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**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

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NEW HAMPSHIRE
SUPREME COURT

2019 APR 15 P 12: 31

Case No. 2018-0171

Fred S. Teeboom

v.

City of Nashua

Daniel Moriarty

v.

Jim Donchess, Mayor, City of Nashua and

City of Nashua

APPELLEES' SUPPLEMENTAL MEMORANDUM OF LAW

QUESTIONS ASKED:

On March 26, 2019, the Court issued an order requesting supplemental briefs on the following two questions:

1. Do the 2018 amendments to Part I, Article 8 of the State Constitution apply retroactively? If so, is there any dispute that Teeboom has standing pursuant to those amendments?
2. If the 2018 amendments to Part I, Article 8 of the State Constitution do not apply retroactively, has Teeboom articulated a concrete, particularized injury that is distinguishable from the generalized wrong allegedly suffered by the public at large?

ANSWERS AND ARGUMENT:

1. The 2018 amendments to Part I, Article 8 of the State Constitution do not apply retroactively. However, even if the court determines that they do, Mr. Teeboom would still not have standing pursuant to those amendments as the Superior Court properly found that Mr. Teeboom's dispute was not capable of judicial redress.

An amendment to Part 1, Article 8 of the State Constitution was approved by New Hampshire voters in November of 2018. The amendment included, in part, the following language:

[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. pt. 1, art. 8. Constitutional Amendment Concurrent Resolution ("CACR") 15, 2018 Session, providing for this proposed constitutional amendment, states that "if the proposed amendment is approved by 2/3 of those voting on the amendment, it becomes effective when the governor proclaims its adoption". Governor Christopher Sununu proclaimed this amendment's adoption on December 5, 2018, making that the effective date of this constitutional amendment.

By its plain language, the legislature stated when the constitutional amendment would become effective. "[I]t becomes effective when the governor proclaims its adoption". CACR 15, 2018 Session. There is no language in the concurrent resolution or the amendment that suggests or refers to any retroactive application. There could have been such language if it was desired or intended. Mr. Teeboom filed his Complaint in this matter on April 12, 2017, well

before the constitutional amendment's effective date of December 5, 2018. In order to be eligible to obtain relief and in order "[f]or a court to hear a party's complaint, the party must have standing to assert the claim." Gen. Elec. Co. v. Comm'r, N.H. Dep't of Revenue Admin., 154 N.H. 457, 461 (2006). See also Superior Court Rule 8, which states the complaint must show that the pleader is entitled to relief. As the plaintiff's standing must exist at the time the complaint is filed, Mr. Teeboom is not entitled, over a year and a half after filing his complaint, to utilize the new "taxpayer" status for standing from this subsequent constitutional amendment.

Rix v. Asadoorian, 103 N.H. 330 (1961) analyzed a situation involving a constitutional amendment similarly. Part 1, Article 20 of the State Constitution was amended in 1960, such that the value in controversy had to exceed \$500 in order to be entitled to a jury trial, where it previously only had to exceed \$100. The amendment was approved by the voters on November 8, 1960, but became effective on November 30, 1960, when it was proclaimed by the Governor. "At the time the defendant requested trial by jury, as well as when the plaintiff moved to have this case tried by the court on November 28, 1960, the amendment had not taken effect and the defendant was entitled to trial by jury as it formerly existed in cases where the value in controversy exceeds one hundred dollars." Id. at 333. A party's right to a jury trial was considered at the time it was asserted; the question of Mr. Teeboom's standing needs to be considered when he took action and filed his complaint.

We can also consider the related issue of assessing the retroactivity of statutory laws that are passed while an action is pending or on appeal. Part 1, Article 23 of the State Constitution states that "[r]etroactive laws are highly injurious, oppressive, and unjust. No such law, therefore, shall be made, either for the decision of civil causes, or the punishment of offenses." Courts have distinguished between changes to procedural laws and changes in substantive laws.

We have long held that statutes are presumptively intended to operate prospectively. When the legislature is silent as to whether a statute should apply prospectively or retrospectively, ...our interpretation turns on whether the statute affects the parties' substantive or procedural rights. When a statute is remedial or procedural in nature, it may be applied to cases pending at the time of enactment. If application of a new law would adversely affect an individual's substantive rights, however, it may not be applied retroactively.

Appeal of Tina Silk, 156 N.H. 539, 542 (2007) (internal citations omitted).

While there is no precise definition of either substantive or procedural law, it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress....By definition substantive laws establish new rules, rights, and duties or change existing ones, while procedural laws prescribe a method for enforcing a substantive right and relate to the form of the proceeding or the operation of the laws.

Petition of N.H. Secretary of State and N.H. Attorney General, No. 2018-0208, January 24, 2019

(internal citations omitted).

The 2018 constitutional amendment established that one element of standing could now be satisfied based solely on taxpayer status, with no requirement that the taxpayer has to demonstrate that his or her personal rights were impaired or prejudiced. Creating this new way to satisfy part of the plaintiff's right to sue is a substantive law, which should not be applied retroactively.

The city acknowledges that "it has long been established that the provisions of part 1 of our Constitution, which constitutes our Bill of Rights, are restrictions on government actions which protect our private citizens, not the government", and thus the city has no standing to assert any rights under Article 23. Town of Nottingham v. Harvey, 120 N.H. 889, 898 (1980). However, the city believes the established framework of an Article 23 analysis is useful in considering whether or not a constitutional amendment should be retroactively applied.

