

GRAFTON, SS. STATE OF NEW HAMPSHIRE SUPERIOR COURT

Case No. 215-2022-CV-00167
Steven Rand, et al.,

v.

The State of New Hampshire

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER
WITH NOTICE TO PRESERVE STATUS QUO WHILE THE COURT
ASSIGNS A NEW JUDGE TO PRESIDE AFTER PRIOR JUDGE'S RECUSAL**

Now come the Plaintiffs, through counsel, and pursuant to Rule 48, Superior Court Rules, and respectfully move the Court to quickly schedule a hearing on this Motion and to issue a Temporary Restraining Order until such time as a newly assigned judge of the Superior Court may issue an order on Plaintiffs' pending preliminary injunction motion regarding the Department of Revenue Administration's ("DRA") administration of the Statewide Education Property Tax ("SWEPT") that violates the constitutional rights of 90% of the state's property taxpayers. Plaintiffs have sought the cooperation of the State and the potential Intervenors¹ to maintain the status quo and both have affirmatively refused. Thus, this motion is necessary.

In support of this motion, the Plaintiffs state as follows.

The Timeline

1. The Plaintiffs filed their Complaint on June 28, 2022, and their First Amended Complaint on August 26, 2022. The State's Answer, filed on September 7, 2022, revealed that a constitutional problem with the SWEPT continued even though the Legislature had reduced the

¹ Although the intervention motion may have triggered the presiding judge's belief that his recusal was necessary, the motion has not been ruled upon and Plaintiffs object to the intervention of the "Coalition Communities" that seek to maintain their tax advantages.

amount raised by the SWEPT from \$363 million per year to \$263 million. *See* First Amended Complaint at ¶31 and Answer at ¶31; *see also* ¶¶21-22 of the First Amended Complaint and the Answer. Plaintiffs' counsel engaged counsel for the State in conference about the unconstitutionality of the SWEPT two days after the State's Answer was filed and, after further discussions that were not fruitful, moved for a Preliminary Injunction soon thereafter on October 5, 2022.

2. The State objected to the Motion for Preliminary Injunction on October 28, 2022 and the Plaintiffs immediately replied on October 31, 2022. With agreement of the Plaintiffs, the State filed a surreply on November 2, 2022 and the parties, through counsel, appeared for a hearing before the Grafton County Superior Court on the morning of November 4, 2022. The State was represented at the hearing by New Hampshire Solicitor General Anthony Galdieri and Senior Assistant Attorney General Sam Garland. Plaintiffs were represented by New Hampshire counsel Natalie Laflamme, John Tobin and Andru Volinsky. *Pro bono* counsel from New York, Michael Jaoude and Morgan Brock Smith of White & Case, flew in the night before to help represent the Plaintiffs.

3. On the night before the hearing, a lawyer representing an unincorporated association of property wealthy communities called, the Coalition Communities 2.0, contacted counsel for the parties to seek consent to intervene in the matter.² The State assented. The Plaintiffs did not.

² The communities that are members of Coalition Communities 2.0 are listed below. Communities that either apply negative rates in 2021-22 or 2022-23 or retain a surplus in either of these years are indicated with an *. Lebanon, Judge MacLeod's hometown, is a member of Coalition Communities 2.0, but does not apply a negative tax rate to offset the SWEPT and has not retained a surplus for more than a decade.

- Town of Bridgewater*
- Town of Carroll*
- Town of Center Harbor*
- Town of Franconia*

The Coalition Communities 2.0 formally filed a motion to intervene two hours before the hearing November 4, 2022. The Plaintiffs filed an objection to the intervention on November 8, 2022.³

4. On November 9, 2022, without prior notice or inquiry of the parties, the Court (MacLeod, J.) issued an order recusing himself from the matter because he had not previously realized that the city of Lebanon is a member of Coalition Communities 2.0 and, as a substantial real estate holder in Lebanon, he might give the appearance of having a conflict of interest.

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- Town of Gilford
 - Town of Hampton* (2021-22 only)
 - Town of Hebron*
 - Town of Holderness*
 - Town of Hollis
 - Town of Jackson*
 - City of Lebanon
 - Town of Lincoln*
 - Town of Meredith* (2021-22 only)
 - Town of Moultonborough*
 - Town of Newbury*
 - Town of New Castle*
 - Town of Newington*
 - Town of New London*
 - Town of North Hampton* (2021-22 only)
 - City of Portsmouth* (2021-22 only)
 - Town of Rye*
 - Town of Sandwich*
 - Town of Sugar Hill* (2021-22 only)
 - Town of Sunapee*
 - Town of Tuftonboro*
 - Town of Waterville Valley*
 - Town of Wolfeboro*
- Alton, Bartlett, Easton, Errol, Freedom, Hale’s Location, Hart’s Location, and Pittsburg are all excess communities but are not members of Coalition Communities 2.0. See <https://coalitioncommunitiesnh.com/members-of-the-coalition-communities-2-0/> (last visited November 11, 2022).

³ The motion to intervene remains pending.

Plaintiffs' Constitutional Concerns

5. The State funds a portion of its responsibility to provide a constitutionally adequate education pursuant to Part 2, Article 83, New Hampshire Constitution, with a statewide property tax. Property taxes to fund the State's Article 83 responsibility are subject to Part 2, Article 5 of the New Hampshire Constitution in that they must be imposed at a uniform effective rate.

Claremont School District v. Governor, 142 N.H. 463, 471 (1997) (*Claremont II*) (“To the extent the State relies upon property taxes to fund a constitutionally adequate public education, the tax must be administered in a manner that is equal in valuation and uniform in rate throughout the state.”).

