE OF NEW HAMPSHIRE**

| **ROCKINGHAM, SS.** | **SUPERIOR COURT** |
|---|---|
| BRENT TWEED,<br>G&F GOODS, LLC,<br>Plaintiffs,<br><br>v.<br><br>TOWN OF NOTTINGHAM, NEW HAMPSHIRE<br>DONA DANIS<br>Defendants,<br><br>and<br><br>NOTTINGHAM WATER ALLIANCE, INC.,<br><br>Intervenor-Defendant. | Case No. 218-2019-CV-00398 |

**MOTION TO INTERVENE IN TWEED V. NOTTINGHAM**

The Nottingham Water Association ("NWA"), by and through its undersigned counsel, respectfully petitions this Court for leave to intervene pursuant to New Hampshire Superior Court Civil Rule 15. The NWA submits an Appearance and a Motion to Dismiss, attached, and through this petition and accompanying affidavit asserts its interest in these proceedings.

**PRELIMINARY STATEMENT**

The Freedom from Chemical Trespass Rights-Based Ordinance ("Ordinance") is a Constitutional, binding, and enforceable municipal law that Nottingham voters properly enacted on March 16, 2019. The NWA was instrumental in enacting the Ordinance, which

enshrines the NWA members' right to local self-government. Plaintiffs' lawsuit jeopardizes this right; the NWA moves to intervene to protect itself and its members from injury.

## FACTS

The NWA is a nonprofit corporation with four individual officers, all of whom are residents and voters of the Town of Nottingham. The NWA represents and serves over 100 people through its advocacy and mobilization work, all of whom are residents of the Town of Nottingham.

The New Hampshire Department of State lists the NWA's principle purpose as "educat[ing] the residents of Nottingham about local self-government."

The NWA drafted and proposed the Ordinance, making its adoption their primary organizational goal from March 2018 to March 2019.

Through the efforts of its individual officers and participants, the NWA engaged in a year-long community education campaign and collected enough signatures to place the Freedom from Chemical Trespass Rights-Based Ordinance ("Ordinance") before the electorate on the 2019 Town Meeting ballot.

The Ordinance took effect on March 16, 2019, but it has never been enforced.

## STANDARD OF LAW

"Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause." N.H. Super. Ct. Civ. R. 15, (formerly R. 139).

"The right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice." *Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 446 (2002). To intervene in a case, an applicant must have a right involved in the trial, and must

demonstrate a direct and apparent interest in the case. *Lamarche v. McCarthy*, 158 N.H. 197, 199 (2008).

New Hampshire courts allow parties to intervene without finding that the intervenor has standing. *See, e.g., Am. Fed'n of Teachers v. State*, 167 N.H. 294, 299 (2015) (assuming, "without deciding, that the non-individual plaintiffs have standing to be intervenors"), and *G2003B, LLC v. Town of Weare*, 153 N.H. 725, 727 (2006) (allowing residents to intervene in a dispute over the constitutionality of a municipal ordinance). Trial courts may allow a party to intervene even after finding that the intervenor lacks standing. *Prof'l Fire Fighters of N.H. v. State of N.H.*, 167 N.H. 188, 191 (2014) (affirming the trial court's ruling that "dismissed the ... plaintiffs for lack of standing, but allowed them to proceed as intervenors").

While the New Hampshire Rules favor intervention more than the Federal Rules of Civil Procedure, even in federal District Court standing requirements do not apply to intervenors. The First Circuit declined to rule whether intervenors must have federal Constitutional standing, but the majority of Federal Circuits find that intervenors need not comply with Article III Standing requirements. *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 109 (1st Cir. 1999) and *King v. Governor of the State of New Jersey*, 767 F.3d 216, 245 (3d Cir. 2014).

Interpreting the more onerous "interest" requirements for intervening using Federal Rule 24, the First Circuit allowed interventors to defend the Constitutionality of a challenged law that affected the intervenors in a manner distinct from the law's effect on the "ordinary run of citizens." *Daggett*, 172 F.3d at 110.

A showing of distinct impact is sufficient, but not necessary, for a state court to grant a motion to intervene pursuant to New Hampshire Rule 15. Parties intervening in New Hampshire courts must show only a right at stake and an interest in the litigation.

## ARGUMENT

The NWA's interest in this case stems both from the central role that the NWA played in enacting the Ordinance, and from the NWA's stake in the substantive rights that the Ordinance protects.

The NWA catalyzed the adoption of the Ordinance. Voters enacted the Ordinance as a direct result of the NWA's efforts, fulfilling the NWA's primary organizational goal. Without the time and resources that the NWA expended drafting the Ordinance and educating Nottingham residents about their right to local self-government, the dispute before this Court would not exist.

Plaintiffs' claims seek a result that would undo the gains that the NWA and its members have secured. An unfavorable result in this lawsuit would waste the resources that the NWA invested in promoting and securing the right to local self-government.

Substantively, the Ordinance acutely protects the rights of the NWA in two ways. First, the Ordinance codifies a right at the heart of the NWA's organizational purpose: local self-government. "All residents of Nottingham possess a right of self-government." *Freedom from Chemical Trespass Rights-Based Ordinance*, § 1(a). The Ordinance protects Nottingham residents' right to local self-government, and exemplifies an exercise of this right through its very existence.

Second, the Ordinance bestows upon residents' the right to enforce the lawsuit and to participate in lawsuits concerning its legality: "[a]ny resident of Nottingham may enforce or defend this Ordinance." Ordinance, § 2(d). As an organization comprised entirely of residents of Nottingham, the NWA has an interest in representing and protecting the residents' ability to bring suit to uphold the provisions in the Ordinance.

The NWA has a sufficient interest even according to federal precedent because the disputed Ordinance applies distinctly to the NWA and its individual members, but the NWA need only to meet the State requirements. State precedent allows an organizational party to intervene in a dispute between two parties if the organization has an interest the constitutionality of the law that provides the basis for the dispute. *Lamarche*, 158 N.H. at 201 ("Nor does the fact that the OMA has no direct or apparent interest as a party in the subject matter of the underlying personal injury litigation bar it from intervening."). The NWA has an interest in upholding the constitutionality of a municipal law that codifies a right at the heart of the NWA's reason for existing and provides a mechanism for NWA members themselves to litigate over that right.

The Town of Nottingham does not adequately represent the NWA's interests because the people of Nottingham, not the Town of Nottingham, enacted this Ordinance. The Ordinance protects NWA members and other Nottingham residents, but does not protect the municipal corporation. The Town has interests distinct from the NWA's.

For the reasons listed above, the NWA seeks permission from this Court to intervene. If this Court favorably considers this request, the NWA will file a timely Motion to Dismiss the Complaint (proposed Motion attached), and is prepared to fully air any and all issues before the Court.

Respectfully submitted,

Dated: May 15, 2019

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.*

**AFFIDAVIT OF JOHN TERNINKO, MEMBER OF NOTTINGHAM WATER ALLIANCE, INC.**

I, John Terninko, of Nottingham New Hampshire, solemnly swear to the best of my knowledge that the contents in the Motion to Intervene in Tweed v. Nottingham are true and correct. Specifically, I state the following facts to be true:

1. The NWA has four officers, all of whom are residents and voters of the Town of Nottingham.

2. The NWA represents and serves over 100 people through its advocacy and mobilization work, all of whom are residents of the Town of Nottingham.

3. Adopting this specific Ordinance was the NWA's primary goal from, at a minimum, March 2018 to March 2019.

4. Since December, 2016, the NWA has been working to publicize the concept of a rights-based ordinance and of local self-government.

5. The NWA promoted this Ordinance by hosting public meetings, sending flyers to residences in Nottingham and West Nottingham, distributing information to Nottingham residents in person, and posting information at local businesses, the library, and other public spaces.

By: John Terninko

Dated this 15th Day of May, 2019 in Lee, New Hampshire.

**********

John Terninko personally appeared before me and has indicated that this verification is his free act and deed.

By: Megan A Parke
Notary Public

My commission expires:

MEGAN A. PARKE, Notary Public
My Commission Expires August 22, 2022

**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: May 16, 2016.

*/s/Kira Kelley*

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.*

# The State of New Hampshire
# Superior Court

## Rockingham

BRENT TWEED, ET AL.

v.

TOWN OF NOTTINGHAM, ET AL.

No. 218-2019-CV-0398

**ORDER ON NOTTINGHAM WATER ALLIANCE'S MOTION TO INTERVENE**

At issue is whether Nottingham Water Alliance ("NWA") should be allowed to intervene in support of a town ordinance being challenged by the plaintiffs. After considering the pleadings, arguments, and applicable law, NWA's motion to intervene is DENIED.

Facts and Procedural History

On March 16, 2019, the voters of the Town of Nottingham voted to enact "The Freedom from Chemical Trespass Rights-Based Ordinance" (the "Ordinance"). See Doc 1, Ex. 1 (hereinafter cited as "Ordinance").[1] This Ordinance creates (or asserts as already existing) a bevy of rights, the violation of which would expose a business or government entity to a fine of $1,000 per day. Ordinance, § 2(a). Among the rights it confers upon the residents of Nottingham, the Ordinance purports to create a right for any resident, ecosystem, or natural community "to intervene in any action concerning this Ordinance." Id. at § 2(d).

[1] "Doc." references refer to the numbers assigned to the documents in the Court's file.

Shortly after the Ordinance was enacted, the plaintiffs, an individual resident of Nottingham and a Delaware LLC doing business in New Hampshire, filed suit in this Court challenging the Ordinance under a plethora of legal and constitutional theories and seeking a declaratory judgment that the law is facially invalid. See Doc. 1 (Compl.). After the Town of Nottingham filed an answer, NWA moved to intervene in the case on the grounds that it has a direct and apparent interest in the case because it played a central role in enacting the law. See Doc. 8 (Defs.' Answer); Doc. 11 (NWA Mot. Intervene). Further, NWA alleged that it has substantive rights both created in and protected by the Ordinance, including the right to "participate in lawsuits concerning its legality." Doc. 11 at 4. Finally, NWA claimed that its members' interests are not adequately represented by the Town of Nottingham acting alone as a party in the case because it was the citizens of Nottingham, and not the "municipal corporation," who enacted the Ordinance. Id. at 5.

The plaintiffs filed an objection to NWA's motion to intervene, arguing that NWA lacks a sufficiently direct and apparent interest to justify intervention. See Doc. 13 (Pls.' Obj. Mot. Intervene). In their motion, the plaintiffs raise concerns that adding NWA as a party will greatly increase the duration and cost of litigation in this case. Specifically, the plaintiffs point to the relationship between NWA and the Community Environmental Legal Defense Fund ("CELDF"), which the plaintiffs allege has a history of frivolous and time-consuming litigation over similar ordinances.[2]

[2] The plaintiffs also attached an order from the U.S. District Court for the Western District of Pennsylvania (Baxter, M.J.), which imposed sanctions on an attorney for CELDF for pursuing frivolous claims and defenses. See Doc. 13, Ex. H (Pennsylvania General Energy Co., LLC v. Grant Township, Case No. 14-CV-209 (W.D. Pa. 2018)).

NWA filed a response to the plaintiffs' objection, laying out in greater detail its legal basis for intervention. See Doc. 16 (NWA Resp. Pls.' Obj. Mot. Intervene). NWA again claimed that the Ordinance created a right for it to intervene in the case. Additionally, NWA argued that potential litigation costs are irrelevant to the Court's analysis of the legal standard for intervention. Finally, NWA reiterated that the Town of Nottingham does not have the same motivation as NWA in defending the Ordinance.

Currently, there is a temporary injunction in place barring the enforcement of the Ordinance, and there is a motion to dismiss filed by NWA which is held in abeyance until the resolution of its motion to intervene. See Doc. 12 (NWA Mot. Dismiss).

