

**THE STATE OF NEW HAMPSHIRE**

**HILLSBOROUGH NORTH, SS.**

**SUPERIOR COURT**

**Docket # 218-2020-CV-00008**

**PAMELA D. KELLY, et al.**

**v.**

**TOWN OF NOTTINGHAM**

**DEFENDANT'S MOTION TO STRIKE CLASS ACTION**

NOW COMES the Defendant, Town of Nottingham, by and through counsel, Upton & Hatfield, LLP, and hereby submits this Motion to Strike Class Action, stating in support as follows:

1. The Plaintiffs filed this case as a class action lawsuit under N.H. Super. Ct. R. 16. They specified 26 roads at issue in the Complaint within the boundaries of the Town. These roads are located on two separate lakes in the Town: Pawtuckaway Lake and Nottingham Lake.

2. Since the filing of the Complaint, Town residents placed an article on the warrant for Highland Road, one of the roads listed by the Plaintiffs, to be accepted as a class V highway. This article approved by the voters in June 2020 at Town Meeting, leaving just 25 roads ripe for declaratory judgment in this matter.

3. Out of the 25 roads, only eleven such roads are represented by a named Plaintiff.<sup>1</sup> Of these eleven Plaintiffs, none of them live on Nottingham Lake. The roads listed by the Plaintiffs include five roads on Nottingham Lake, including Langley Lane, Little John Lane,

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<sup>1</sup> Named Plaintiff Cheryl LeBlanc resides on Highland Rd. She is the twelfth named Plaintiff, but her road is no longer at issue for the declaratory judgment requested by the Plaintiffs. Ms. LeBlanc was a signatory on the petition for the article which made Highland Rd a class V highway.

Nottingham Lane, Sherwood Lane, and Swan Drive (f/k/a Marston Lane). Maps of the area in question and the two lakes are attached to this Motion as Exh. A.

4. To certify any part of a case as a class action, the Court must find that the Plaintiffs have proven all six factors laid out in N.H. Super. Ct. R. 16:

- a. That joining all Plaintiffs in one action would be not practicable,
- b. That common questions of law or fact predominate over any individual interests,
- c. That the named Plaintiffs have claims which are typical of the class as a whole,
- d. That the representative parties will adequately represent the class,
- e. That a class action is superior to all other forms to adjudicate the issues justly and fairly, and
- f. That the attorney selected will adequately represent the entire class.

5. The present case should not be certified as a class action because the Plaintiffs have failed to meet their burden with respect to the second and fourth factors.

6. The second factor is really a combination of two questions: (1) whether the class shares at least one common question of fact or law, referred to as “commonality”; and (2) whether those common questions outweigh any impact to the individual class member, referred to as “predominance.” In re Bayview Crematory, LLC, 155 N.H. 781, 785 (2007).

7. While the question of commonality presents a relatively low threshold, the Plaintiffs must show the class shares “at least one significant question of law or fact in common with each other.” Id.

8. In their Complaint, the Plaintiffs allege that the common question of fact supporting a class action is “the manner in which each Camp Road was created and has been maintained by the Respondent.” Pl. Compl. ¶ 28.

9. Instead of demonstrating a common factual issue, the purported question shows that each road must be considered independently, both in how the road was created and how it has been maintained. Evidence will be required as to how each Camp Road was created and how each was maintained after creation. The Plaintiffs cannot use an attempted class action to get around their burden that proof must be presented for each road specifically, and the Town does not agree that all Camp Roads were created or maintained identically.

10. Furthermore, the Town does not agree with the Plaintiffs that any of these Camp Roads were impliedly accepted by the Town before the 1995 or 2011 emergency lane votes. Thus, the Plaintiffs will need to set forth evidence for each Camp Road to prove its allegations that each was a class V road before 1995 or 2011.

11. The Town also does not agree that the entire length of each road listed in the Complaint has even been classified as an emergency lane at any point.

