STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
DOCKET NO.: 703-12-18 Wncv

HUNTINGTON SCHOOL DISTRICT,
Plaintiff,

v.

VERMONT STATE BOARD OF EDUCATION;
and
VERMONT AGENCY OF EDUCATION;
and
MOUNT MANSFIELD MODIFIED UNION SCHOOL DISTRICT
Defendants.

DEFENDANT MOUNT MANSFIELD MODIFIED UNION SCHOOL DISTRICT'S MOTION TO DISMISS

NOW COMES the Defendant, Mount Mansfield Modified Union School District (or "Mount Mansfield"), by and through its attorneys, Lynn, Lynn, Blackman & Manitsky, P.C., and hereby moves pursuant to V.R.C.P. 7, 12(b)(1), and 12(b)(6) for an order dismissing Huntington School District's (or "Huntington") claims against Mount Mansfield. In support of this request, Mount Mansfield submits the following Memorandum of Law.

Memorandum of Law

This action arises out of the State Board of Education's November 30, 2018 Final Report and Order ("Order") requiring the Huntington School District to merge with the Mount Mansfield

Modified Union School District into a single school district.[1] The full text of the Order concerning the merger of Huntington and Mount Mansfield states:

> Pursuant to the authority and mandates in 2015 Acts and Resolves No. 46, Sec. 8 and Sec. 10, as amended, and the provisions of 16 V.S.A. ch. 11, be it resolved that as of the date of this Order, the State Board of Education hereby:
>
> * * *
>
> 16) *Designates* the **Huntington School District** as a **prekindergarten through grade 12 member** of the Mount Mansfield Modified Unified Union School District *provided that* a majority of the voters of the Mount Mansfield Modified Unified Union School District present and voting at an annual or special meeting warned for the purpose on or before July 1, 2019 vote to approve the addition of the Huntington School District as a prekindergarten through grade 12 member pursuant to 16 V.S.A. § 721, at which time the Mount Mansfield Modified Unified Union School District:
>
> a) Shall be a unified union school district;
>
> b) Shall provide for the prekindergarten through grade 12 education of students residing in the town of **Huntington** beginning on July 1, 2019 under the terms and conditions specified in the union district's voter-approved Articles of Agreement; and
>
> c) Shall supplant the Huntington School District pursuant to 16 V.S.A. ch. 11 on July 1, 2019, except that the Huntington School District shall remain in existence after that date for no more than six months for the sole purpose of completing any audits or any other task that the unified union school district is legally unable to perform.

(emphasis in original).[2]

While the Order "designates" Huntington as member of Mount Mansfield, the Order conditions the designation on an affirmative vote by the current electorate of Mount Mansfield.

---

[1] For purposes of this motion only, Mount Mansfield is assuming all of these facts to be true. *See Birchwood v Land Co. v. Krizan*, 2015 VT 37, ¶ 6, 198 Vt. 420, 115 A.3d 1009. Mount Mansfield specifically reserves the right to contest all facts raised in Huntington's Complaint through filing of an Answer if this Motion to Dismiss is denied.

[2] The Complaint quotes the Order at length, which is incorporated by reference and can be considered by the Court. *See Davis v. Am. Legion, Dep't of Vermont*, 2014 VT 134, ¶ 13, 198 Vt. 204, 209, 114 A.3d 99, 103–04 ("Where pleadings rely upon outside documents, those documents 'merge[ ] into the pleadings and the court may properly consider [them] under a Rule 12(b)(6) motion to dismiss.' The trial court may consider such documents without converting the motion into one for summary judgment.") (quoting *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n. 4, 186 Vt. 605, 987 A.2d 258 (mem.)). *See also Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991) ("we have held that the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference"). The full Order is available at https://education.vermont.gov/sites/aoe/files/documents/sbe-act46-final-report-order-statewide-school-district-merger-decisions.pdf.