## Analysis

### I. NWA Must Establish Standing to Intervene in this Litigation

NWA advances three main arguments as to why its motion to intervene should be granted: (1) the Ordinance creates a legal right for residents of Nottingham (and NWA on their behalf) to intervene in cases involving the Ordinance; (2) NWA has a direct and apparent interest in the litigation because it played an integral role in the passage of the Ordinance; and (3) the Town has a different motivation in defending the Ordinance because the citizens of Nottingham—ostensibly represented by NWA—and not the "municipal corporation," lobbied for and enacted the Ordinance. Each of these arguments is addressed below. Before the Court addresses these specific issues, the Court will address the issue of whether a prospective intervenor must have standing to be involved in the litigation.

New Hampshire's Civil Rules of Procedure state that "[a]ny person shown to be interested may become a party to any civil action upon filing and service of an

Appearance and pleading briefly setting forth his or her relation to the cause . . . ." Super. Ct. Civ. R. 15 (formerly R. 139). "A person who seeks to intervene in a case must have a *right* involved in the trial and his *interest* must be direct and apparent; such as would suffer if not indeed be sacrificed were the court to deny the privilege." Snyder v. New Hampshire Sav. Bank, 134 N.H. 32, 35 (1991) (quoting R. Wiebusch, 4 New Hampshire Practice, Civil Practice and Procedure § 176 at 129–30 (1984)) (emphasis in original). Thus, the test for determining whether to allow a prospective litigant intervenor status has two element: (1) the aspiring intervenor must have a direct and apparent interest to be vindicated through the court process and (2) the potential intervenor must have a right that is involved in the litigation already pending in court. For the reasons set forth below, the first element of intervenor status goes to the potential intervenor's standing to seek a judicial remedy. The second prong on the intervenor test is whether that prospective intervenor should be allowed to vindicate that legal or equitable interest in a case already pending in court between other parties. Whether to grant or deny a motion to intervene is ultimately within the discretion of the Court. Lamarche v. McCarthy, 158 N.H. 197, 200 (2008) (quotation omitted).

NWA cites three cases for the proposition that a party does not need to establish standing to intervene in cases challenging the validity of a law. See Doc. 11 at 3. However, these cases are premised on the opposite conclusion. See Am. Fed'n of Teachers v. State, 167 N.H. 294, 299 (2015) (stating that "we assume, without deciding, that the non-individual plaintiffs have standing to be intervenors" in the case, when the parties failed to raise the issue on appeal); Prof'l Fire Fighters of N.H. v. State, 167 N.H. 188, 191 (2014) (concluding the same); G2003B, LLC v. Town of Weare, 153 N.H. 725,

728 (2006) ("[W]e assume without deciding that the intervenors have standing to contest the trial court's ruling."). By assuming that the parties did have standing before starting their analysis, the Supreme Court implied that the parties needed some degree of standing to continue in the case as intervenors. See also In re Keene Sentinel, 136 N.H. 121, 125 (1992) (finding that because a newspaper had standing to petition the trial court for records, it could intervene in a divorce case in which it was seeking records). More importantly, because standing is a prerequisite for subject matter jurisdiction, a court cannot allow a party to seek judicial relief without establishing that the party has standing under the New Hampshire Constitution. See Duncan v. State, 166 N.H. 630, 639-40 (2014).

The federal courts are split on the issue of whether a prospective intervenor must establish standing under Article III of the U.S. Constitution. See City of Chicago v. Fed. Emergency Mgmt. Agency, 660 F.3d 980, 984 (7th Cir. 2011) (citing cases). Generally, those courts which do not require an intervenor to have Article III standing reason that so long as there is a "case or controversy" between the primary litigants, the potential inventor does not need to establish it has independent standing to pursue a judicial remedy. See, e.g., Loyd v. Alabama Dep't of Corr., 176 F.3d 1336, 1339 (11th Cir. 1999) ("we note that this circuit has held that a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit" (quotation omitted)).

This Court finds the analysis of the federal circuit courts which require Article III standing persuasive. As the Seventh Circuit succinctly explained:

> The cases that dispense with the requirement overlook the fact that even if a case is securely within federal jurisdiction by virtue of the stakes of the existing parties, an intervenor may be seeking relief different from that sought by any of the original parties. His presence may turn the case in a new direction—may make it really a new case, and no case can be maintained in a federal court by a party who lacks Article III standing.

Id. at 985 (citations omitted).

The Ordinance at issue in the case at bar purports to grant standing to intervene to "[a]ny resident, and any ecosystem or natural community." Ordinance, § 2(d). As a general proposition, "[s]tanding under the New Hampshire Constitution 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." Petition of Guillemette, 171 N.H. 565, 569 (2018) (quotation omitted). While the Ordinance attempts to establish standing, it is abundantly clear that neither a statute nor ordinance can provide standing to an individual or organization when the party does not have a concrete legal or equitable interest in the outcome of the litigation. See Duncan, 166 N.H. at 645 (striking down statute which granted standing to taxpayers to challenge unlawful spending by a municipality).

**A. NWA does not have general standing to seek judicial relief**

The New Hampshire Supreme Court has set forth the following principles for courts to apply in determining whether a party has standing to seek judicial relief:

> [W]e focus on whether the party suffered a legal injury against which the law was designed to protect. Neither an abstract interest in ensuring that the State Constitution is observed nor an injury indistinguishable from a generalized wrong allegedly suffered by the public at large is sufficient to constitute a personal, concrete interest. Rather, the party must show that its own rights have been or will be directly affected.

State v. Actavis Pharma, Inc., 170 N.H. 211, 215 (2017) (quotations omitted), cert. denied, 138 S. Ct. 1261 (2018).

A party must have a direct and apparent interest in the outcome of the case in order to intervene. Snyder, 134 N.H. at 35. 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 floodgates for any number of special interest groups to intervene in litigation involving laws they lobbied for or against. Any lobbyist, political action committee, political party, or even candidate who supported specific legislative could move to intervene under NWA's interpretation. It would essentially create a situation in which the trial courts would become inundated with briefs from would-be intervenors every time the Court is asked to rule on the validity of a controversial law. From a public policy perspective, and in the interests of judicial economy, this cannot be the intended purpose of intervention.

NWA's position is not analogous to that of the Office of Mediation and Arbitration ("OMA") in Lamarche. In Lamarche, the Supreme Court ruled that a government agency had standing to intervene on in an interlocutory appeal to defend the constitutionality of a Superior Court rule which collected fees to fund its operation. Lamarche, 158 N.H. at 199. The OMA therefore had a direct and apparent interest in

the outcome of the appeal, even if it did not have any interest in the underlying tort litigation. Id. at 201. In other words, the source of funds to maintain OMA's operations was dependent on the constitutionality of the court rule governing alternative dispute resolution. Here, however, NWA has no such direct and apparent interest. Whether the Ordinance is struck down or upheld has no bearing whatsoever on the funding or continued operation of the NWA as a non-profit organization. Whether the Ordinance is constitutional or not has no bearing on NWA's ability to continue to represent the residents of Nottingham, and to continue advocating and educating as it wishes. See Doc. 11 at 2 ("The New Hampshire Department of State lists the NWA's principle purpose as 'educat[ing] the residents of Nottingham about local self-government.'"). Thus, NWA has no legally cognizable interest in the outcome of this litigation.

NWA's position is more akin to that of the Aviation Association in Rye v. Ciborowski, 111 N.H. 77 (1971). In, the Supreme Court affirmed the trial court's denial of intervention by the Aviation Association of New Hampshire. Id. at 82. The underlying dispute was over the scope of the defendant's variance to operate a private landing strip on his property. Id. The Aviation Association sought to intervene in the case to brief the trial court on the desirability of the location as an airport, and the trial court denied the motion. Id. The Supreme Court affirmed this denial, finding that the issue before the trial court related to the scope of the variance granted to the defendant. Id. Therefore the Aviation Association had no interest in the case and the denial of its motion to intervene was not an abuse of discretion. Id.

Here, NWA is similarly situated as a special interest group seeking to defend an Ordinance it lobbied to enact. It is neither a party nor a representative of any of the

parties in the underlying dispute (though it does purport to represent *some* of the taxpayers of Nottingham). For these reasons, the Court finds that NWA does not have a "direct and apparent interest" in the outcome of the case that would suffer or be sacrificed by the Court denying its motion to intervene. See Snyder, 134 N.H. at 35.

In summary, the Court concludes that NWA has neither any legal rights at stake nor a "direct and apparent" interest in the outcome of this litigation. For these reasons, NWA does not have standing to intervene under the general standing principles embodied in the New Hampshire Constitution.

**B. NWA does not have standing under Pt. I, Art. 8 of the New Hampshire Constitution.**

While NWA does not have standing under the general principles established in the State Constitution, the Court must address whether a recent amendment to the New Hampshire Constitution, which expanded standing to taxpayers is a basis for NWA's motion to intervene. In November 2018, voters in New Hampshire amended the State Constitution to state in relevant part:

> [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.

N.H. Const. Part I, Art. 8.

When the Court's inquiry requires it to interpret a provision of the Constitution, it must look to the provision's purpose and intent. Warburton v. Thomas, 136 N.H. 383, 386-87 (1992). "The first resort is the natural significance of the words used by the framers. The simplest and most obvious interpretation of a constitution, if in itself

sensible, is most likely to be that meant by the people in its adoption." Bd. of Trustees, N.H. Judicial Ret. Plan v. Sec'y of State, 161 N.H. 49, 53 (2010) (internal quotations omitted). Thus, in interpreting the meaning of Part I, Article 8 of the Constitution, the Court must inquire into both the plain meaning of the language as understood by the voters who ratified the amendment as well as the surrounding circumstances in which it was passed. See Warburton, 136 N.H. at 387.

The plain language of the constitutional amendment states that it grants taxpayers 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.

Moreover, the historical context in which the amendment was passed— including its relationship to previous attempts by the legislature to create generalized taxpayer standing—makes it clear that the intent of the amendment was to create standing to *challenge* government spending which violates the law or Constitution. The 2018 constitutional amendment establishing so-called "taxpayer standing" was added to Part I, Article 8 of the New Hampshire Constitution. The first sentence of that constitutional provision establishes the principle that all government actors must be accountable to the people. There is no need to seek judicial intervention simply to declare that

municipal government has passed a lawful ordinance. To do so would not further the goal of Article 8, namely to hold the government accountable. Governments (or their officials) need only be held to answer for their conduct if they take action that violates the law. This is the principle that the language of the 2018 amendment codified in the New Hampshire Constitution.

This interpretation is consistent with the historical context in which the 2018 amendment was ratified. In 2012, in response to a series of decisions by the Supreme Court that limited taxpayer standing for declaratory judgment actions, the legislature amended RSA 491:22 to create general taxpayer standing in such actions. The statute stated in relevant part:

> The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

RSA 491:22 (as amended in 2012).

The invalidation of this provision of the Declaratory Judgment Statute by the New Hampshire Supreme Court ultimately precipitated the aforementioned efforts to amend the New Hampshire Constitution. See Duncan v. State, 166 N.H. 630 (2014). Thus, the statute's language is illustrative of the intent of the 2018 amendment—to overrule the holding in Duncan and allow taxpayers to have standing to *challenge* laws in declaratory judgment actions—and not to intervene in their defense. See RSA 491:22 ("therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district ... has engaged, or

proposes to engage, in conduct that is unlawful or unauthorized") (emphasis added). Therefore, because NWA is moving to intervene *in support of* a challenged law and not to challenge the law itself, NWA's motion does not fall within the rights guaranteed under Part I, Article 8 of the New Hampshire Constitution.

## II. NWA May Seek Status as an Amicus Curiae Without Standing to Pursue Judicial Relief.

Although the Court finds that NWA does not have standing to intervene, the Court has considered the related issue of whether NWA should be allowed to participate in this litigation as amicus curiae. 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). The Court recognizes that neither party has requested that NWA join the lawsuit as amicus curiae and that in such a case, the Court should exercise caution in inviting an amicus brief. See Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970). However, where 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 id.

