

STATE OF NEW HAMPSHIRE

GRAFTON COUNTY

SUPERIOR COURT

Docket No. 215-2022-CV-00167

**Steven RAND et al.**

v.

STATE OF NEW HAMPSHIRE

**PARTIALLY ASSENTED-TO MOTION TO INTERVENE AND FOR LEAVE TO FILE  
BRIEF**

Coalition Communities (the “Coalition”), an association of New Hampshire municipalities, hereby moves to intervene in the above-captioned matter, and requests leave to file a brief concerning Plaintiff’s request for a preliminary injunction, stating as follows:

**THE COALITION COMMUNITIES**

1. The Coalition is an association of approximately two dozen towns and cities.<sup>1</sup> The Coalition’s members constitute many of what the Plaintiffs call “Excess SWEPT Communities,” *i.e.*, they collected and assessed SWEPT in excess of the State’s calculated adequacy cost. See Pl. Reply Exh. A Tables 1 – 2. The Coalition’s members joined together prior to 2006 to oppose the “donor” and “receiver” town system, legislatively and through other means. The members hold a belief, pursued jointly through the Coalition for many years, that

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<sup>1</sup> The Coalition’s members are Bridgewater, Carroll, Center Harbor, Franconia, Hampton, Hebron, Holderness, Hollis, Jackson, Lebanon, Lincoln, Meredith, Moultonborough, Newbury, New Castle, Newington, New London, North Hampton, Portsmouth, Rye, Sandwich, Sugar Hill, Sunapee, Tuftonboro, Waterville Valley, and Wolfeboro.

the State's education funding system should not be based on the donor-receiver system, *e.g.*, the redistribution of SWEPT funds from one municipality to another. See generally <https://coalitioncommunitiesnh.com/#home>.

### **THE INTERVENTION STANDARD IS MINIMAL AND EASILY MET HERE**

2. To intervene, the Coalition must show “a right involved in the [litigation] and a direct and apparent interest therein.” Brzica v. Trs. of Dartmouth Coll., 147 N.H. 443, 446 (2002). This is a minimal burden: the “right of a party to intervene in pending litigation in this state has been rather freely allowed as a matter of practice.” Id. Under Superior Court Rule 15, all that needs to be filed is an appearance and a pleading “briefly setting forth his or her relation to the cause.”

3. That standard is easily met here because Plaintiffs have expanded their original injunction request to require the Coalition's members to return surplus SWEPT funds to the State, threatening substantial economic and administrative effects on the Coalition's members.

### **PLAINTIFFS' NEWLY REQUESTED RELIEF DIRECTLY IMPLICATES THE COALITION'S INTERESTS**

4. The exact contours of Plaintiffs' requested relief are fuzzy. The Complaint alleges the SWEPT is unconstitutional because of two “loopholes” or “tax avoidance strategies.” See First Amended Complaint ¶¶26-37. Plaintiffs allege that one of those “loopholes” is that “property-wealthy” towns are allowed to retain surplus SWEPT instead of returning them to the State to be distributed to other towns. See id. ¶¶31-32. The other alleged loophole is that a “smaller number of towns” make their local education tax rate negative to offset the SWEPT. See id. ¶33.

5. In their original Memorandum of Law, Plaintiffs seem to seek an injunction of the entire tax, see Pl. Memo. at 3, and further contend that both practices (retention of surplus

SWEPT and negative local rates) are unconstitutional. See Pl. Memo. at 16-17. However, the Plaintiffs’ Motion for an Injunction does not target both practices. It does not ask the Court to order the State to have municipalities return SWEPT surpluses, but instead only seeks an order prohibiting the State from “(i) setting the [SWEPT] rates for the coming year, and (ii) allowing any school district to set a negative local education tax rate.” See Pl. Mot. for Prelim. Inj. ¶1. The proposed injunction, Exhibit A to their motion, similarly targets only the negative tax rates, requesting that the Court prohibit the DRA Commissioner from (1) “approving any final school district tax rate” that is negative, and (2) directing municipalities to assess and use for school purposes any tax revenues based upon a negative tax rate. See Exh. A to Complaint ¶¶2-3. As the Plaintiffs note, the number of communities with a negative tax rate is small. They consist of very small, and mostly unincorporated communities with little or no educational expenses.<sup>2</sup> An injunction prohibiting negative tax rates does not directly affect the Coalition’s members, all of whom have positive local education tax rates.

6. However, it now appears Plaintiffs may actually be asking for more extensive relief than just prohibiting negative local educational rates.

