

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' OBJECTION TO MOTION TO INTERVENE
AND LEAVE TO FILE BRIEF**

INTRODUCTION

Before this Court is a motion for preliminary injunction that challenges the ongoing administration of the Statewide Education Property Tax (“SWEPT”) by the Department of Revenue Administration (“DRA”). The injunction is part of a broader suit that challenges the way property owners are taxed to fund the State’s responsibility to provide a constitutionally adequate education. The legal regime used by the DRA has repeatedly been held unconstitutional by the courts of this state for decades. This Court has heard, on an expedited schedule, oral argument on Plaintiffs’ Motion for a Preliminary Injunction, which seeks injunctive relief as the DRA Commissioner continues to issue warrants to collect the unconstitutional tax from localities.

Ignoring months of public filings and wide-spread media coverage, a motion to intervene and for leave to file brief was filed on the morning of the injunction hearing by the Coalition Communities (“Coalition” or “Intervenors”) — an ad-hoc third party whose interests are aligned with and already adequately represented in this matter by the State.

Not only does the Coalition seek to intervene at the last minute, it also requests to delay the proceedings, which have been conducted on an expedited schedule to avoid further irreparable harm to Plaintiffs. Although the State has assented to intervention, it has not offered to deal with

the harm caused by the delay attendant to filing a late brief. If Plaintiffs are to have a chance to avoid further irreparable injury, the Court should deny the motion to intervene.

While a Court may “freely allow[]” intervention, “[t]he right to intervene [is] usually determined as a matter of discretion by the Trial Court.” *Scamman v. Sondheim*, 97 N.H. 280, 281 (1952). Accordingly, this Court retains a high degree of discretion to grant or deny the motion. See *Brzica v. Trustees of Dartmouth Coll.*, 147 N.H. 443, 446 (2002) (“[w]e may not overturn the trial court’s decision unless we are persuaded that the court’s exercise of discretion is unsustainable”); *Samyn-D’Elia Architects v. Satter Companies of New England, Inc.*, 137 N.H. 174, 177 (1993) (“[a] trial court’s decision to grant intervener status will not be overturned unless we are persuaded that the court abused its discretion”) (citations omitted). The Coalition must show that it has “a right involved in the trial and [its] 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)). As the Coalition’s interests are already adequately defended by the State and have been presented to this Court via two briefings and an oral argument, this Court should not risk further irreparable harm to Plaintiffs by jeopardizing the original timeline agreed upon by all parties.

ARGUMENT

I. THE INTERESTS OF THE INTERVENERS ARE ALREADY REPRESENTED BY THE STATE.

Generally, “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*, 134 N.H. at 35 (quotation and citation omitted).

To the extent the Coalition has an interest in this proceeding, those interests are already represented by a party in this case. The Coalition reveals as such in their motion. *See Mot. To Intervene* at ¶ 1 (“ . . . the State’s education funding system should not be based on . . . the redistribution of SWEPT funds . . .”); *c.f.* *Answer* ¶ 7–8 (“since 2011, communities for which the amount raised by the SWEPT exceeds the total amount of adequacy aid paid by the State have been permitted to retain the excess amount raised by the SWEPT”). The Coalition bears the same interest of the State in keeping the SWEPT in place as administered by the DRA Commissioner — as a disproportional tax — and relies on the same theories and arguments as the State. For this reason, the Motion to Intervene should be denied.

The Coalition’s motion makes the same argument as the State in many respects. First, the Coalition contends that the public interest, or more accurately, the interests of the Coalition communities, are at issue. *See Mot. to Intervene* at ¶ 11 (“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.”). The State has already addressed these interests in their argument. *See State’s Objection, Affidavit of Charles Arlinghaus* at ¶ 11 (“Such a result would be unprecedented, harmful to the operations of the state government, and, ultimately, harmful to the public interest. To the best of my knowledge the State has never faced an unanticipated, unplanned revenue shortfall of \$263 million during a single fiscal year. Nor, to the best of my knowledge, has a Governor ever had to issue an Executive Order directing anything approaching \$263 million in spending cuts.”). The State devotes a section of its Objection to the public interest and maintaining the status quo. *See State’s Objection* at 22-26,

The Coalition's motion acknowledges that the alleged "cascading administrative nightmares and budgeting chaos that could result from an injunction of the entirety of the SWEPT" were "pointed out" by the State. Mot. to Intervene at ¶ 7 (citing State's Objection at 22-23). Indeed, the Coalition's motion specifically points to testimony by the State's witness detailing the potential problems for the Coalition members, including higher local education tax rates, recalculation of tax rates and multiple bills, and delays in rate setting and bills. Mot. to Intervene at ¶ 10 (citing to State's Surreply, Kenuer Supp. Aff. at ¶¶ 5-8).