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 of a town 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 this 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 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.

At the New Hampshire Supreme Court, the role of amicus curiae is governed by Rule 30, and they may only participate in litigation by leave of the Court. Sup. Ct. R. 30. The Superior Court's rules are silent as to the issue of amicus curiae. This Court is unaware of any reported New Hampshire case addressing the role amicus curiae at the trial court level. Nonetheless, the Court retains the inherent authority to appoint amicus curiae at its discretion for the benefit of the Court. See Strasser, 432 F.2d at 569; Verizon New England v. Me. PUC, 229 F.R.D. 335, 338 (D. Me. 2005); Alliance of Auto. Mfrs. v. Gwadowsky, 297 F.Supp.2d 305, 306–07 (D. Me. 2003); see also Garabedian, 106 N.H. at 157 (observing that "courts of general jurisdiction in New Hampshire have 'inherent rule-making authority' to regulate their proceedings "as justice may require").

Alliance of Auto. Mfrs. v. Gwadowsky is particularly illustrative of the role amicus curiae can fill in the trial court. In Gwadowsky, the district court allowed an industry group to participate as amicus curiae in a lawsuit challenging a piece of legislation. Gwadowsky, 295 F.Supp.2d at 307–08. The court noted that the industry group had strongly supported the legislation at issue, had a unique and special interest in the outcome of the litigation, and was in a position to increase the court's basis of knowledge on the impact of the legislation from an industry standpoint. Id. at 307. Moreover, the industry group was allowed to participate as amicus curiae despite the fact that Maine's Attorney General was already adequately defending the challenged statute in the lawsuit. Id.

While NWA does not have a direct and apparent stake in this case sufficient to establish standing, it is undeniable that it does have some connection to the subject matter of the lawsuit. As NWA points out in its motion to intervene, it played an integral role in the passage of the Ordinance by expending time and resources both drafting the Ordinance and lobbying for its passage. Doc. 11 at 4. Moreover, it averred that it represents the views of over 100 residents of the Town of Nottingham. Id. at 7. Thus, just as the industry group in Gwadowsky and the taxpayers in G2003B were able to provide important insights to the Court, NWA may be able to provide a valuable perspective as to the impact of the legislation on the residents of Nottingham that it represents.

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). In Patch, the First Circuit affirmed the district court's denial of intervention by rate paying utility consumers in a dispute between electric companies and the New Hampshire Public Utilities Commission ("PUC") because the PUC adequately represented their interests.[3] The Court held that the party seeking intervention bears the burden to prove "some tangible basis to support a claim of purported inadequacy" of representation. Id. Moreover, because their interests were represented by members of a representative government body, "the burden of persuasion is ratcheted upward," and the would-be intervenors must overcome a

[3] This case was decided interpreting Fed. R. Civ. P. 24(a). However, the federal rule mirrors the requirements for intervention in New Hampshire, so the Circuit Court's analysis is relevant here. Compare the elements of Fed. R. Civ. P. 24(a), with Super. Ct. Civ. R. 7 and Snyder, 134 N.H. at 34.

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.

At this stage of the litigation, the Court will not grant NWA permission to intervene in this action, even in the limited role as amicus curiae. NWA may renew its motion if it can demonstrate that the Town of Nottingham will not adequately defend the constitutionality of the ordinance. If granted amicus status, NWA will only be allowed to participate in this case in a limited role. See Gwadowsky, 295 F.Supp.2d at 307–08. NWA may file briefs and memoranda on motions before the Court. See id. However, in this role, NWA is not a party to the lawsuit and does not legally represent any party to the lawsuit. Therefore, NWA would not have right to engage in any discovery. Nor would it have authority to file any substantive motions seeking relief from the Court.

NWD has filed a Motion to Dismiss (Doc. 12) arguing that the plaintiffs do not have standing to seek declaratory judgment. The Court will not consider this motion on its merits because NWA does not have standing to seek judicial relief. NWA is also not permitted to file other substantive motions, such as motions for summary judgment. The Court reserves until a later date the decision as to what extent, if any, NWA may participate as an amicus curiae in submitting legal memoranda or participating in oral arguments on dispositive motions.

Conclusion

Consistent with the foregoing, the Court holds that NWA does not have standing to intervene in this case. Consequently, the NWA's' motion to intervene is DENIED.

SO ORDERED.

8/6/2019

DATE

N. William Delker
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 08/06/2019

**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.

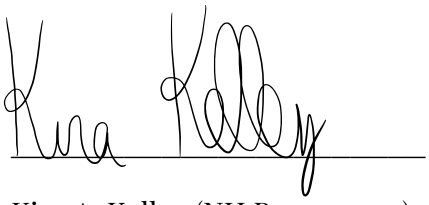
### 3. Only the federal rules and case law explicitly condition intervention on a showing that existing parties will not vigorously defend the intervenor's threatened interest.

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

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.*

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.

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.*

**STATE OF NEW HAMPSHIRE**

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

**NOTICE OF INTENT TO REPLY TO OBJECTION TO MOTION TO RECONSIDER**

The Nottingham Water Alliance, Inc ("NWA"), by and through its undersigned counsel, respectfully advises that should this Court grant the Plaintiffs' Motion for Leave to File Late, the NWA will be filing a reply to Plaintiffs' Objection to the NWA's Motion to Reconsider.

Respectfully submitted,

Dated: August 28, 2019

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.*

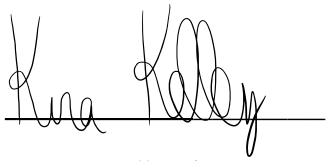
**CERTIFICATE OF SERVICE**

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

Michael Courtney, attorney for Defendants Town of Nottingham and Donna Danis

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

Dated: August 28, 2019.



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.*

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-398

**MOTION FOR SUMMARY JUDGMENT**

NOW COME the plaintiffs, Brent Tweed and G&F Goods, LLC, by and through counsel, and respectfully move that this Honorable Court grant this motion for summary judgement, and in support thereof state as follows:

1. At its March, 2019 town meeting, the Town of Nottingham adopted an ordinance called "Freedom from Chemical Tresspass."

2. The court should grand summary judgment for at least four reasons.

3. First, the ordinance is ultra vires in that the New Hampshire General Court never authorized towns to adopt such an ordinance.

4. Second, the ordinance is unconstitutionally overbroad, void for vagueness, and violates the First Amendment rights of New Hampshire citizens.

5. Third the subject matter of the ordinance is preempted by state and federal laws and regulations.

6. Fourth, the ordinance violates Part I, Article 37 of the New Hampshire Constitution in that it usurps core judicial branch functions and purports to grant them to the town.

7. A memorandum of law setting for the legal reasoning supporting this motion is being filed contemporaneously with this motion.

8. In the complaint in this matter, the plaintiffs asked the court to order the town to pay its legal fees. The plaintiffs reserve the right to advance this request in the event that the court grants this motion or otherwise provides appropriate relief.

9. Pursuant to Super.Ct.R. 12(g)(2), a separate statement of material facts is attached to this motion and is simultaneously being forward to counsel for the Town of Nottingham.

WHEREFORE, the plaintiffs respectfully move that this Honorable Court:

A. Grant this motion for summary judgment; and

B. Issue an Order declaring the Town of Nottingham, "Freedom From Chemical Trespass" ordinance to be unconstitutional, ultra vires, invalid, and unenforceable; and

C. Issue an Order requiring the Town of Nottingham to pay the plaintiffs' attorneys fees, or in the alterntive upon a successful conclusion to this matter, allow the plaintiffs to file a motion seeking attorneys fees; and

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

Respectfully Submitted
Brent Tweed; and
G&F Goods, LLC
By their attorneys,
Lehmann Law Office, PLLC

January 13, 2020 /s/*Richard J. Lehmann*

Richard J. Lehmann (Bar No. 9339)
3 North Spring Street, Suite 200
Concord, N.H. 03301
(603) 731-5435
rick@nhlawyer.com

CERTIFICATION

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

/s/*Richard J. Lehmann*

Richard J. Lehmann

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-398

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

This matter involves the Town of Nottingham's "Freedom From Chemical Trespass" ordinance adopted by the Town at its March, 2019 town meeting. Unlawfulness pervades virtually every provision of the ordinance, with the exception of Section 3. That section calls for, "amendment of the New Hampshire Constitution and federal Constitution to recognize expressly a right of local self-government free from governmental restriction, ceiling preemption, or nullification by corporate 'rights.'" Exhibit #1, Section 3. Residents of the Town of Nottingham are free to pass resolutions in town meeting calling on their elected representatives to do whatever they want. The fact that the ordinance does contain such a plea reflects the fact that the advocates of this measure were fully aware of the illegality of the ordinance. What Nottingham may not do, however, is to adopt ordinances that trample the rights of others, which is precisely what the ordinance does.

## II. STATEMENT OF UNDISPUTED FACTS

The sole question before the Court is whether the ordinance is within the authority of the Town of Nottingham to enact and/or whether various provisions in the ordinance violate the

United States and New Hampshire Constitutions. A copy of the ordinance is attached hereto as Exhibit #1.

The plaintiff Brent Tweed is an individual with a residence located in the Town of Nottingham. See Affidavit of Brent Tweed, Exhibit #4. Mr. Tweed is also a taxpayer in the Town of Nottingham with an equitable right and interest in the preservation of an orderly and lawful government within the taxing district. See Affidavit of Brent Tweed, Exhibit #4.

Mr. Tweed is also the sole shareholder and director of co-plaintiff G&F Goods, LLC, a Delaware limited liability company registered to do business in New Hampshire. See Affidavit of Brent Tweed, Exhibit #4. G&F Goods, LLC, is a company in the business of making mail order purchases and sales. As such, G&F Goods has occasion to burn fossil fuels for transportation for business purposes and for heat at his place of business within the Town and to dispose of packaging and other waste material that may contain toxic substances is landfill or other disposal sites within the Town of Nottingham. See Affidavit of Brent Tweed, Exhibit #4. G&F Goods, LLC further has occasion to use paint and cleaning supplies at its place of business, which it disposes of properly within the Town of Nottingham.

Based on the breadth of the statute, Mr. Tweed is concerned that any resident of the Town of Nottingham may seek to enforce the provisions of ordinance against him and seek to have a fine of up to $1000 imposed upon him.

He seeks a declaration from this Court that the ordinance is unconstitutional and unenforceable.

## III. LEGAL STANDARD APPLICABLE FOR DECLARATORY JUDGMENT

Pursuant to RSA 491:22:

> Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine

> the question as between the parties, and the court's judgment or decree thereon shall be conclusive. The taxpayers of a taxing district in this state shall be deemed to have an equitable right and interest in the preservation of an orderly and lawful government within such district; therefore any taxpayer in the jurisdiction of the taxing district shall have standing to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.

N.H. Rev. Stat. Ann. § 491:22. A petition for declaratory judgment is peculiarly appropriate to determine the constitutionality of a statute, when parties desire, and public needs require the speedy determination of important public interest involved therein. *Chronicle & Gazette Publishing Co. v. Attorney General* 94 U.S. 148, 150 (1946).

The existence of the vague ordinance that by its plain language purports to give any resident of the Town of Nottingham the right to enforce the ordinance against fellow residents is a matter that that is "peculiarly appropriate" for a judicial declaration concerning constitutionality and enforceability. Like private criminal prosecutions, private enforcement of vague environmental ordinances that purport to subject persons to fines create a significant risk that such actions may originate from private quarrels, may be intended to vex and harass an opponent, and often to not result in public benefit. See generally, *State v. Martineau,* 148 N.H. 259, 262-263 (2002)(citing *Waldron v. Tuttle,* 4 N.H. 149, 151 (1827)).