12. Essentially, the current matter before the Court will require a series of mini trials on each Camp Road individually before the Plaintiffs can be found to have met their burden. This does not demonstrate a common question of fact, and the Plaintiffs have not met their burden.

13. In addition, the “predominance” question of the second factor in the class action analysis demonstrates that the Plaintiffs cannot meet their burden for class certification.

14. In order to demonstrate predominance, “the issues common to the proposed class must outweigh the issues that are particular to the individual class members.” In re Bayview Crematory, LLC, 155 N.H. at 785. This factor is “far more demanding” than just looking at whether the individual class members have common questions of law or fact. Id. The policy behind this factor is the promotion of judicial economy and a uniformity of decision for persons

similarly situated. *Id.* at 785–86.

15. This requires the Court to consider the case as a whole “identifying the substantive issues that will control the outcome of the case, assessing which issues will predominate, and determining whether those issues are common to the class.” *Id.*

16. The Plaintiffs allege that “predominance” is met as each named Plaintiff is a landowner on a Camp Road, like the others in the class, and that the relief requested in the Complaint as to the repair, maintenance, and Town acceptance of the Camp Roads will adequately protect the interests of the class. Pl. Compl. ¶¶ 29, 32. No further explanation is provided by the Plaintiffs.

17. Instead of being a unified body, the facts show that this group of landowners does not have a predominant interest in having their road declared a class V highway. The named Plaintiffs may want the Town to assume ownership and maintenance of these roads, but the actions of the property owners do not bear this out for the class as a whole.

18. There are numerous instances of property owners treating these Camp Roads as they are currently classified: private roads. Some property owners have paved certain portions of the Camp Roads without approval or consent of the Town. On one road, a property owner is in the process of moving the road’s path of travel to be further from the house location. Other property owners have placed signs along the road specifically stating that the road is a “Private Road” and that visitors are not welcome.

19. It does not automatically follow that just because the named Plaintiffs wish to have their roads assumed by the Town, that this is a predominant issue and desire among the entire class. This is especially true as only eleven roads have representation in the named Plaintiffs and the roads around one lake—Nottingham Lake—have no representation at all.

20. Based on the lack of a common question of fact and a predominate issue that outweighs the individuals, the Plaintiffs cannot meet their burden under the second factor, and the Town respectfully requests that the Court refuse to certify this as a class action suit.

21. Similarly, the Plaintiffs have not met their burden with respect to the fourth factor: whether the named Plaintiffs will adequately represent the class. N.H. Super. R. 16(a)(4).

22. The named Plaintiffs have made it clear that they want all roads listed in the Complaint to be declared class V roads. As stated above, however, many property owners have visibly demonstrated their interest and desire to keep their road private. If the named Plaintiffs are only seeking for the Town to assume ownership of the road, they cannot represent these contradictory interests and cannot represent the interests of the entire class.

23. Without maintaining their burden of proof as to all six factors in N.H. Super. R. 16(a), the Plaintiffs have not set forth a suit that should be certified as a class action. The Town respectfully requests that the Court deny the Plaintiffs' request to do so.

WHEREFORE, the Town respectfully requests that this Honorable Court:

- a) Find the Plaintiffs have failed to meet their burden to show the second and fourth factors of the class action analysis; and
- b) Deny the Plaintiff's request in the Complaint to so certify this action as a class action;
- c) Schedule a hearing on this matter; and
- d) Grant any such further relief as is just and equitable.

Respectfully submitted,

**Town of Nottingham,**

By its Counsel,

**UPTON & HATFIELD, LLP**

Date: August 24, 2020

/s/ Susan Aileen Lowry  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I forwarded a copy of the within document via the Court's electronic filing system to James L. Soucy, Esq., opposing counsel of record.