At the same time, the State Board Order does not order the Mount Mansfield to hold a vote accepting Huntington as a member, nor does the Complaint suggest as much. Indeed, the Complaint acknowledges that the State does not have authority to order Mount Mansfield to accept the merger under Act 46. Compl. ¶¶ 55-62. As a result, the merger can only occur if Mount Mansfield holds a vote and a majority of its voters accept the merger.

Since the Complaint does not allege that a vote is pending or even contemplated, any claim by Huntington against Mount Mansfield is not yet ripe.

Throughout its Complaint, Huntington alleges numerous claims against the Vermont State Board of Education and the Vermont Agency of Education concerning their decision to merge Huntington with Mount Mansfield. The Complaint contains no allegations showing that Mount Mansfield was involved with the State's decision. Nor does it allege that Mount Mansfield will hold such a vote, or that its voters would ratify such a decision. Mount Mansfield is simply here because it might, at some later date, merge with Huntington, assuming the State Defendants' Final Report and Order is upheld, assuming Mount Mansfield puts the matter to a vote, and assuming that a majority of Mount Mansfield voters might approve of the merger. Such speculative claims cannot be maintained, even granting Vermont's liberal pleading standard.

The real conflict is between Huntington and the State. Mount Mansfield should not be forced into litigation where it played no part in the State's decision and order to merge, it was not ordered to merge, and has taken no action to vote to permit Huntington to join the Mount Mansfield Modified Union School District. The Court should dismiss Mount Mansfield from this case.

Argument

It is an oft-stated precept that in order for the Court to review a controversy, such controversy must be "ripe" for review. The Vermont Supreme Court has instructed that "'courts

should not render decisions absent a genuine need to resolve a real dispute,' and should not render decisions on claims that are 'purely speculative . . . involving events that are contingent upon circumstances that may or may not occur in the future.'" *Skasiw v. Vermont Agency of Agriculture*, 2014 VT 133, ¶ 31, 198 Vt. 187, 112 A.3d 1277 (quoting *In re Robinson/Keir P'ship*, 154 Vt. 50, 57, 573 A.2d 1188, 1192 (1990)); *see Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (stating "threatened injury must be 'certainly pending' to constitute injury in fact" under case and controversy requirement). *See also Negotiations Comm. of Caledonia Cent. Supervisory Union v. Caledonia Cent. Educ. Ass'n*, 2018 VT 18, ¶ 8, 184 A.3d 236, 239 (reviewing dismissal for lack of subject matter jurisdiction based on ripeness, explaining that the parties "interests and positions" must be "concrete, clear, and adverse" to be ripe).

Huntington's claims against Mount Mansfield are predicated on at least three contingencies: (1) that this Court upholds the Final Report and Order rendered by the State Defendants; (2) that Mount Mansfield, at some date, chooses to warn and hold a vote permitting Huntington to join; and (3) that the majority of Mount Mansfield voters, at some date, vote to approve the merger. These contingencies vitiate all of Huntington's claims against Mount Mansfield. Because Huntington's claims against Mount Mansfield are not ripe for review, Mount Mansfield should be dismissed from this action.[3]

I. The legislative and statutory framework establish that the State has not ordered Mount Mansfield to hold a vote merging with Huntington and thus Huntington's claims against Mount Mansfield are not ripe.

[3] Notably, if Huntington proceeds against the State but without Mount Mansfield, it has every opportunity to achieve the same results. If Huntington prevails and the Court preliminarily enjoins the merger, it is the functional equivalent of the Court granting an injunction to stop Mount Mansfield from voting. The same is true of any permanent injunction or declaration invalidating the State Board Order forcing merger. The difference is that while Huntington's claims against the State are ripe, its claims against Mount Mansfield are not.