## IV. ARGUMENT

### A. The Ordinance Is Ultra Vires

In enacting our state constitution, the people of New Hampshire agreed "to form themselves into a free, sovereign and independent Body Politic, or State, by the name of THE STATE OF NEW HAMPSHIRE." N.H. Const. Part 2, Art. 1. They further agreed that "[t]he Supreme Legislative Power, within this State, shall be vested in the Senate and House of

Representatives, each of which shall have a negative on the other." N.H. Const. Part 2, Art. 2. These provisions have long been construed to grant the General Court the entirety of the legislative authority, leaving none for municipalities, except that which the General Court itself delegates to them. Nottingham's assertion of municipal rights that are "natural, fundamental, and unalienable," which can also be fairly characterized as an assertion of "inherent rights," has been rejected repeatedly by the New Hampshire Supreme Court.

> An "inherence" of the right is advocated on the ground that such government was established and in force when the Constitution was ordained. But the Constitution did not preserve existing institutions because of the fact of their existence. Unless its provisions demanded their preservation, they had no more than a common–law support for their continuance, which the Legislature might terminate or extend in an altered or modified form. The power of the Legislature is supreme outside the limitations the Constitution states. The theory of a restriction on its power by an "inherence" of right thereto is not in this state a judicial implement of constitutional construction. The sovereignty of the people of the state is represented by their government in completeness of power and authority except only as the Constitution places restraints upon it. The state is not a union of locally organized communities or units, but was formed by "the people inhabiting the territory formerly called the province of New Hampshire." Const. pt. 2, art. 1. The community entities were in existence when the Constitution was adopted. It recognized their existence and did not destroy them. But they were not parties to, and were not made a part of, the organization of the state government except to the extent the Constitution provided.

*Amyot v. Caron*, 88 N.H. 394, 190 A. 134, 138 (1937).

"There has been a consistent and unvarying support of the principle of complete legislative control of local government." *Opinion of the Justices*, 99 N.H. 540, 541 (1955)(citing *Amyot*). New Hampshire cities and towns are creations of the state and have only those powers that the New Hampshire General Court has delegated to them. "Towns are merely subdivisions of the State and have only such powers as are expressly or impliedly granted to them by the legislature." *Public Serv. Co. v. Town of Hampton*, 120 N.H. 68, 71 (1980). The legislature has:

> plenary power over municipalities [that is] limited only by provisions of our State Constitution which grants municipalities only the right to control the form of their

> local government as enacted in their charters. N.H. Const. pt.1, art. 39…. Otherwise the legislature may grant, withhold, or withdraw local control as it sees fit.

*Seabrook Citizens for Defense of Home Rule v. Yankee Greyhound Racing, Inc*., 123 N.H. 103, 108 (1983)(quoting *Region 10 Client Mgt., Inc. v. Town of Hampstead*, 120 N.H. 885, 888 (1980)).

"When a municipality enacts an ordinance pursuant to a grant of authority by the legislature, "the municipality must exercise [its] power in conformance with the enabling legislation." *K.L.N. Construction v. Town of Pelham*, 167 N.H. 180, 184 (2014)(quoting *Cmty. Res for Justice v. City of Manchester*, 154 N.H. 748, 754 (2007)). "If a town enacts an ordinance "for considerations or purposes not embodied in an enabling act, it will be held invalid ... as an ultra vires enactment beyond the scope of the delegated authority." *Id*. (internal quotation omitted).

In the exercise of its "supreme legislative power," the General Court has delegated limited authority to municipalities to choose their form of government and to legislate on a narrow range of local interests. These choices are relatively narrowly drawn by the legislature and do not authorize a town to simply change its form of government on a whim by enacting whatever ordinance it may see fit. The permissible forms of local government, and the method for enacting those changes to the form of government, are prescribed in statue. To the extent that the operative language of the ordinance constitutes or relies on an change in the form of government of the town, any such change that would support the broad assertions of power contained in the ordinance are not authorized by any enactment of the General Court and therefore should be declared invalid.

The ordinance asserts a right of local self-government that completely ignores the constitutional structure. In 1966, the people amended our state constitution to give towns an extremely limited home rule option. Part I, Art. 39 reads as follows:

> [Art.] 39. [Changes in Town and City Charters, Referendum Required.] No law changing the charter or form of government of a particular city or town shall be enacted by the legislature except to become effective upon the approval of the voters of such city or town upon a referendum to be provided for in said law. The legislature may by general law authorize cities and towns to adopt or amend their charters or forms of government in any way which is not in conflict with general law, provided that such charters or amendments shall become effective only upon the approval of the voters of each such city or town on a referendum.

New Hampshire law gives towns a small number of forms of government from which they can choose. The principle forms are either the traditional open town meeting/board of selectmen form of government and the town council/town manager form of government. This allows for towns to choose between the traditional board of selectmen/town meeting form of government and the town council/town manager for described in RSA 49-D-2. See generally, *Appeal of Barry*, 143 N.H. 161, 164 (1998). Further, a town may choose to adopt the official ballot/SB2 form of government, RSA 40:12-16, and may also choose among forms of budget committees set forth in statute. RSA 32:15-17. That is the extent of a town's power to alter its form of government.

Through its ordinance, Nottingham attempts to enact a change far outside the scope of our Constitution and the legislation implementing the extremely limited home rule. The ordinance does not hide this fact and indeed, it proclaims its revolutionary, nature by quoting from the Declaration of Independence, with minor editorial changes:

> We hold these truths to be self-evident, that all people are created equal, that they naturally are endowed with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, the people institute governments, which derive their just powers from the consent of the governed.

> Further, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

Exhibit #1, Preamble, paragraphs 1-2. The ordinance then asserts a source of its alleged right to enact the ordinance, stating, "This right of self-government, as stated in the Declaration of Independence, is natural, fundamental, and unalienable. It is also secured to us by the United States Constitution and the Constitution of the State of New Hampshire." Exhibit #1, paragraph 3. Finally, having asserted a right derived from natural law, the Declaration of Independence, and the United States and New Hampshire Constitutions, the ordinance asserts, "if our system of local government infringes our rights, we the people of Nottingham, have the right to alter or replace that system with one that secures and protects our rights…." See, Exhibit #1, Preamble, paragraph 4. The preamble to the ordinance concludes that, "we deem it necessary to alter our system of local government, and we do so by adopting this [ordinance]." Exhibit #1, Preamble.

The Town of Nottingham attempt to alter its system of local government in the manner reflected by the ordinance must fail. First, the ordinance severely misconstrues the dual constitutions and the Declaration of Independence. Both documents were drafted by representatives of the states acting on behalf of those states in a representative capacity. It is the *states* that were the building block of the federal republic and the *states* that were the body politic through which "the people" exercised their natural rights of self-government. While our founding documents create various rights to be protected from government interference, they do not create a right in any group of people other than the states themselves to form their own government. Yet this is precisely the right Nottingham asserts in the ordinance.

The United States Supreme Court described this historical reality in *Printz v. United States*, 521 U.S. 898, 918-922 (1997)(internal citations and quotations omitted for clarity):

> It is incontestible that the Constitution established a system of "dual sovereignty." Although the *States* surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty." This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a *State's territory*, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the *"Citizens" of the States*; the amendment provision, Article V, which requires the votes of three-fourths of the *States* to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the *states* and ... those means and instrumentalities which are the creation of their sovereign and reserved rights." Residual *state sovereignty* was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the *States*, are reserved to the *States* respectively, or to the people."

(Emphasis added).

RSA 31:39 is the grant of New Hampshire's state power to towns that authorizes them to enact ordinances. The statue reads as follows:

> 31:39 Purpose and Penalties. –
> I. Towns may make bylaws for:
> (a) The care, protection, preservation and use of the public cemeteries, parks, commons, libraries and other public institutions of the town;
> (b) The prevention of the going at large of horses and other domestic animals in any public place in the town;
> (c) The observance of Memorial Day, whereby interference with and disturbance of the exercises for such observance, by processions, sports, games or other holiday exercises, may be prohibited;
> (d) Regulation of the use of mufflers upon boats and vessels propelled by gasoline, oil or naphtha and operating upon the waters within the town limits;
> (e) The kindling, guarding and safekeeping of fires, and for removing all combustible materials from any building or place, as the safety of property in the town may require;
> (f) The collection, removal and destruction of garbage, snow and other waste materials;
> (g) Regulating the operation of vehicles, except railroads as common carriers, upon their streets;

(h) Regulating the conduct of public dances;
(i) Regulating the conduct of roller skating rinks;
(j) Regulating the sanitary conditions of restaurants within town limits in accordance with the provisions of RSA 147:1;
(k) Issuing a license for the operation of a restaurant and other food serving establishments within the town limits and charging a reasonable fee for same;
(l) Making and ordering their prudential affairs;
(m) Issuing permits for tattooing facilities and charging a fee for the permit; and
(n) Regulating noise.
(o) Requiring the reporting of contributions to, and expenditures by, any candidate or political committee made for the purpose of influencing the election of any candidate for local elective office, or any person or committee for the purpose of influencing the vote on any local ballot or referendum question.
(p) Regulating the retail display and accessibility of martial arts weapons including throwing stars, throwing darts, nunchaku, blow guns, or any other objects designed for use in the martial arts that are capable of being used as lethal or dangerous weapons.
II. Towns may appoint all such officers as may be necessary to carry the bylaws into effect.
III. Towns may enforce the observance of the bylaws by suitable penalties not exceeding $1,000 for each offense to enure to such uses as the town may direct.

Nothing in the plain language of this statute can be read to authorize the town to enact a sweeping environmental regime by municipal ordinance.[1] In effect, the ordinance seeks to act as a town-wide zoning ordinance that bans entire classes of legitimate and regulated business activities that produce by products that might be considered "toxic." By purporting to ban broad swaths of economic activity, the town in effect zoned them out of existence.

The New Hampshire Supreme Court addressed a similar circumstance in *Beck v. Town of Raymond*, 118 N.H. 793 (1978). In *Beck*, the town adopted a "slow growth" ordinance which limited the availability of residential building permits. The town defended its action by asserting that the "slow growth" ordinance was a valid exercise of its police powers under RSA 31:39. *Id*. at 795. The Supreme Court rejected this contention, stating:

[1] To the extent that the town may assert that its ordinance is within the general police power to enact regulations protecting the health, safety, and morals of its residents, any such action is preempted by state and federal law as discussed infra.

> We hold that the general police power delegated to a municipality pursuant to RSA 31:39 may not be used as a usual and expedient mechanism for effecting zoning regulations which would otherwise fall within the scope of RSA 31:60-89. When such ordinances become a substitute for a zoning plan, the purpose and effect of the zoning enabling legislation is defeated. "Such controls cannot be used in the development of a broad comprehensive plan, and they lack the broad scope of power and continuity which is essential to long-range planning." 1 N.H. Office of Comprehensive Planning, Growth Management: A Handbook on Land Use Controls for New Hampshire Municipalities, 41 (1977).

*Beck*, 118 N.H. at 800.

Much like the "slow growth" ordinance in *Beck*, the Nottingham ordinance is "so comprehensive as to require compliance with RSA 31:60-89," and is an invalid exercise of the police power delegated to a municipality pursuant to RSA 31:39.

It is worth noting that advocates for this kind of ordinance are well aware that towns do not have the authority to enact the desired change at present. In 2018, a Constitutional Amendment Concurrent Resolution was introduced in the New Hampshire House. See, 2018 CACR 19. The proposal required a two-thirds votes of the house to pass. It failed miserably, with an inexpedient to legislation motion being adopted by a nearly two-thirds margin, 217-112 on March 15, 2018.