6. Plaintiffs contend the DRA administers the SWEPT in an unconstitutional fashion for two reasons. First, the State sets local education property taxes pursuant to R.S.A. 21-J:35 that are in the negative to offset the entirety of the SWEPT tax in 22 communities (*e.g.*, Hales Location had a \$1.85/1000 SWEPT rate in 2021-2022 and the DRA set a local education tax rate of -\$1.85/1000, completely offsetting the SWEPT rate). Second, the DRA allows approximately 23 property wealthy communities to retain surplus funds generated by the nominally uniform SWEPT rate and permits these communities to apply them for local purposes. Both administrative decisions lower SWEPT effective tax rates in the benefitted communities, violating the uniformity in rate requirement of Part 2, Article 5, and thus render the SWEPT unconstitutional. Indeed, both of these strategies have been considered and condemned by the New Hampshire Supreme Court. *See Opinion of the Justices (Sch. Fin.)*, 142 N.H. 892 (1998)

(special abatement unconstitutional) and *Claremont School District v. Governor*, 144 N.H. 210 (1999) (Statewide Property Tax Phase-in unconstitutional).⁴

7. The Plaintiff taxpayers do not live in communities with surplus funds and do not enjoy negative local school tax rates. Plaintiffs' preliminary injunction motion requests the Court enjoin these practices consistent with Part 2, Article 5's uniformity requirement.

The DRA's Rate Setting is Ongoing

8. The State has objected to the preliminary injunction motion by asserting Plaintiffs (and every other taxpayer) lack standing, that Plaintiffs can seek individual property tax abatements and, most relevant to this request for a Temporary Restraining Order, that the DRA had commenced its tax rate setting process and that tax rates are set and issued to local communities on a rolling basis through the Fall. The State reported that six of the localities with reduced effective tax rates have had their rates set and issued to the communities. These communities, it was represented at the November 4th hearing, have not yet issued tax bills to their taxpayers. The State claims it would disrupt the DRA's rollout of tax rates to issue the requested injunction.

9. As Plaintiffs pointed out in their pleadings and at the hearing, the DRA sets the tax rate for SWEPT and for 259 communities, and the DRA may continue to issue rates for the communities that are unaffected by Plaintiffs' concerns before turning to the rate setting for the affected communities. Further, Plaintiffs assert that 90% of the State's taxpayers suffer a disadvantage because of the DRA's administration of the SWEPT.

⁴ The State has not challenged Plaintiffs' assertion that the New Hampshire Supreme Court has considered these two DRA administrative strategies and found them unconstitutional.

Plaintiffs Efforts to Mitigate Harm Caused by Recusal

10. Plaintiffs learned about Judge MacLeod's recusal order at 3:30 p.m. on November 9, 2022. That night, Plaintiffs asked the State's lawyers to instruct the DRA to refrain from setting negative rates or setting SWEPT rates that allow certain communities to benefit from a surplus until a new judge could be assigned to this matter and be given time to rule on the preliminary injunction motion. The State announced its refusal to cooperate in this regard on November 10, 2022.

11. At virtually the same time on November 9, 2022, the Plaintiffs asked counsel for the Coalition Communities 2.0 to agree that his client communities would delay mailing tax bills during the time it took to assign this matter to another judge and obtain a ruling. After a further conversation on the evening of November 10, 2022, counsel for the Coalition Communities 2.0 said that his clients would not agree to delay the mailing of tax bills.

Request for Relief

12. The State will take advantage of Judge MacLeod's recusal to moot Plaintiffs' motion for a preliminary injunction without remedying their harm if no action is taken. The parties agree that there is need for expedition in deciding Plaintiffs' preliminary injunction request.

13. Plaintiffs do not seek to upend the entire school funding system with their injunction request. Rather, Plaintiffs seek to enjoin two specific administrative acts by the DRA that cause 90% of the State's taxpayers to suffer from the State's constitutional violation. They must do so before the DRA sets tax rates for the remaining surplus and negative rate communities. By this Motion for Temporary Restraining Order, Plaintiffs simply ask the Court to order the State to refrain from setting tax rates in the negative rate and excess communities, and withdraw the rates set and issued to any negative rate and excess communities, until the Court system assigns a new

judge to this matter and that judge has time to review the pleadings and tape of the November 4, 2022 hearing⁵ and issue a ruling on the merits of Plaintiffs' injunction request. Maintaining the status quo — and not allowing the State to gain an unfair advantage because of Judge MacLeod's unexpected recusal — are quintessential reasons to issue a Temporary Restraining Order. As well, the sooner the court system assigns a new judge to this matter, the shorter the Restraining Order.

WHEREFORE, Plaintiffs request the Court issue an order temporarily restraining the State from setting tax rates for localities that either impose negative local tax rates or retain surplus until a newly assigned judge rules on Plaintiffs' Motion for Preliminary Injunction.

Dated: November 12, 2022

Respectfully submitted,

/s/ Natalie J. Laflamme

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⁵ Plaintiffs are willing to re-argue the Motion for Preliminary Injunction if the newly assigned judge so requests.

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** Pro Hac Vice pending

AFFIDAVIT

I hereby affirm that the factual representations contained in this motion are true and correct under the pains and penalties of perjury and as represented in the pleadings and affidavits on file in this matter or the offers of proof made by all parties with witnesses present during the hearing held on November 4, 2022, before the Grafton County Superior Court (MacLeod, J.).

/s/ Natalie Laflamme, Bar No. 266204

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion for Temporary Restraining Order was sent via the court's electronic filing system to all parties of record on this 12th day of November 2022. Copies were also emailed to Anthony Galdieri and Samuel Garland, counsel for the State, and John Mark Turner, counsel for Coalition Communities 2.0, using their work email addresses.

/s/ Natalie Laflamme

Natalie Laflamme