Furthermore, the question of whether or not the 2018 amendments to Part 1, Article 8 of the State Constitution apply retroactively to Mr. Teeboom is not dispositive to the case at hand.

“[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regards to an actual, not hypothetical, dispute, which is capable of judicial redress.” Duncan v. State, 166 N.H. 630, 642-43 (2014) (citations omitted). The 2018 constitutional amendments only address satisfying the first element of standing - that of having a personal legal or equitable right adverse to the other party regarding an actual dispute. The constitutional amendments allow this requirement to be satisfied by one’s status as a taxpayer, no longer having to show that any personal rights were impaired or prejudiced.

However, the second required element of standing is that the dispute is capable of judicial redress. “The requirement that parties have personal legal or equitable rights that are capable of being redressed by the court tends to assure that the legal questions presented to the court will be resolved...in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.” Id. at 643 (citations omitted). As the Superior Court stated in the Order on Standing, even if the Court were to rule that the city had violated the spending cap, “such a decision would only provide ‘redress’ for the plaintiffs’ claimed injuries... if the spending cap itself is enforceable.” Appellant’s Brief at 33. “In other words, if the spending cap is unenforceable, then the Court could not provide the plaintiffs a remedy for the defendants’ alleged spending cap violation(s).” Id. at 33-34. As the Court found that the current version of the spending cap violates State law and is unenforceable, “the Court cannot provide any redress for the plaintiffs’ claims, and thus the plaintiffs lack standing to pursue their claims in the context of this action.” Id. at 34.

In summary, even if the 2018 amendments to Part 1, Article 8 of the State Constitution do apply retroactively, Mr. Teeboom would still not have standing in this matter because his dispute remains incapable of judicial redress.

2. Assuming that the proper standing analysis is under Duncan v. State, 166 N.H. 630 (2014), Mr. Teeboom has not articulated a concrete, particularized injury that is distinguishable from the generalized wrong allegedly suffered by the public at large.

In order to have standing, Mr. Teeboom must “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.” Duncan at 642-43 (citations omitted). A “generalized interest in an efficient and lawful government” without a definite and concrete personal injury is insufficient to meet the constitutional requirements for standing in New Hampshire. Id. at 648.

While Duncan left the door open in saying that “[w]hen a taxpayer has a sufficiently personal and concrete interest to confer standing, the taxpayer may seek judicial relief,” Id., Mr. Teeboom has not alleged or offered proof of any such sufficiently personal and concrete interest. Mr. Teeboom claims he will pay increased taxes due to the actions of the Mayor and Nashua, and that is a qualifying personal injury.

However, his claim that the city’s actions resulted in increased property taxes to him is speculation. The record shows that on June 13, 2017, the Nashua Board of Aldermen, by a vote of 10 to 5, adopted a budget for the 2018 fiscal year. They did so relying on “spending cap” calculations which flowed as a result of the earlier adoption of O-17-031 which eliminated operation and maintenance spending out of the Wastewater Fund from the spending cap

calculation. If O-17-031 had not been passed, those same ten aldermen could have adopted the exact same budget by relying on section 56-d of the city charter to exempt some or all of debt service or capital improvement expenditures from the spending cap calculation. The impact on any taxpayer would be identical.

The alleged injury is also conjectural and hypothetical. The Mayor and Board of Aldermen have other ways to respond to anticipated tax increases. For example, the Mayor and Board of Aldermen could have raised the amount of unassigned general fund balance they annually choose to apply to the tax rate. This would affect the amount of property taxes paid by a taxpayer. In short, one cannot say that this one specific action by the Mayor and Board of Aldermen directly resulted in an increase in any particular taxpayer's property tax, as there are other actions that were taken and could be taken by the Mayor and Board of Aldermen that affect the amount of property tax paid.

As any potential impact on Mr. Teeboom's taxes is not a certainty, it is not a definite and concrete injury sufficient to confer standing. Moreover, any injury – such as the increased property tax alleged in this case - is shared generally by all other taxpayers in the city, meaning it is not a distinguishable, particularized injury.

It is likely that this extreme difficulty in showing that one action by the Mayor and Board of Aldermen directly and specifically resulted in a property tax increase is the reason the 2018 constitutional amendments allow the injury to be solely based on taxpayer status, without requiring a particular impairment or prejudice to the taxpayer's personal rights.

Finally, as discussed above, the Superior Court's Order denied Mr. Teeboom standing because the Court found it could not provide any redress for Mr. Teeboom's claims. The Superior Court said in footnote 11 of its Order on Standing that because it found that the

Plaintiffs lacked standing on other grounds, “the Court need not (and affirmatively declines to) reach this issue [of whether or not the Plaintiffs had standing under the Duncan case]”.

Appellant’s Brief at 43.

April 15, 2109

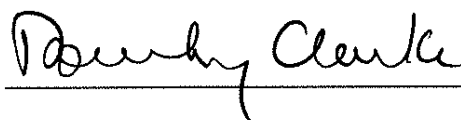
Respectfully submitted,

Jim Donchess, Mayor

City of Nashua

By their Attorney

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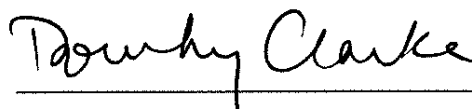
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I hereby certify that two copies of the foregoing supplemental memorandum of law were mailed this date to Charles G. Douglas, III, Esq. and Seth J. Hipple, Esq.



Dorothy Clarke