The ordinance passed by the Town of Nottingham also contains an illegal enforcement mechanism that violates RSA 31:39-c(I). That statute reads in pertinent part as follows:

> Any town may establish, by ordinance adopted by the legislative body, a system for the administrative enforcement of violations of any municipal code, ordinance, bylaw, or regulation and for the collection of penalties, to be used prior to the service of a formal summons and complaint. *Such a system may be administered by a police department or other municipal agency*.

(Emphasis added). The ordinance does not limit enforcement to a police department of other municipal agency. Rather, the ordinance expressly states that, "[a]ny resident of Nottingham may enforce or defend this ordinance through an action brought in the resident's name." Exhibit #1,

Section 2(d). This mechanism exceeds the authority delegated by the legislature in RSA 31:39 and must be found to be outside the scope of the town's authority to adopt ordinances.

The ordinance also creates new jural persons, referred to as "ecosystems" and "natural communities," and purports to grant them authority to participate in judicial proceedings to "enforce or defend" the ordinance. See, Section 2(c). This is a radical and bizarre proposition that flies in the face of existing law, tramples on judicial authority, has never been authorized by the New Hampshire General Court, and should be declared invalid by this court.

**B. The Ordinance is Unconstitutionally Overbroad, Void for Vagueness, and Violates the First Amendment Rights of Nottingham Residents.**

Both state and federal law governing principles of overbreadth and vagueness are well established. The United States Supreme Court has held that, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Id*. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Id*. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Finally a third, but related issues it that, "where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . .

than if the boundaries of the forbidden areas were clearly marked.'" *Id*. (internal quotations omitted).

New Hampshire law is similar. A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *State v. Gatchell*, 150 N.H. 642, 643 (2004).

The ordinance constitutes the most pernicious type of law because it fails on both counts: It is harsh in its response, yet it gives the ordinary citizen no notice whatsoever of the conduct it prohibits, and it leaves its ambiguous terms to be defined not just by law enforcement officers, but to any and all residents of the Town of Nottingham who may wish to act as special prosecutors. Worse still, it invites residents of Nottingham not only to represent their own interests, but to step forward for the purpose of advocating on behalf of a "healthy climate," "natural communities," and "ecosystems." The ordinance provides no guidance on what constitutes a "healthy climate" or the interests of "natural communities" or "ecosystems, nor does the ordinance identify how a spokesperson for these entities will be chosen. The ordinance creates the very real risk of creating a race to represent these entities because whoever is chosen to speak on their behalf will wield substantial power determining exactly what the interests of those entities are. The combination of vague definitions combined with an express statement permitting any person in the Town to seek enforcement of the vague provisions creates an environment where abusive enforcement is likely to flourish. "The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws, enables

individuals to conform their conduct to the requirements of law, and permits meaningful judicial review." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). The ordinance leaves the construction of its terms to the newly empowered residents of Nottingham who may do with it practically whatever they wish.

The ordinance does not define either its goals nor its means of achieving those goals with anywhere near the level of specificity required the state and federal constitutions. For example, the ordinance asserts a right to a "climate capable of sustaining human societies," and creates a non-exhaustive laundry list of some of the acts that may violate the ordinance, including "the physical deposition or disturbance of…any other waste that poses a present or potential hazard to human health of ecosystems." It is entirely unclear what activities may produce waste that a Nottingham resident believes poses a potential hazard to human health. Does a driving a motor vehicle that is part of a corporate fleet have the potential to harm human health or release toxic contaminants into the air, soil, or water? Does a dairy farmer who operates his or her business in corporate form, and who fertilizes the soil and feeds hay to cows who then release methane through belching and flatulence run afoul of the ordinance? It appears so. Certainly nothing in the ordinance offers any protection for a person performing these two activities whatsoever.

In effect, the ordinance authorizes individual citizens to harass their neighbors for activities that are too numerous to possibly name them all here. The Court should find that the ordinance fails to describe the conduct it seeks to prohibit and as such should declare it void for vagueness.

The ordinance is overbroad as well. The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, "may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of

application to protected expression." *New York v. Ferber*, 458 U.S. 747, 768 (1982)(quotation omitted); See also *State v. Briggs*, 147 N.H. 431, 435-36, 790 A.2d 792 (2002).

The ordinance expressly tramples on citizens' First Amendment rights and completely upends the constitutional structure of our government. Section 2(e)[2] of the ordinance reads as follows:

> (e) If the Town of Nottingham fails to enforce or defend this law, or a court fails to uphold this law or purports to declare it unlawful, the law shall not be affected, and any resident may then enforce the rights and prohibitions of the law through non-violent direct action. If enforcement through non-violent direct action is commenced, this law shall prohibit any private or public actor from filing a civil or criminal action against those participating in such non-violent direct action. If an action is filed in violation of this provision, the applicable court must dismiss the action promptly, without further filings being required of direct-action participants. "Direct action" as used by this provision shall mean any non-violent activities or actions carried out to directly enforce the rights and prohibitions contained within this law.

This section purports to prohibit the right of a citizen to seek the assistance of courts to enforce his or her rights. "The right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011)(quoting *Sure-Tan, Inc. v. NLRB, 467 U.S.* 883, 896-897 (1984)). The Town of Nottingham has no authority to narrow the protections of the First Amendment and the ordinance should be declared invalid for this reason alone.

The United States District Court for the District of New Mexico considered a substantially similar provision in *Swepi, Ltd. P'ship v. Mora Cty*., 81 F. Supp. 3d 1075 (D.N.M. 2015), holding

[2] Section 2(e ) of the ordinance is so exceptionally contrary to so many established legal principles that it could fairly be located in several different sections of this memorandum. The fact that is being discussed in the constitutional overbreadth section as a violation of citizens' First Amendment rights is for ease of drafting and, hopefully, of reading. However placement in this section should not be construed to mean that the plaintiffs are not also challenging the section based on the ultra vires nature of its contents nor upon the clear violation of judicial independence and separation of powers.

that the ordinance was "substantially overly broad" and that no "'conceivable governmental interest would justify such an absolute prohibition of' First Amendment Rights." *Id.* at 1188. The *Swepi* court continued: "SWEPI, LP is currently exercising its First Amendment rights by filing suit to overturn the Ordinance—i.e. seeking to violate the Ordinance. According to Section 5.5, because of SWEPI, LP's exercise of its First Amendment rights, it no longer has First Amendment rights. Such a law is illogical and cannot stand. Section 5.5 is overly broad in its restriction of First Amendment rights, and, as such, must be invalidated*." Id*. In Washington, a court affirmed a decision keeping a similar initiative off of the ballot because "municipalities cannot strip constitutional rights from entities and cannot undo decisions of the United States Supreme Court." *Spokane Entrep. Ctr. v. Spokane Moves to Amend the Const*., 369 P.3d 140, 146 (Wash. 2016). And in Pennsylvania, a court described an argument that business entities lacked the right to complain about an ordinance as "contrary to over one hundred years of Supreme Court precedent." *Pa. Gen. Energy Co., LLC v. Grant Tw*p., 139 F. Supp. 3d 706, 714 (W.D. Pa. 2015).

There are no legitimate applications of a law that eliminates the right to assert legitimate legal defenses to criminal prosecution; the law is therefore invalid on its face. See, e.g., *City of Chi. v. Morales*, 527 U.S. 41, 52 (1999)(noting that "the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep'" (quoting *Broadrick v. Okla*., 413 U.S. 601, 612-15 (1973)). The Nottingham ordinance has no "plainly legitimate sweep" whatsoever. Accordingly, there is no way that the restriction of the plaintiffs' First Amendment rights can fall within it.

The unique context in which the effort to squelch citizens' First Amendment rights makes the effects of the effort even worse than may be immediately apparent. Section 2(e ) purports to provide special protections for Nottingham residents who engage in "direct action." The ordinance defines direct action as, "any non-violent activities or actions carried out to directly enforce the rights and prohibitions contained within this law." (Emphasis added). Notably, the ordinance refers to "non-violent" action rather than "lawful" action. The plain meaning of the ordinance invites non-violent protest that can take the form of trespass and civil disobedience against disfavored actors who earn the ire Nottingham residents.[3] The ordinance then purports to prevent the victims of this "non-violent," but potentially illegal conduct, from seeking to enforce their rights in the courts of law. An ordinance that sets up a conflict and then seeks to remove the rights of one party to seek judicial relief cannot withstand scrutiny and is fundamentally unfair under the Fifth Amendment to the United States Constitution and Part I, Article 14 of the New Hampshire Constitution, as well as a violation of the First Amendment's petition clause.

Section 2(e) also fails in that it purports to order this court, and others, to rule in favor of future unknown persons, who presumably will commit future illegal acts of an unknown nature, before they actually go out and commit those acts. The ordinance orders the court to dismiss any claims brought against persons engaged in "direct action" without any pleadings being filed. This language clearly violates the separation of powers, as set forth below, in that if allowed to stand it would impinge upon the "necessary characteristic of a judicial officer …to render judgment to

[3] This language may have been derived from an organization known as the Coalition for Direct Action at Seabrook, which proposed "direct action" in the form of massive acts of trespass and civil disobedience against the construction of the Seabrook Nuclear power plant. See Exhibit #2. It is worthy of note that civil disobedience generally is thought to mean a public, non-violent and conscientious breach of law undertaken with the aim of bringing about change in laws or government policy. When the public sees fellow citizens being punished by unjust laws, the theory goes, the public will demand change. The Town of Nottingham seems to want the benefit of being able to break the law while avoiding the adverse consequence of potentially illegal acts.

determine issues that are properly raised before the judicial branch." *Opinion of the Justices,* 128 N.H. 17, 19 (1986)(citing *Rhode Island v. The State of Massachusetts,* 37 U.S. 657, 718 (12 Pet. 657, 718) 9 L.Ed. 1233 (1838)).

**C. The Ordinance is Preempted By State and Federal Regulation**

Under the preemption doctrine, "[l]ocal legislation is repugnant to State law when an ordinance or bylaw either expressly contradicts a statute or else runs counter to the legislative intent underlying a statutory scheme." *Town of Salisbury v. New England Power Co*., 121 N.H. 983, 984 (1981)(quoting *State v. Driscoll*, 118 N.H. 222, 224 (1978)). "Generally, a detailed and comprehensive State statutory scheme governing a particular field demonstrates legislative intent to preempt that field by placing exclusive control in the State's hands." *JTR Colebrook, Inc. v. Town of Colebrook*, 149 N.H. 767, 770 (2003). "Such exhaustive treatment of the field ordinarily manifests legislative intent to occupy it." *North Country Environmental Services v. Town of Bethlehem*, 150 N.H. 606, 615 (2005). "It is well settled that towns cannot regulate a field that has been preempted by the state*." JTR Colebrook*, 149 N.H. at 770 (2003)(quoting *Town of Hooksett v. Baines*, 148 N.H. 625, 627 (2002)).

The ordinance asserts that, "All residents of Nottingham possess the right to clean air, water, and soil, which shall include the right to be free from all corporate activities that release toxic contaminants into the air, water, and soil…." (Emphasis added). Thus, the only fair reading of the plain words of the ordinance is that it prohibits *any* corporate actor from releasing *any* toxic substances whatsoever at *any* location in the town. It is an ordinance of astounding, and ill-considered, breadth.

The New Hampshire Supreme Court held that municipalities were preempted from making their own air emissions standards in *Bio Energy, LLC v, Town of Hopkinton*, 153 N.H.

145 (2005). That case involved an effort by the town selectmen to issue a cease and desist order against a wood co-generation facility in the Town of Hopkinton, asserting that Bio Energy's business activities were contrary to the town's zoning ordinance[4]. *Id*. at 147. The case describes in detail the town's rationale under the zoning ordinance to issue the cease and desist letter, however for the purposes of this memorandum, the case is relevant because the Supreme Court concluded that the cities and town in this State have not been given, "concurrent affirmative authority to regulate air pollution." *Id*. at 153.