Between 2010 and 2017, the Legislature passed a series of laws designed to "address a statewide trend of declining student enrollment and increased education costs." *Paige v. State of Vermont, et al.*, 2018 VT 136, ¶ 2, __ Vt. __, __ A.3d ___; Compl. ¶¶ 20–36. These laws, known as Act 46 and Act 49, "established a multi-year process for merging existing school districts into newly created districts with preferred governance structures." *Paige*, 2018 VT 136, ¶ 2.

As stated in the Complaint, Mount Mansfield became a modified union school when its current members, pursuant to 2010 Acts and Resolves No. 153, as amended by 2012 Acts and Resolves No. 156, voted to merge on November 4, 2014. Compl. ¶¶ 4, 9-17. Under Act 156, Sec. 17, a modified unified union school district is a "regional education district" and a union district. Huntington voted against the merger and did not join the new union district in 2014. Compl. ¶ 16. As such, Huntington is neither a union district nor a regional education district.

Sections 8 & 10 of Acts 46, as amended by Act 49, authorize the State Board to issue an order merging existing school districts consistent with the goals of the Act. However, Act 49, Sec. 10(e)(3)(B) states that the State Board's authority to merge districts does not apply to a union district that formed between June 30, 2013 and July 2, 2019 and "is a regional education district or any other district eligible to receive incentives pursuant to 2010 Acts and Resolves No. 153, as amended by 2012 Acts and Resolves No. 156."

Accordingly, Sec. 10, authorizing the State Board to order the merger of districts, is not applicable to Mount Mansfield as a modified unified union school district. *See* Compl. ¶¶ 56-59. In other words, the State Board does not have authority to order Mount Mansfield to merge.

As noted above, in fact, the Order designates Huntington as a member of Mount Mansfield, but does not order Mount Mansfield to accept Huntington. Instead, it states that Huntington will

become a member "provided that" the Mount Mansfield voters approve it "pursuant to 16 V.S.A. § 721." *See* Compl. ¶ 64.

Title 16, chapter 11 concerns the formation and operation of "union school districts" in Vermont and largely provides the statutory framework within which Act 46 operates. Section 721 concerns the "Inclusion of additional school districts," including the process when a district is to become a member of an existing union district:

> (a) Action initiated by district outside the union. After preliminary study by a district school board and approval by the State Board, and when a majority of voters present and voting at a school district meeting duly warned for that purpose vote to apply to a neighboring union school district for admission as a member of the union district, the vote shall be certified by the clerk of the school district to the clerk of the union school district and to the Secretary of Education. If, within two years from the date of that vote a majority of those voting at a meeting of the union school district duly warned for that purpose, votes to include the additional school district as a member of the union, the clerk of the union shall certify the results of that vote to the Secretary of Education. The Secretary of Education shall designate the additional school district a member of the union, and so certify to the Secretary of State. The Secretary of State shall record such certification in accordance with the provisions of section 706g of this title, which shall have the effect as provided therein.

(emphasis added).[4]

Putting aside the allegations in the Complaint about whether the State Board can order Huntington to merge without a vote, *see* Compl. ¶¶ 65-69, the plain language of § 721(a) requires approval from the voters of an existing union school prior to the additional district becoming a member. The language conditionally states, "If, within two years" the existing union district votes to include the member, only then does the additional district join the existing district. In other words, § 721 requires the approval of the existing union district voters, but does not require the existing union to ever hold such a vote.

[4] Section 721(b) concerns "Action initiated by union school district" to add additional members to an existing union. There are no allegations suggesting that Mount Mansfield initiated the proposed merger with Huntington.

The conditional language in § 721 ("If") mirrors the conditional language in the Order ("provided that"), reflecting that the Huntington can only become a member of Mount Mansfield if Mount Mansfield both decides to put the matter to a vote and a majority votes to allow Huntington to join. *See, e.g., Landscape Design & Const., Inc. v. Harold Thomas Excavating, Inc.*, 604 S.W.2d 374, 377 (Tex. Civ. App. 1980), *writ refused NRE* (Dec. 17, 1980) (noting that inclusion of phrases of conditional language like "if" or "provided that" generally make performance specifically conditional).