/s/ Susan Aileen Lowry  
Susan Aileen Lowry

# EXHIBIT A

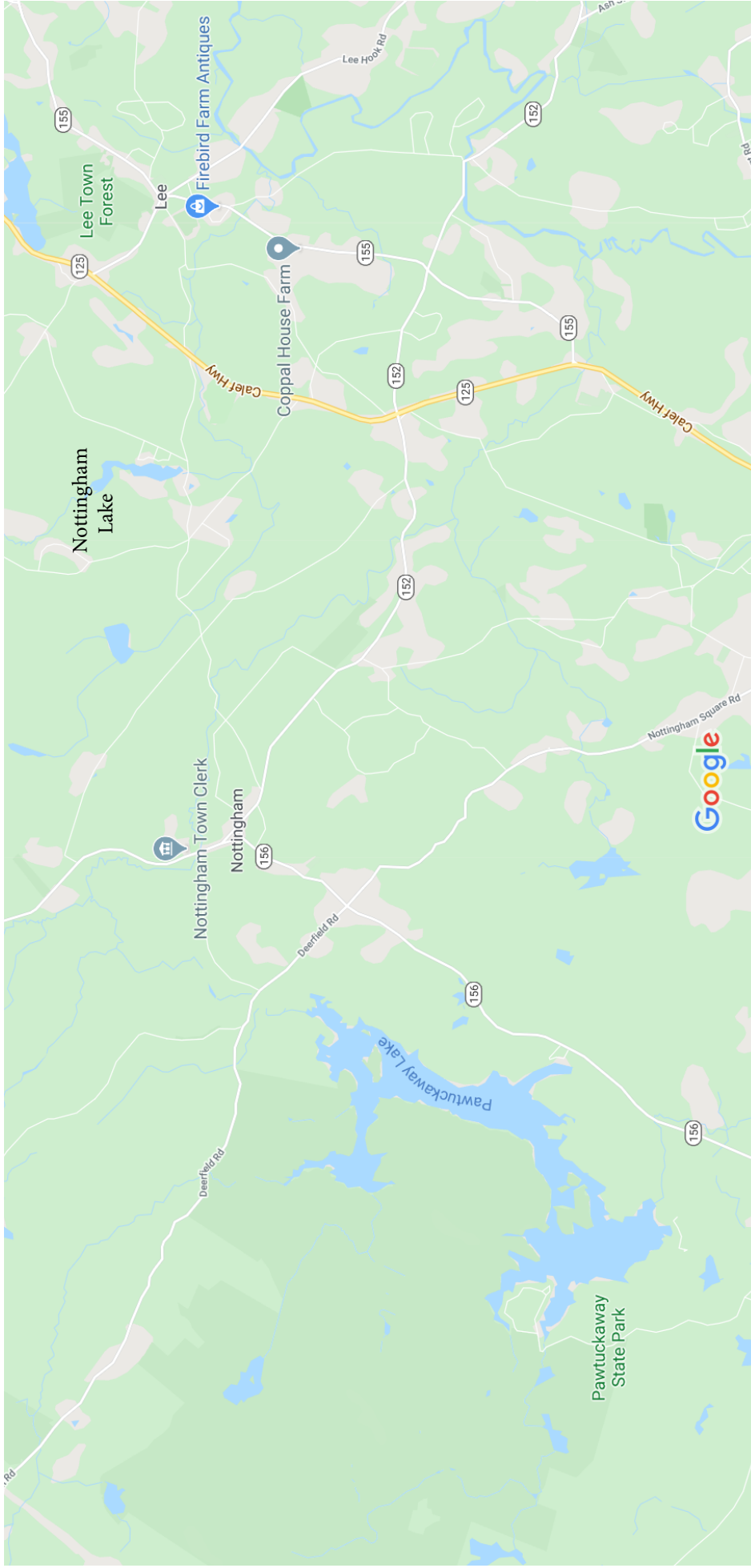


Exhibit A





Map data ©2020 2000 ft

# Google Maps

Map of Nottingham Lake



Map data ©2020 1000 ft