The Court continued:

> We regard it as highly improbable that the legislature, after establishing detailed guidelines," intended to leave the ultimate regulation of air pollution "to the vagaries of local regulation." *JTR Colebrook*, 149 N.H. at 771. It follows that the town had no authority to issue a cease and desist order based upon emissions produced by Bio Energy's operation of its co-generation facility. "Where the state has preempted the field, local law regulating the same subject is inconsistent with the state's transcendent interest, whether or not the terms of the local law actually conflict with the statewide legislation." *Id*. at 773 (quotation omitted). Of course, "[a]ny local regulations relating to such matters as traffic and roads, landscaping and building specifications, snow, garbage, and sewage removal, signs, and other related subjects, 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 approved by the State." *Stablex Corp*., 122 N.H. 1091, 1104 (2005).

*Bio Energy, LLC v. Town of Hopkinton*, 153 N.H. 145, 154 (2005). Thus, under the *Bio Energy* precedent, the state has preempted the field of air pollution regulation and any town ordinance that is inconsistent with state law is invalid.

---

[4] There is a significant body of preemption law concerning zoning cases because municipalities seeking to extend the legitimate reach of their power have used their zoning authority, which the General Court has clearly delegated to them and authorized them to use, to the greatest extent and effect possible. Sometimes the Supreme Court has found these uses of the zoning power to be within the legislative delegation of authority and sometimes not. In addition to cases discussed in this memorandum, see generally, *Lakeside Lodge, Inc. v. Town of New London*, 158 N.H. 164 (2008); *Blagbrough Family Trust v. Town of Wilton*, 153 N.H. 234 (2006); *Town of Carroll v. Rines*, 164 N.H. 523 (2013); *Whitcomb v. Town of Carroll*, 141 N.H. 402 (1996); *Corey v. Majestic Moters, Inc*., 140 N.H. 426 (1995). This is significant because it reflects the desire of most New Hampshire municipalities to root their exercise of local control on a legitimate legal basis. Rather than follow this tactic, Nottingham has instead resorted to the language of revolution.

In *Stablex v. Town of Hooksett*, 122 N.H. 1091 (1982), the Supreme Court found that an ordinance governing solid waste disposal was preempted by state law. Hooksett adopted an ordinance purporting to ban privately owned or operated facilities for the "collecting, receiving, processing, reprocessing, treatment, recovery, storage, disposal or burying of hazardous waste" anywhere within the town, except with the approval of the voters of the town. *Id*. at 1905. The local ordinance "clearly provided that notwithstanding State approval of a proposed hazardous waste facility, local approval in the form of a popular referendum, was required in order for such a facility to be built in the town." *Id*.

Stablex argued that the town lacked authority to enact the ordinance requiring local popular approval because the state had preempted the field. The town argued that its ordinance was an exercise of its police power to enact zoning ordinances and regulations for the protection of the health, safety and welfare of its citizens. *Id*. at 1099. The town also argued that the authority to require popular approval was an exercise of its powers under RSA 31:39.

The New Hampshire Supreme Court rejected Hooksett's claims and found that state law preempted the local hazardous waste ordinance. The Court reviewed both federal and state law in the area of solid hazardous waste disposal and concluded that the legislature, "devised a comprehensive and detailed program of statewide regulation, which on its face must be viewed and preempting any local actions having the intent or effect of frustrating it." *Id*. at 1101. Thus, just as *Bio Energy* held that state laws and regulations preempted the field of air pollution regulation, *Stablex* found that state and federal laws preempted the field of solid waste disposal.

In *Town of Salisbury v. New England Power Co*., 121 N.H. 983 (1981), the Supreme Court found an ordinance banning the spraying of chemical defoliants within the town to be preempted by state law. And in *Town of Pelham v. Browning Ferris Industries of New*

*Hampshire, Inc*., 141 N.H. 355 (1996), the Supreme Court found that regulations relating to landfill closures were preempted by state law. *Id.* at 363. Notably, the Town of Pelham argued that towns were, "free to apply their own regulations on top of state requirements." *Id*. The Supreme Court rejected this argument as well.

*Bio Energy*, *Stablex, New England Power,* and *Browning Ferris* are all cases involving the rejection of local environmental regulations that were drawn far more narrowly than the Nottingham ordinance. The Nottingham ordinance would plainly ban the air emissions in *Bio Powe*r, the hazardous waste facility in *Stablex*, and the spraying of chemical defoliants in *New England Power*, all of which the Supreme Court declared could not be banned by local regulation in the face of a state statutory scheme.

Given that the Supreme Court has already ruled that three activities that the ordinance would ban are preempted by state law, this court should find that the subject matter of the ordinance is preempted and declare it unenforceable based on the Supreme Court's reported cases alone.

If the existing precedent does not convince the court that the state has preempted the field of environmental regulation, the brief review of the regulations governing environmental protection should. Even a cursory examination of the state's broad scheme of environmental regulation will overwhelmingly support a declaration that the subject matter of the ordinance is preempted.

The General Court has created the New Hampshire Department of Environmental Services ("DES") and placed within it a Division of Water, RSA 21-O:6, a Division or Waste Management, RSA 21-0:8, and a Division of Air Resources. Pursuant to their legislative authority, these subdivisions of DES have adopted extensive administrative rules governing the

permissible amount of pollutants that can be released into the environment, issuing permits for such releases, and regulating entities that participate in related activities.[5] See Exhibit #3, Table of Contents of Administrative Rules. The federal government has done even more. Despite this extensive the thorough regulation of virtually all aspects of environmental protection, the ordinance proposes to negate any state or federal program that permits a corporation to obtain a permit and engage in legal activities. This staggering overreach should be declared to be outside the scope of the town's authority, illegal, and unenforceable.

**D. The Ordinance The Ordinance Violates the Separation of Powers**

Part I, Article 37 of the New Hampshire Constitution reads as follows:

> Separation of Powers. In the government of this State, the three essential powers thereof, to wit, the Legislative, Executive, and Judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity.

The concept of the separation of powers "contained in virtually every American constitution was designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government. The Federalist No. 47 (Madison)." *Opinion of the Justices*, 121 N.H. 552, 556 (1981). The separation of powers doctrine is "violated when one branch usurps an essential power of another." *Petition of Mone*, 143 N.H. 128, 134 (1998). "A necessary characteristic of a judicial officer is the authority to render judgment to determine issues that are properly raised before the judicial branch. *Opinion of the Justices,* 128 N.H. 17, 19 (1986).

[5] The amount of environmental regulation is so vast, and the activities banned by ordinance are so broad, that it is not possible to intelligently discuss whether a particular activity that the ordinance might seek to limit is preempted until the Town asserts that some subject area is, in fact, not preempted. In the event that the Town does make an argument about a particular subject area, the plaintiffs reserve the right to address such a claim with a more specific response.

As described above, Section 2(e) seeks to deprive the judicial branch of government of its core function of determining the rights and responsibilities of parties that are properly before it be pre-judging cases that have not even arisen yet. As such, the ordinance usurps judicial authority and seeks to place that authority with the municipal legislative entity of the town meeting.

Further, the ordinance seeks effectively to modify Superior Court 15 by creating a right of intervention in superior court proceedings. Pursuant to Sup. Ct. R. 15:

> Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause; or, upon motion of any party, such person may be made a party by order of court notifying him or her to appear therein. If a party, so notified, neglects to file an Answer or other responsive pleading on or before the date established by the court, that party shall be defaulted. No such default shall be set aside, except by agreement or by order of the court upon such terms as justice may require.

The ordinance would improperly supersede the superior court rule and threaten the ability of judicial branch to control the proceedings occurring in court. The court's rulemaking authority is and area in which "the Judiciary and Legislature share concurrent authority, absent constitutional considerations, such as impairment of the court's ability to function*." In re: Southern New Hampshire Medical Center*, 164 N.H. 319, 328 (2012)(quoting McNamara, The Separation of Powers Principle and the Role of Court in New Hampshire, 42 NH.B.J. 66, 82 (June 2001)). However, this shared authority exists between the General Court, which holds the supreme legislative power, and the Supreme Court, which holds the supreme judicial power. As set forth above, Nottingham has no grant of legislative authority in this area and does not stand on a co-equal basis with the judicial branch. However, even if the town had that authority, a provision granting ecosystems and natural communities the right to intervene would threaten the ability of

courts to conduct their core function of adjudicating cases while protecting the rights of all parties.

## V. CONCLUSION

For the forgoing reasons, the Court should grant this motion for summary judgment and declare the ordinance invalid, unconstitutional, and unenforceable.

Respectfully Submitted,

Brent Tweed and
G&F Goods, LLC
By his attorneys,
Lehmann Law Office, PLLC

January 13, 2020

/s/*Richard J. Lehmann*
Richard J. Lehmann (Bar No. 9339)
3 North Spring Street, Suite 200
Concord, N.H. 03301
(603) 731-5435
rick@nhlawyer.com

CERTIFICATION

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

/s/*Richard J. Lehmann*

Richard J. Lehmann

# EXHIBIT #1

# FREEDOM FROM CHEMICAL TRESPASS RIGHTS-BASED ORDINANCE

ESTABLISHING A COMMUNITY RIGHTS-BASED ORDINANCE FOR NOTTINGHAM, NH, THAT PROHIBITS ACTIVITIES AND PROJECTS THAT WOULD VIOLATE RIGHTS SECURED BY THE ORDINANCE

**Preamble**

We hold these truths to be self-evident, that all people are created equal, that they naturally are endowed with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, the people institute governments, which derive their just powers from the consent of the governed.

Further, that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

This right of self-government, as stated in the Declaration of Independence, is natural, fundamental, and unalienable. It is also secured to us by the United States Constitution and the Constitution of the State of New Hampshire.

Pursuant to that right of self-government, if our current system of local government infringes our rights, we, the people of Nottingham, have the right to alter or replace that system with one that secures and protects our rights, as long as the new system does not infringe other rights protected for us by state or federal law.

It is our legislative determination that chemical trespass resulting from the following corporate activities, namely the physical deposition or disturbance of toxic wastes, including petroleum refining wastes, coal combustion wastes, sewage sludge, heavy metals, chemical residue from manufacturing processes, mining residuals, radioactive wastes, or any other waste that poses a present or potential hazard to human health or ecosystems, is detrimental to our rights, health, safety, and welfare.

As we are purportedly constrained by state and federal law, which courts interpret to require us to accept such harmful corporate activity, we the people of Nottingham are unable under our current system of local government to secure our rights by banning said activity.

Therefore, we deem it necessary to alter our system of local government, and we do so by adopting this Freedom from Chemical Trespass Rights-based Ordinance.

**Section 1 – Statements of Law**

*(a) Right of Self-Government.* All residents of Nottingham possess a right of self-government, which includes, but is not limited to, the following rights: first, the right to a system of local government founded on the consent of the people of the municipality; second, the right to a system of local government that secures their rights; and third, the right to alter any system of local government that lacks consent of the people or fails to secure and protect the people's rights, health, safety, and welfare.

Any action to annul, amend, alter, or overturn this Ordinance shall be prohibited unless such action is approved by a prior Town vote at which a majority of the residents of the Town voting approve such action.

*(b) Right to a Healthy Climate.* All residents of Nottingham possess a right to a climate system capable of sustaining human societies, which shall include the right to be free from all corporate activities that infringe that right, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes, which, for purposes of this ordinance, includes petroleum refining wastes, coal combustion wastes, sewage sludge, heavy metals, chemical residue from manufacturing processes, mining residuals, radioactive wastes, or any other waste that poses a present or potential hazard to human health or ecosystems.

*(c) Right to Clean Air, Water, and Soil.* All residents of Nottingham possess the right to clean air, water, and soil, which shall include the right to be free from all corporate activities that release toxic contaminants into the air, water, and soil, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes.