In sum, the State Board does not have the authority under Act 46 to order Mount Mansfield to accept Huntington as a member, nor has it ordered Mount Mansfield to do so. Mount Mansfield has the authority to hold a vote to accept Huntington as a member, but it is not required to do so, nor is any pending vote planned. Accordingly, Huntington's claims are not ripe.

II. Huntington's claim that Mount Mansfield acted outside of its statutory or legal authority is not ripe.

Count I is predicated on the theory that the State Defendants acted outside of their statutory and/or legal authority when they issued the Final Report and Order. Count I alleges that the two State Defendants exceeded their powers under Act 46 as amended by Act 49 by "effectively order[ing] the merger of Huntington and Mount Mansfield." Compl. ¶ 61. The use of the word "effectively" is telling, given that the Order does not actually order Mount Mansfield to merge.

The Complaint does not identify any statutory or legal power that Mount Mansfield exceeded—it rests on the speculative claim that if the Final Report and Order remains in effect and if Mount Mansfield voters vote to approve the merger, then Mount Mansfield will have acted outside of its statutory or legal authority by approving the merger. The claim depends upon a number of contingencies that make this claim too speculative to survive a motion to dismiss. *See Tarrant Reg'l Water Dist v. Herman*, No. 07–CV–45, 2010 WL 2817220, at *3 (W.D. Okla. Jul.

16, 2010) (granting motion to dismiss where plaintiff's claim was predicated on water rights owned by Apache Tribe that might be sold to plaintiff, which, if occurred, would allow plaintiff to pursue a water application, which may or may not be granted by Oklahoma, which then would allow plaintiff to sue Oklahoma for an alleged unconstitutional statutory scheme); *Carlson v. City Const. Co.*, 606 N.E.2d 400, 412–13 (Ill. Ct. App. 1992) (finding damages claim in wrongful death case too speculative where claim asserted decedent would have become an engineer but for his death, even though decedent had not completed his GED or gone on to college).

Here, it is possible that the Court will resolve Huntington's claims against the State related to the Order without Mount Mansfield ever holding a vote. Huntington's Count I claim should be dismissed as it applies to Mount Mansfield because the parties "interests and positions" are not "concrete, clear, and adverse" enough to be ripe for review. *See Negotiations Comm. of Caledonia Cent. Supervisory Union*, 2018 VT 18, ¶ 8, 184 A.3d 236, 239.

III. Huntington's claim that Mount Mansfield violated of the separation of powers doctrine is not ripe.

Count II contains only one allegation against Mount Mansfield: that through the Final Report and Order, the Vermont State Board of Education and the Vermont Agency of Education impermissibly delegated to Mount Mansfield the power to "unilaterally dissolve Huntington." Compl. ¶ 80. It is unclear how Mount Mansfield can be viewed as having any power to dissolve Huntington; at most Mount Mansfield can only except or reject Huntington as a member of its union district under the process in Title 16, chapter 11; it is solely the State that ordered Huntington to merge. Without the Order there is no reason for Mount Mansfield to follow the process under 16 V.S.A. § 721.

Regardless, as with Count I, Count II must be dismissed as against Mount Mansfield because it rests upon too many contingencies rendering it speculative and unripe for review. *See*

Texas v. United States, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."). There is no action by Mount Mansfield for the Court to review. It has not been ordered to merge and has taken no action to hold a vote approving the designation of Huntington as a member.

The legality/constitutionality of the Order as it concerns Huntington is ripe and properly before the Court. If the Order is deemed constitutional and Mount Mansfield voters ultimately vote to approve the merger, it necessarily means that Mount Mansfield's actions would be constitutional because it would be complying with a properly issued order. If the Order is deemed unconstitutional, there would be no basis for Mount Mansfield to vote.

