

life, liberty, and the pursuit of happiness. Since its passage, the Ordinance has never been invoked.

Plaintiff Brent Tweed expressed his concerns about the Ordinance at Town Meeting day on May 16, 2019, but failed to convince the majority of voters that their rights to clean ecosystems and a livable climate should yield to a corporation's right to pollute. Tweed now brings these arguments to court, despite having suffered no harm from the enactment of the Ordinance. Intervenor-Defendant respectfully asks the Court to find that Plaintiffs lack standing, and accordingly to dismiss Plaintiffs' claims.

PROCEDURAL POSTURE

On March 27, 2019, Brent Tweed and G&F Goods, LLC filed suit in Rockingham Superior Court. Plaintiffs sought a declaratory judgement that the Ordinance is invalid, and requested temporary and permanent injunctions against Defendant Town of Nottingham to prevent the Town of Nottingham from enforcing the Ordinance.

Seeing no existing or impending violations that would warrant enforcement, the Town of Nottingham stipulated to the temporary injunction.

Before the Court on May 15, 2019, are the NWA's petition to intervene and this accompanying motion to dismiss Plaintiffs' complaint.

LEGAL STANDARD

A motion to dismiss asks the trial court "to determine whether the allegations contained in the [Plaintiffs'] pleadings are sufficient to state a basis upon which relief may be granted." *K.L.N. Constr. Co. v. Town of Pelham*, 167 NH 180, 183 (2014). When reviewing a motion to dismiss for lack of standing and other affirmative defenses, courts should "determine, based on the facts, whether the [Plaintiffs] have sufficiently demonstrated their right to claim relief."

Id. A motion to dismiss should be granted if the plaintiff's alleged facts fail to satisfy the prerequisites for standing.

ARGUMENT

Plaintiffs do not have standing to bring their complaint, which should be dismissed. Failing to meet either the traditional criteria for standing or the prerequisites for taxpayer standing pursuant to Article 8, Part 1 of the New Hampshire Constitution and NH RSA 491:22, Plaintiffs lack standing to bring this action.

I. Neither Brent Tweed nor G&F Goods, LLC have general Constitutional standing because neither have been harmed by the Ordinance and are instead asking the Court to issue an advisory opinion.

To have standing according to the New Hampshire Constitution, a plaintiff needs “personal legal or equitable rights that are adverse to [the Defendant] with regard to an actual, not hypothetical, dispute, which is capable of judicial redress.” *Duncan v. State*, 166 NH 630, 642-43 (2014). A party must demonstrate harm, because “judicial power ordinarily does not include the power to issue advisory opinions.” *Birch Broad., Inc. v. Capitol Broad. Corp., Inc.*, 161 NH 192, 199 (2010).

Plaintiffs have suffered no harm from the enactment of the Ordinance. The plaintiffs in *K.L.N. Constr. Co.* had standing to challenge the validity of a municipal ordinance after that ordinance had been enforced against them. 167 NH 180. Here, Plaintiffs have suffered no harm from the Ordinance. A person to whom a law applies does not automatically have standing to argue that the law is unconstitutional. *Eby v. State*, 166 NH 321, 336 (2014) (dismissing plaintiff for lack of standing because he “allege[d] only that the Gambling Winnings Tax gave rise to the mere possibility of disproportionate or double taxation.”).

Simply because the Ordinance took effect in a town that Plaintiffs do business in does not give rise to any kind of individualized or concrete injury. The Ordinance has never been enforced, nor is any enforcement action threatened, against Plaintiffs.

II. Neither Brent Tweed nor his LLC qualify for taxpayer standing under Part I, Article 8 of the New Hampshire Constitution or NH RSA 491:22.

Constitutional and State Law provisions granting taxpayer standing do not apply to Plaintiffs because the Town of Nottingham has not engaged in unlawful conduct or spent taxes on the challenged Ordinance. Taxpayer standing also does not apply to G&F Goods, LLC because that entity is neither an individual nor a taxpayer.

The recently amended Article 8, Part 1 of the New Hampshire Constitution provides standing only to an “individual taxpayer eligible to vote in the State,” who may only challenge a political subdivision that “has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision.”

NH RSA 491:22 similarly limits relief to “taxpayers of a taxing district” who allege that “the taxing district or any agency or authority thereof has engaged, or proposes to engage in conduct that is unlawful or unauthorized.”

G&F Goods, LLC is not an “individual taxpayer eligible to vote,” and therefore cannot assert standing pursuant to Article 8.

Nowhere does the Complaint allege that G&F Goods, LLC pays taxes in Nottingham. G&F Goods, LLC fails to meet the elements of NH RSA 491:22 taxpayer standing.

Plaintiffs assert that Brent Tweed “has a right ... not to have his tax money spent on enforcement of an *ultra vires* and unconstitutional ordinance,” but do not show how this right has been violated. Pls.’ Compl. at ¶ 5. The Town of Nottingham has never enforced the Ordinance, and has therefore neither spent nor approved spending on enforcement.

Plaintiffs similarly do not identify any unlawful “conduct” that the Town of Nottingham “engaged, or proposes to engage in” that would permit Tweed to exercise taxpayer standing according to NH RSA 401:22. State law authorizes towns to place properly petitioned items on the ballot and to allow residents to vote on those items. *See, e.g.,* NH RSA 39, 40. These actions, and no more, are the only actions remotely related to the challenged Ordinance that the Town of Nottingham has taken. The RSAs do not authorize municipal corporations to evaluate the Constitutionality of a ballot item.

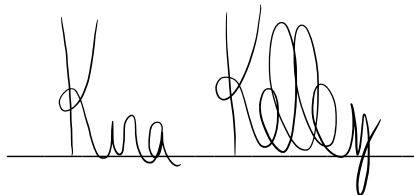
None of Plaintiff Tweed’s tax money has ever been spent enforcing this Ordinance, and the Complaint fails to identify any unlawful municipal conduct. Plaintiff G&F Goods, LLC has not been shown to pay taxes, and is not an individual eligible to vote. Both Plaintiffs lack standing under Article 8, Part I of the New Hampshire Constitution.

CONCLUSION

Because Plaintiffs failed to establish standing under either the general rule or the exception for taxpayers, the NWA respectfully asks this court to dismiss all counts of Plaintiffs’ complaint.

Respectfully submitted,

Dated: May 15, 2019

A handwritten signature in black ink, appearing to read "Kira Kelley", is written over a horizontal line.

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