7. After the State’s Objection pointed out the cascading administrative nightmares and budgeting chaos that could result from an injunction of the entirety of the SWEPT, see State Memo. at 22-23, Plaintiffs pivoted in the reply they filed Monday this week. Contrary to the limited relief requested in their Motion, Plaintiffs confirmed that what they really seek to enjoin

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<sup>2</sup> For instance, Plaintiffs report Odell as one of the communities with a negative local education tax rate. According to the 2020 Census, Odell is populated by a single person. See Odell Census Profile, [https://data.census.gov/cedsci/profile/Odell\\_township,\\_Coos\\_County,\\_New\\_Hampshire?g=0600000US3300757860](https://data.census.gov/cedsci/profile/Odell_township,_Coos_County,_New_Hampshire?g=0600000US3300757860).

is “the conduct of DRA in permitting property wealthy communities to retain excess funds.” See Pl. Reply at 2. These funds are, according to Plaintiffs, being “illegally withheld” by the municipalities (who, parenthetically, have been ordered by the Commissioner’s warrant to assess and collect the SWEPT). See id. at 13.

8. According to Plaintiffs, the Court can avoid “friction in the education funding system or [] any impact on the State’s budget”, id. at 12-13, simply by ordering the State to “require municipalities to remit the excess funds.”

### **THE COURT SHOULD HEAR FROM THE AFFECTED COMMUNITIES**

9. Whatever the truth to the statement that there will be no friction to the State or impact on the State’s budget, Plaintiffs’ new injunction request will have a dramatic effect on the members of the Coalition, their budgets, and their communities.

10. As the State’s witness from the DRA testified, ordering the return of surplus SWEPT creates numerous, overlapping potential problems for the Coalition’s members:

- (1) ***Higher local educational tax rates:*** for communities for which the DRA has not completed rate setting, the DRA will remove surplus SWEPT from the calculation of the local education tax rate, resulting in higher local tax. See Kenuer Supp. Aff. ¶5, attached to State’s Sur-reply.
- (2) ***Recalculation of Rates and Multiple Tax Bills:*** for communities for which DRA has completed rate setting, municipalities with surplus SWEPT would have to recalculate a higher local education rate; if they have already sent out their tax bills, the municipalities would have to send out replacement bills, somehow educate its confused taxpayers, and then create a program to refund any tax improperly paid on the first bill. See Kenuer Supp. Aff. ¶¶6-7.
- (3) ***Delays in Rate Setting and Bills Can Result in Delayed and Reduced Revenue:*** any delays caused by sending out replacement bills or recalculation of rates could result in the delay of tax revenues. See Kenuer Supp. Aff. ¶¶7-8.

11. It is essential to understand these potential ramifications before issuing the injunction requested by Plaintiffs. A critical element in the preliminary injunction analysis is the “public interest.” See UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14-15 (1987). Plaintiffs’ entire argument on this element of the inquiry is that the public interest is served because there will be no effect on the *State*. They glide right past the rest of the public, making no effort to account for the effects on the municipalities and their citizens if the Court changes a decade-long practice during the peak of rate-setting and tax billing.

12. The Court cannot fully grasp the public’s interest without hearing from those who would be affected by the order. The Coalition’s members are the entities that will be directly affected by the requested order because the SWEPT is an important part of *their* budgets and *their* local education rates. The Coalition is thus uniquely suited to provide the Court with direct information on how any proposed refund of SWEPT surpluses would affect local communities and schools.

13. The Coalition therefore requests permission to file a post-hearing brief by November 14, which is 10 days from the injunction hearing.

14. The State has assented to this Motion to Intervene and Leave to File.

15. Plaintiffs have told the Coalition that they do not assent because they do not want the Court’s decision to be delayed by additional briefing.

16. That is not a sufficient reason under the liberal standards of Rule 15 to deny intervention or leave to file a brief.

17. The Coalition only learned this week of Plaintiffs’ changed injunction request and its possible effects on the Coalition’s members. The Coalition is now moving to intervene and participate as expeditiously as possible. Because Plaintiffs’ changed injunction request

(confirmed definitely on Monday) came so recently, the Coalition's counsel was unable to adjust his schedule to participate in the injunction hearing today. Therefore, a post-hearing brief will be the only meaningful way for the Coalition to participate and have its position heard.

18. Furthermore, a brief delay in the Court's decision to allow the Coalition to file a post-hearing brief will not result in prejudice to Plaintiffs. As the Plaintiffs acknowledge, the current system has been in place for a decade. Allowing a further ten days after ten years will not meaningfully affect Plaintiffs.

19. While speed is important when the Court is weighing a preliminary injunction request, speed should not trump accuracy and prudence. That is especially true in a case like this one, with complicated statutory and regulatory provisions, numerous Supreme Court opinions, multiple competing stakeholders, and numerous possible unintended consequences that the State's affiants have already testified to.

20. In summary, Plaintiffs seek to upset the long-term status quo with no clear articulation of what they actually want and no evidence about what the effects will be. The State has offered uncontradicted testimony from its witness on the negative effects of the requested injunctions on the State and municipalities. The Coalition would also like the opportunity to better inform the Court on how any order would affect its members.

WHEREFORE, the Coalition respectfully requests that this Honorable Court:

- A. Permit it to intervene in this matter;
- B. Allow it until November 14, 2022 to file a brief responding to Plaintiff's injunction request; and
- C. Grant such other relief as is necessary and just.