Because the outcome of the Report and Order's constitutionality controls Mount Mansfield's next steps, at this juncture, any claims brought against it regarding the Order must be dismissed as speculative and unripe for review, particularly given that the Order does not mandate Mount Mansfield to vote and there is no vote pending or planned. Count II should be dismissed as to Mount Mansfield.

IV. Huntington's takings claim against Mount Mansfield is not ripe.

Huntington alleges that by forcing it to merge with Mount Mansfield, the State Defendants have taken property from Huntington without just compensation. As no vote is ordered or pending, nothing has been taken.

Huntington appears to rest its takings claim against Mount Mansfield on the fact that Mount Mansfield would receive Huntington's assets, assuming the merger goes forward. The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend V. "The purpose of this prohibition is to prevent [the] 'Government from forcing some people to alone bear public burdens which, in all

fairness and justice, should be borne by the public as a whole.'" *Am. Pelagic Fishing Co., L.P. v. United States*, 379 F.3d 1363, 1371 (Fed. Cir. 2004) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978)). "[T]he court must determine whether the governmental action at issue amounted to a compensable taking of that property interest." *Id.* at 1372.

Here, Huntington's takings claim as applied to Mount Mansfield fails because Mount Mansfield has taken no governmental action and thus has not "taken" anything from Huntington. Accordingly, the claim is not ripe.

Whatever Huntington's claim against the State Defendants who have ordered it to merge, presently, Mount Mansfield is merely the potential receptacle of the State Defendants' actions. Because the Complaint is devoid of any allegation that Mount Mansfield was involved in the State Defendants' decision to issue the Final Report and Order, and because Mount Mansfield has taken no governmental action, and Huntington cannot plausibly claim that Mount Mansfield's inactions constituted a taking. Count III should be dismissed as applied to Mount Mansfield.

V. Huntington's claim that Mount Mansfield violated the Vermont APA or the Due Process Clause is not ripe.

To support its claim that the Defendants violated Vermont's Administrative Procedure Act ("APA"), 3 V.S.A. § 800, *et seq.*, Huntington claims that the State Defendants' Final Report and Order was not "the product of rulemaking nor the product of contested-case procedures." Compl. ¶ 97. Huntington makes no claim that Mount Mansfield was involved with the Final Report and Order. Whether the State Defendants provided Huntington with an "opportunity . . . to present evidence, cross-examine, witnesses, or exercise other rights intrinsic to an adjudicative process," Compl. ¶ 98, this provides no basis for holding Mount Mansfield liable for purportedly violating Vermont's APA. Indeed, Mount Mansfield was not involved whatsoever in the proceedings

leading up to the State Defendants' issuance of their Final Report and Order. Given the allegations, it has hard to see how Count IV would even apply to Mount Mansfield.

Likewise, Count IV is devoid of any allegations tending to show that Mount Mansfield deprived Huntington of due process. Mount Mansfield has taken no action against Huntington; unless the Final Report and Order is upheld and unless Mount Mansfield holds a vote and a majority of its voters approve of the merger, Huntington will have no basis for taking action against Mount Mansfield. The Complaint makes no claim and provides no basis for finding that Mount Mansfield deprived Huntington of due process with decisions that may or may not occur, sometime in the future. Count IV should be dismissed as applied to Mount Mansfield.

Conclusion

For all the foregoing reasons, Mount Mansfield respectfully requests that the Court grant its motion and dismiss it from this case.

DATED at Burlington, Vermont this 16th day of January, 2019.

MOUNT MANSFIELD MODIFIED UNION SCHOOL DISTRICT

By Its Attorneys,

LYNN, LYNN, BLACKMAN & MANITSKY, P.C.

By _____

Pietro J. Lynn, Esq.
Sean M. Toohey, Esq.
Lynn, Lynn, Blackman & Manitsky, P.C.
Attorneys for Defendant
76 St. Paul Street, Suite 400
Burlington, VT 05401
plynn@lynnlawvt.com