*(d) Rights of Ecosystems and Natural Communities.* Ecosystems and natural communities within Nottingham possess the right to naturally exist, flourish, regenerate, evolve, and be restored, which shall include the right to be free from all corporate activities that threaten these rights, including chemical trespass resulting from the physical deposition or disturbance of toxic wastes.

*(e) Right to Protection from Governmental and Corporate Interference.* All residents of Nottingham and the Town of Nottingham possess the right to enforce this Ordinance free of interference from corporations, other business entities, and governments. That right shall include the right of residents to be free from ceiling preemption, because this Ordinance expands rights and legal protections for people and nature above those provided by less-protective state, federal, or international law.

**Section 2 – Enforcement**

(a) Any business entity or government that willfully violates any provision of this Ordinance shall be subject to a civil penalty in an amount of $1,000 per day of violation.

(b) Any business entity or government that willfully violates any provision of this Ordinance also shall be liable for any injury to an ecosystem or natural community caused by the violation. Damages shall be measured by the cost of restoring the ecosystem or natural community to its state before the injury, and shall be paid to the Town of Nottingham to be used exclusively for the full and complete restoration of the ecosystem or natural community.

(c) Ecosystems and natural communities within Nottingham may enforce or defend this Ordinance through an action brought in the name of the ecosystem or natural community as the real party in interest.

(d) Any resident of Nottingham may enforce or defend this Ordinance through an action brought in the resident's name. Any resident, and any ecosystem or natural community, also shall have the right to intervene in any action concerning this Ordinance in order to enforce or defend it, and in such an

action, the Town of Nottingham shall not be deemed to adequately represent their particularized interests.

(e) If the Town of Nottingham fails to enforce or defend this law, or a court fails to uphold this law or purports to declare it unlawful, the law shall not be affected, and any resident may then enforce the rights and prohibitions of the law through non-violent direct action. If enforcement through non-violent direct action is commenced, this law shall prohibit any private or public actor from filing a civil or criminal action against those participating in such non-violent direct action. If an action is filed in violation of this provision, the applicable court must dismiss the action promptly, without further filings being required of direct-action participants. "Direct action" as used by this provision shall mean any non-violent activities or actions carried out to directly enforce the rights and prohibitions contained within this law.

**Section 3 – State and Federal Constitutional Changes**

Through the adoption of this Ordinance, the people of Nottingham call for amendment of the New Hampshire Constitution and the federal Constitution to recognize expressly a right of local self-government free from governmental restriction, ceiling preemption, or nullification by corporate "rights."

ENACTED AND ORDAINED this _____ day of _____, 20_____, by the Town of Nottingham, in Rockingham County, New Hampshire.

By:

Signature _____Print_____

Signature _____Print _____

Signature _____Print _____

Signature _____Print _____

Signature _____Print _____

*Attest:* _____

# EXHIBIT #2

The Christian Science Monitor



# Antinuclear coalition set for fresh assault on Seabrook

May 22, 1980

**By Randy Shipp**, Staff writer of The Christian Science Monitor

BOSTON

Once more -- on Saturday, May 24 -- opponents of the nuclear poweer plant being built at Seabrook, N.H., will attempt to disrupt construction. Members of 57 antinuclear groups are expected to participate in what is being billed as a "nonviolent" occupation and blockade of the plant site. This time, however, leaders of the Coalition for Direct Action at Seabrook (GDAS), an offshoot of the antinuclear Clamshell Alliance, say demonstrators will "resist" arrest, though not violently.

Gov. Hugh Gallen has declared a civil emergency in connection with the planned protest, and New Hampshire state troopers and National Guard troops will be assisted by troopers from Massachusetts, Maine, Vermont, and Rhode Island.

New Hampshire officials see the issue not as pro- or anti-nuclear power, but as the necessity to prevent destruction of private property.

CDAS members say it is imperative that demand construction at Seabrook be stopped. They say the hazards to human life and disruption of the delicate coastline far outweigh potential benefits, and that use of alternative fuels, plus increased conservation can meet New England's power needs.

They insist the nuclear plant is not needed, citing a report by the New England Power Pool (NEPOOL -- an organization of public and private electric utilities supplying more than 99 percent of the region's electric power) indicating that even without the nuclear plant New England will have a projected reserve of 44.3 percent in 1985-86, and only slightly less than 30 percent in 1991.

Spokesmen for Public Service Company of New Hampshire (PSNH), the private utility that is building the Seabrook plant, do not dispute those figures, but say they are misleading because they include projections of some plants that have since been delayed and may be indefinitely postponed.

The NEPOOL figures also assume a continued rate of conservation and use of alternative fuels that may not hold true for future years, Public Service spokesmen say.

But the big selling points, PSNH's Gordon McKenney says, is the cost factor and the lessening of dependence on foreign oil. At present about 50 percent of the power produced or purchased by PSNH comes from oil-burning plants. When the two Seabrook reactors go on line, this will be reduced to about 5 percent, he says.

"Seabrook can be justified today on oil cost savings alone," Mr. McKenney contends. "If you go through the numbers, you'll find that Seabrook will pay for itself in oil cost savings alone by the end of the 1980s, assuming it comes on line as scheduled. . . ."

CDAS member Jamie Factor is unimpressed. She talks calmly about tearing down fences, facing attack dogs, National Guard troops, and state police armed with billy clubs and chemical Mace. She says she has done it before, and if that is what it takes to halt the construction, she will do it again.

She says the "direct action" of CDAS is similar to the civil disobedience used, without success, by the Clamshell Alliance in trying to halt Seabrook construction. But there is one major difference -- those involved in the CDAS protest will resist arrest, according to Miss Factor.

"With civil disobedience people are saying they feel strongly enough about something to be willing to go to jail for it. With direct action we're saying that although we feel strongly enough that we would go to jail for it, we don't want to because that's not going to help us stop the plant from being built."

Coalition members feel the nuclear power plant poses tremendous potential danger to life, and that his justifies their action. But they insist there will be no violence directed at people, no matter what security forces do.

The destruction of private property (fences, etc.) and the potential for violence if security forces try to keep the protesters out has alienated other more moderate anti-nuclear groups.

"I think it's clear that neither the state of New Hampshire nor the Public Service Company of New Hampshire feels that the Seabrook nuclear power plant should be shut down," says Nate Thayer, explaining that decision. "They have continuously rejected the wishes of the people of Seabrook, who have voted . . . not to have the nuclear power plant in the town, and it's clear that the plant will continue to be built if we rely upon working within the electoral system."

Since March 1976, Seabrook residents have voted twice against construction of the nuclear plant; once against transporting radioactive materials through Seabrook, and once against providing the large quantities of water the plant would need. $"We're not militant terrorists," says a CDAS member. "We're just normal college students, workers, people who feel we have to change something in our lives. And we do it with just the resources we have at hand -- our minds, our abilities, and our collective understanding of what we're trying to do."

Some CDAS members also apparently see the Seabrook action as a test of a new, more militant form of direct action that might be emulated by other groups.

"It's important to realize that there are more objectives this time than just occupying and blockading the plant," says a CDAS member. The aim is "to help build a direct action movement that will empower people in all different strata of society to take direct action in their own lives wherever they feel oppressed. . . . We hope this will be an example to others in the antinuclear movement, the women's movement, and other emerging movements such as the antidraft movement."

## Related stories

- Maine earthquake felt across New England
- **CONSUMER ENERGY REPORT** Why Germany is ditching nuclear power
- **FOCUS** In battle to stop sexual assault, young men emerge as allies

ISSN 2573-3850 (online)

# EXHIBIT #3

**Certified Rules**

Air Program Rules (Env-A)

Env-A 100-4800 Rules Governing the Control of Air Pollution
Env-A 100: Organizational Rules
Env-A 300: Ambient Air Quality Standards
Env-A 400: Acid Deposition Control Program
Env-A 500: Standards Applicable to Certain New or Modified Facilities and Sources of Hazardous Air Pollutants; State Plans for Designated Facilities and Pollutants
Env-A 600: Statewide Permit System
Env-A 700: Permit Fee System
Env-A 800: Testing and Monitoring Procedures
Env-A 900: Owner or Operator Recordkeeping and Reporting Obligations
Env-A 1000: Prevention, Abatement and Control of Open Source Air Pollution
Env-A 1100: Prevention, Abatement, and Control of Mobil Source Air Pollution
Env-A 1200: Volatile Organic Compounds (VOCs) Reasonably Available Control Technology
Env-A 1300: Nitrogen Oxides (NOx) Reasonably Available Control Technology (RACT)
Env-A 1400: Regulated Toxic Air Pollutants
Env-A 1500: Conformity
Env-A 1600: Fuel Specifications
Env-A 1700: Permit Application
Env-A 1800: Asbestos Management and Control
Env-A 1900: Incinerators
Env-A 2000: Fuel Burning Devices
Env-A 2100: Particulate Matter and Visible Emissions Standards
Env-A 2300: Mitigation of Regional Haze
Env-A 2400: Ferrous and Non-Ferrous Foundries, Smelters and Investment Casting Industries
Env-A 2500 Reserved (previously Pulp and Paper Industry: Particulate Matter and Visible Emissions Standards; now covered by other rules)
Env-A 2600 Reserved (previously Pulp and Paper Industry: Total Reduced Sulfur Emissions from Kraft Mills; now covered by other rules)
Env-A 2700: Hot Mix Asphalt Plants
Env-A 2800: Sand & Gravel Sources; Non-Metallic Mineral Processing Plants; Cement & Concrete Sources
Env-A 2900: Sulfur Dioxide and Nitrogen Oxides Annual Budget Trading and Banking Program
Env-A 3000: Emissions Reduction Credits Trading Program
Env-A 3100: Discrete Emissions Reduction Trading Program
Env-A 3200: NOx Budget Trading Program
Env-A 3300: Municipal Waste Combustion
Env-A 3400 Reserved (previously Commercial and Industrial Solid Waste Incinerators; now covered by other rules)

Env-A 3500 Reserved (previously Hospital/Medical/Infectious Waste Incineration; now covered by other rules)
Env-A 3600 Reserved (previously National Low Emission Vehicle (National LEV) Program; expired/not readopted)
Env-A 3700 Reserved (previously NOx Emissions Reduction Fund for NOx-Emitting Generation Sources; repealed)
Env-A 3800 Reserved (previously Voluntary Greenhouse Gas Emissions Reductions Registry; statute repealed eff. 7-1-17)
Env-A 4000 Reserved (previously Portable Fuel Container Spillage Control); now covered by federal regulations
Env-A 4100 Consumer Products
Env-A 4200 Architectural and Industrial Maintenance Coatings
Env-A 4300 Other Solid Waste Incineration
Env-A 4600 Carbon Dioxide (CO2) Budget Trading Program [ EFFECTIVE January 1, 2020, SEE Env-A 4600 under Recently Adopted Air Programs Rules on Rulemaking Page]
Env-A 4700 Carbon Dioxide (CO2) Offset
Env-A 4800 Carbon Dioxide (CO2) Allowance Auction Program

**Hazardous Waste Rules (Env-Hw)**

Env-Hw 100 Organization and Definitions
Env-Hw 200 Procedural Rules
Env-Hw 300 Permits
Env-Hw 400 Identification & Listing of Hazardous
Env-Hw 500 Requirements for Hazardous Waste
Env-Hw 600 Requirements for Hazardous Waste Transporters
Env-Hw 700 Requirements for Owners & Operators of Hazardous Waste Facilities/ Hazardous Waste Transfer Facilities
Env-Hw 800 Requirements for Recycling of Hazardous Wastes
Env-Hw 900 Inspection & Enforcement
Env-Hw 1000 Hazardous Waste Cleanup Fund
Env-Hw 1100 Requirements for Universal Waste Management
Env-Hw 1200 Land Disposal Restrictions