The Coalition and the State also both show ill appreciation of the harm to be suffered by Plaintiffs and the importance of a speedy resolution. See Mot. to Intervene at ¶ 19; State's Objection at 2. The Coalition argues that "[w]hile 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." Mot. to Intervene at ¶ 19 (emphasis added). The State strikes a similar tone by arguing that "[the] plaintiffs' concerns about timing are undermined by the fact that the distribution of revenues generated by the SWEPT has operated the same way for over a decade and could have been challenged at any time." State's Objection at 2.

Plaintiffs ask this Court to restrict the DRA Commissioner from administering the SWEPT in an unconstitutional, disproportional manner while the Defendant wishes to continue the SWEPT administration untouched. It is unclear that the Coalition seeks any remedy or interest that is different from the State. Just as the State seeks to allow the DRA Commissioner to permit excess towns to retain excess funds, the Coalition, likewise, shares that it seeks to avoid the redistribution

of SWEPT funds. *See* Mot. to Intervene at ¶ 1. While Interveners glancingly point to some interests, none supply the “direct and apparent” interests separate from the State that would “suffer” or be “scarified” if intervention is denied. *See Snyder*, 134 N.H. at 35. Accordingly, this Court should deny the Coalition’s Motion to Intervene.

II. DELAY IN INTERVENING REVEALS LACK OF INTEREST.

Plaintiffs filed their Complaint on June 28, 2022, and their Amended Complaint on August 26, 2022. The State filed its Answer on September 7. The State’s Answer made clear to Plaintiffs that the unconstitutional practices regarding SWEPT were continuing and there was imminent and irreparable harm. For that reason, Plaintiffs filed a preliminary injunction to enjoin the State from setting any negative local education rates and from allowing municipalities to retain excess SWEPT funds. *See* Pl. Mot. for Prelim. Inj. ¶ 1. Plaintiffs stressed to this Court the urgency of the harm they, and taxpayers throughout the State, would suffer absent an injunction. *See* Pl. Memo. for Prelim. Inj. at 18–19. Among other threats, the DRA Commissioner is in the middle of issuing warrants to localities to begin the irreversible collection process from taxpayers across this State. *See id.* Within the month of October, (1) the Plaintiffs’ Motion for a Preliminary Injunction, (2) the State’s Objection, and (3) the Plaintiffs’ Reply to the State were all filed with this Court. Four days after Plaintiffs’ reply, both parties appeared to argue the motion. The Coalition, despite adequate notice, requested to intervene on the morning of oral argument.

The Coalition tries to justify their delay by claiming that they “only learned this week of Plaintiffs’ changed injunction request . . .” Mot. to Intervene at ¶ 17. In reality, at the outset of Plaintiffs motion for a preliminary injunction, Plaintiffs have maintained that they seek to enjoin the DRA Commissioner’s current administration of the SWEPT. *See* Pl. Mot. for Prelim. Inj at ¶ 1. In fact, the Plaintiffs have argued this since the case began. *See* Amended Compl. ¶ B. And,

in any event, the Interveners admit that they learned of an alleged impact to their interests last week, upon the filing of Plaintiffs' reply. Yet Interveners still ask this Court to delay proceedings by more than a week despite already having a week to prepare the filing of any brief. Lacking a danger of having their interests "sacrificed were the court to deny the privilege," *Snyder*, 134 N.H. at 3, this Court should deny the Coalition's Motion to Intervene and for Leave to File Brief.

CONCLUSION

The Coalition's motion to intervene should be denied because the risk of irreparable harm faced by Plaintiffs outweighs any benefit to the Coalition. The Coalition failed to timely intervene in a manner that would still protect Plaintiffs' interests in resolving this issue before the issuing of further warrants. The Coalition's interests are already adequately represented in this matter and the State has already proffered evidence of alleged harm to the excess towns of an injunction. Accordingly, an intervention is unnecessary to protect their interests and should be denied.

If, in the alternative, the Court is inclined to grant intervention, Plaintiffs ask the Court to limit intervention to the litigation of the preliminary injunction motion only and allow the Coalition two days to file a brief.¹ The Plaintiffs ask one day to potentially respond to any pleading filed by the Coalition.

¹ The Coalition's request for intervention is vague and it is unclear to Plaintiffs whether the intervention is limited to the litigation of the Preliminary Injunction or to the entire case. To the extent that the Coalition seeks to intervene beyond the injunction and in the merits of the case, Plaintiffs request a separate briefing schedule to litigate that issue. Plaintiffs believe that the Coalition lacks standing to intervene in this case and an intervention would not further any interest as any evidence or argument made by the Coalition does not affect the question of whether the SWEPT as administered is unconstitutional – an interest already defended by the State.

Dated: Concord, New Hampshire
November 8, 2022

Respectfully submitted,

/s/ Natalie J. Laflamme

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Objection was sent via the court's electronic filing system to all parties of record on this 8th day of November 2022.

/s/ Natalie Laflamme
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