**Oil & Remediation Program Rules (Env-Or)**

Env-Or 300 Aboveground Petroleum Storage Facilities
Env-Or 400 Underground Storage Tank Program
Env-Or 500 Recovery of Gasoline Vapors
Env-Or 600 Contaminated Site Management
Env-Or 700 Groundwater Release Detection Permits
Env-Or 800 Brownfields Program Under RSA 147-F

**Solid Waste Rules (Env-Sw)**

Env-Sw 100-2100 Solid Waste Rules Table of Contents
Env-Sw 100 Purpose, Applicability, and Definitions
Env-Sw 200 Procedures
Env-Sw 300 Permits
Env-Sw 400 Collection, Storage, and Transfer Facility Requirements
Env-Sw 500 Processing or Treatment Facility Requirements
Env-Sw 600 Composting Facility Requirements
Env-Sw 700 Incineration Facility Requirements
Env-Sw 800 Landfill Requirements
Env-Sw 900 Management of Certain Wastes
Env-Sw 1000 Universal Facility Requirements
Env-Sw 1100 Additional Facility Requirements
Env-Sw 1200 Permit-by-Notification Facility Requirements
Env-Sw 1300 Public Grants for Landfill and Incinerator Closure
Env-Sw 1400 Financial Assurance
Env-Sw 1500 Certification of Waste-Derived Products
Env-Sw 1600 Solid Waste Facility Operator Training and Certification
Env-Sw 1700 Requirements for Land Application of Wood Ash
Env-Sw 1800 Reduction of Toxics in Packaging
Env-Sw 2000 Inspections
Env-Sw 2100 Management and Control of Asbestos Disposal Sites Not Operated After July 10, 1981

**Dam Program & Related Rules (Env-Wr)**

Env-Wr 100-700 Dam Rules (See individual listings below)
Env-Wr 100 Organizational Rules [includes Definitions]
Env-Wr 200 Procedures
Env-Wr 300 Existing Dams
Env-Wr 400 Constructing or Reconstructing a Dam
Env-Wr 500 Emergency Action Plans
Env-Wr 600 Removal of Dams
Env-Wr 700 Lake Level Determinations
Env-Wr 900 Official List of Public Waters

**Drinking Water & Related Rules (Env-Dw)**

Env-Dw 100 Purpose and Applicability; Use of Federal Terms; Special Provisions For Political Subdivisions; Definitions
Env-Dw 200 Rule Waivers; Confidential Business Information; Hearing Procedures
Env-Dw 300 Sources of Water (see individual Parts below)
Env-Dw 301 Definitions
Env-Dw 302 Large Production Wells and Wells for Large Community Water Systems

Env-Dw 303 Groundwater Sources of Bottled Water
Env-Dw 304 Emergency Bulk Water for Public Water Supplies
Env-Dw 305 Small Production Wells for Small Community Water Systems
Env-Dw 400 Public Water System Classification and Design (see individual Parts below)
Env-Dw 401 PWS Classification; Well Siting; Hydro/Engineering Studies
Env-Dw 402 General Design Standards for Public Water Systems
Env-Dw 403 Coatings, Additives, and Lead Prohibition
Env-Dw 404 Design Standards for Large PWS
Env-Dw 405 Design Standards for Small Community PWS
Env-Dw 406 Design Standards for Non-Community PWS
Env-Dw 407 Standards Adopted by Reference
Env-Dw 500 Operation & Maintenance (see individual Parts below)
Env-Dw 501 Permit to Operate
Env-Dw 502 Certification of Water Works Operators
Env-Dw 503 Public Water Systems Operational Requirements
Env-Dw 504 Public Water Systems Maintenance Requirements

Env-Dw 505 Backflow Prevention
Env-Dw 506 Seasonal Public Water Systems
Env-Dw 600 Capacity Assurance
Env-Dw 700 Water Quality: Standards, Monitoring, Treatment, Compliance, and Reporting
Complete Table of Contents, OLS Revision Notes
Env-Dw 701 Purpose and Applicability; Units Of Measure
Env-Dw 702 - Env-Dw 706 MCLs and MCLGs
Env-Dw 707 General Monitoring Requirements; Laboratory Analytical Methods
Env-Dw 708 Sampling Schedules
Env-Dw 709 - Env-Dw 713 Monitoring For Specific Contaminants
Env-Dw 714 Control of Lead and Copper
Env-Dw 715 Disinfection Residuals, Byproducts, and Byproduct Precursors
Env-Dw 716 Filtration, Disinfection, and Waste Recycling
Env-Dw 717 Groundwater Monitoring and Treatment (Federal Ground Water Rule)
Env-Dw 718 Recordkeeping Requirements & Env-Dw 719 Reporting
Env-Dw 719 Reporting - SEE Env-Dw 718 & Env-719, above
Env-Dw 720 Inspections; Significant Deficiencies
Env-Dw 721 Exemptions
Env-Dw 722 Best Available Technology and Treatment Techniques
Env-Dw 723 Non-Central Treatment
Env-Dw 800 Public Notification by Public Water Systems
Env-Dw 900 Protection of Water Sources (see individual Parts below)
Env-Dw 901 Groundwater Reclassification Rules
Env-Dw 902 Protecting the Purity of Surface Water Sources of Drinking Water
Env-Dw 1000 Grants for Public Water Systems (see individual Parts below)

Env-Dw 1001 Grants for Surface Water Treatment, Regional Water Systems, and Groundwater Investigations
Env-Dw 1002 Water Supply Land Protection Grants
Env-Dw 1100 Drinking Water State Revolving Loan Fund
Env-Dw 1200 Privately Owned Redistribution Systems
Env-Dw 1300 Administrative Procedures for Grants and Loans from the Drinking Water and Groundwater Trust Fund [ Effective October 23, 2019, see Env-Dw 1300 under Recently Adopted Drinking Water & Related Rules on Rulemaking Page]

**Water Quality/Quantity Rules (Env-Wq)**

Env-Wq 300 Surface Water Protection (see individual Parts below)
Env-Wq 301 State Surface Water Discharge Permits [formerly Env-Ws 401]
Env-Wq 304 Certifcation of Wastewater Treatment Plant Operators [formerly Env-Ws 901]
Env-Wq 305 Pretreatment of Industrial Wastewater [formerly Env-Ws 904]
Env-Wq 306 Management of Mercury Amalgam [formerly Env-Ws 905]
Env-Wq 400 Groundwater Protection (see individual Parts below)
Env-Wq 401 Best Management Practices for Groundwater Protection
Env-Wq 402 Groundwater Discharge Permits and Registrations
Env-Wq 402 Cross-Reference Table (prior rules to 2016 rules)
Env-Wq 403 Large Groundwater Withdrawals
Env-Wq 404 Underground Injection Control
Env-Wq 500 Clean Water State Revolving Loan Fund
Env-Wq 600 Selection of Consulting Engineers [SEE Env-C 500]
Env-Wq 700 Standards of Design and Construction for Sewerage and Wastewater Treatment Facilities
Env-Wq 800 Sludge Management
Env-Wq 1000 Subdivisions; Individual Sewage Disposal Systems
Env-Wq 1100 Public Bathing Places
Env-Wq 1200 Winnipesaukee River Basin Program
Env-Wq 1300 NH Clean Lakes Program
Env-Wq 1400 Shoreland Protection
Env-Wq 1500 Alteration of Terrain
Env-Wq 1600 Septage Management Rules
Env-Wq 1700 Surface Water Quality Standards
Env-Wq 1700 Cross-Reference Table - Prior Rules to Rules eff. 12-01-2016
Env-Wq 1800 Rivers Management and Protection Program
Env-Wq 1900 Protection of Instream Flow on Designated Rivers
Env-Wq 2000 Coastal Program Grant Rules
Env-Wq 2100 Water Conservation, Use, Registration, & Reporting (see individual Parts below)
Env-Wq 2101 Water Conservation
Env-Wq 2102 Water Use Registration and Reporting
Env-Wq 2102 Cross-Reference Table - 2008 rules to 2017 rules
Env-Wq 2200 Voluntary Certified Salt Applicator Program

**Wetlands Rules (Env-Wt)**

Env-Wt 100 Wetlands Organizational Rules
Env-Wt 200 Wetlands Procedural Rules
Env-Wt 300 - 700 Wetlands Program
Env-Wt 800 Compensatory Mitigation
Env-Wt 900 Stream Crossings

# EXHIBIT #4

AFFIDAVIT OF BRENT TWEED

State of New Hampshire
County of Hillsborough

Before me, _____ the undersigned Notary, on this 14th day of January, 2020, personally appeared Brent Tweed, who being first duly sworn on this 14th day of January on his oath states as follows:

1. I am an individual with a residence located at 23 Fort Hill Road in the Town of Nottingham, New Hampshire.
2. I am also a taxpayer in the Town of Nottingham with an equitable right and interest in the preservation of an orderly and lawful government within the taxing district.
3. I am also the sole shareholder and director of G&F Goods, LLC, a Delaware limited liability company registered to do business in New Hampshire.
4. G&F Goods, LLC, is a company in the business of making mail order purchases and sales located at 23 Fort Hill Road in the Town of Nottingham, New Hampshire. As such, G&F Goods, LLC, has occasion to burn fossil fuels for transportation for business purposes and for heat at G&F's place of business within the Town and to dispose of packaging and other waste material that may contain toxic substances is landfill or other disposal sites within the Town of Nottingham. G&F Goods, LLC further has occasion to use paint and cleaning supplies at its place of business, which it disposes of properly within the Town of Nottingham.
5. Based on the breadth of the statute, I am is concerned that any resident of the Town of Nottingham may seek to enforce the provisions of ordinance against me and against G&F Goods, LLC, and seek to have a fine of up to $1000 imposed upon either me or G&F Goods, LLC.

Further the affiant sayeth not.

_____
Signature of Brent Tweed

Brent Tweed
23 Fort Hill Road
Nottingham, New Hampshire 03290

Subscribed and sworn to before me this 14th day of January, 2020

_____
Signature of Notary

_____
Printed Name of Notary

Notary Public

My commission expires _____, 20____

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.

**DEFENDANTS' PARTIAL OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

NOW COMES, the Town of Nottingham and Donna Danis, by and through their attorneys, Upton & Hatfield, LLP, and partially object to the Plaintiffs' Motion for Summary Judgment in the above-referenced matter, stating as follows:

1. The parties agree that the questions presented in this case are questions of law.

2. For all the reasons stated in the attached memorandum, which is incorporated herein, attorney's fees should not be awarded to the Plaintiffs.

WHEREFORE, the Defendants respectfully pray that this Honorable Court:

A. Deny Plaintiffs' request for attorney's fees;

B. Alternatively, schedule a hearing to consider the attorney's fees issue; and

C. Grant such other and further relief as may be just and equitable.

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

Dated: February 10, 2020

By: /s/ Michael P. Courtney

Michael P. Courtney (NHBA #21150)
Susan Aileen Lowry (NHBA #18955)
10 Centre Street
Concord, NH 03302
Telephone: 603 224-7791
mcourtney@uptonhatfield.com

**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.

/s/ Michael P. Courtney
Michael P. Courtney

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

By: /s/ Michael P. Courtney

Michael P. Courtney (NHBA #21150)
Susan Aileen Lowry (NHBA #18955)
10 Centre Street
Concord, NH 03302
Telephone: 603 224-7791
mcourtney@uptonhatfield.com

**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

STATE OF NEW HAMPSHIRE

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

**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

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 Defendants Town of Nottingham and Donna Danis

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

Dated: February 21, 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.*

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 tthat 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 opinon 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

Richard J. Lehmann (Bar No. 9339)
835 Hanover Street, Suite 301
Manchester, N.H. 03104
(603) 731-5435
rick@nhlawyer.com

CERTIFICATION

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

*/s/Richard J. Lehmann*

_____

Richard J. Lehmann

**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.*