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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

RICHLAND DIVISION

NEW CINGULAR WIRELESS PCS, LLC, D/B/A AT&T MOBILITY, a Delaware limited liability company,

Plaintiff,

v.

CITY OF WALLA WALLA,

Defendant.

No. 4:23-cv-05162-SAB

PLAINTIFF'S RESPONSE TO MOTION TO INTERVENE BY BARBARA AND EVERETT KNUDSON

2/16/2024

Without Oral Argument

Plaintiff New Cingular Wireless PCS, LLC ("AT&T") submits its Response to the Motion to Intervene of Barbara and Everett Knudson ("Movants").

I. INTRODUCTION

Movants motion to intervene under Federal Rule of Civil Procedure 24 should be denied, since they have failed to establish two of the four requirements for intervention as a matter of right. Specifically, Movants (1) lack a significantly protectable interest relating to the property that is the subject of this action, and (2) they cannot establish that Defendant City of Walla Walla ("City") will not adequately represent Movants' alleged interests in this matter. Movants have also failed to satisfy the requirements for permissive intervention. They have failed to identify, let alone prove, a common question of law and fact between their claims or defenses and the main action. The Court should deny the motion.

II. FACTUAL BACKGROUND

In November 2022, Plaintiff AT&T applied for a conditional use permit to construct and operate a wireless telecommunication facilitiy consisting of a 65-foot faux tree and accessory equipment (the "Proposed Facility") on property owned by the First Church of God Blue Mountain in Walla Walla. Dkt. 1 (Complaint), ¶¶ 3, 24. The City held public hearings on AT&T's application (the "Application") (Dkt. 1, ¶¶ 28-34), and on November 2, 2023, served a Notice of Final Decision (the

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"Decision"). Dkt. 1 (Complaint), ¶ 35; *see also* Declaration of Jeff Bone, Ex. 1. The City found the Proposed Facility "does not meet [the] definition of 'stealth' because the proposed facility, which the applicant will attempt to make look like a tree, does not 'blend' into the surrounding environment, and is not otherwise effectively disguised." Ex. 1, ¶ 43. The City further concluded that "the proposed 'stealth' technology is not sufficient to mitigate the adverse impacts." Ex. 1, ¶ 46.

On December 1, 2023, AT&T initiated this litigation based on the Decision. Dkt. 1. On December 26, 2023, the City filed its Answer and Affirmative Defenses (Dkt. 6), and denied AT&T's allegation that the Hearing Examiner's Final Decision was unsupported by substantial evidence. Dkt. 6, ¶ 1.2. The City also denied all but 7 of AT&T's allegations and asserted 5 affirmative defenses. Dkt. 6, ¶¶ 2.1-2.5. The City's Prayer for Relief includes a request that the Court "dismiss the Complaint with prejudice" and "declare that AT&T is not entitled to approval of its proposed wireless communication facility." Dkt. 6, 6:15-7:5. Movants now seek intervention to ostensibly achieve the same objectives as the City. Dkt. 8. As set forth below, the Court should deny the motion.

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III. LEGAL ARGUMENT

A. Movants Cannot Meet The Requirements For Intervention As A Matter Of Right.

Intervention as a matter of right requires a showing of each of the following: (1) timely move to intervene; (2) a significantly protectable interest for the applicant that relates to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the their ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties to the action. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009). Movants cannot satisfy two of the four above-referenced requirements for intervention as a matter of right, and their motion should be denied.

1. Movants lack any significantly protectable interest relating to the adjacent property.

Movants admit they "are primarily interested in protecting the aesthetics of their home and their bed and breakfast business." Dkt. 8, 7:9-11. To demonstrate a significant protectable interest, an applicant must establish an interest protectable under some law, and a relationship between the legally protected interest and the claims at issue. *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011).

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Movants offer no legal authority for the proposition that they have a legally-protected interest in the aesthetic of their property due to a proposed use on a neighboring property. There is nothing in Washington law protecting Movants' claimed interest in the "aesthetics" of their business, nor do Movants cite any authority to support a claim for injury due to a proposed change in use on a neighboring property allegedly affecting those aesthetics. To the contrary, in *Wood v. Thurston Cnty.*, 125 Wa. App. 1046 (2005), the court held that removing trees that negatively affected plaintiffs' abutting property "violated none of the Woods' fundamental rights of ownership." *Id.*, *4. Similarly, activities on a neighboring site that affect the view of a property owner are not actionable. *See Collinson v. John L. Scott, Inc.*, 55 Wn. App. 481, 485 (1989) ("an unobstructed view has never been held essential to the enjoyment of life or a person's use of his property"). Movants have failed to show a significantly protectable interest under Washington law that relates to the property that is subject to this action. The Court should deny their Motion for this reason alone.

2. Defendant City of Walla Walla can adequately represent the Movants' interests in this matter.

Movants also cannot demonstrate that their interests "will not be adequately represented by the existing parties." *Western Watersheds Project v. Haaland*, 22

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F.4th 828, 840 (9th Cir. 2022). A prospective intervenor bears the burden of demonstrating that the existing parties may not adequately represent the intervenor's interest. *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001).

In reviewing the adequacy of representation, a court considers three factors: (1) whether the interest of a present party is such that it will make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether [the] proposed intervenor would offer anything to the proceeding that other parties would neglect. *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). "The most important factor in determining the adequacy of representation is how the interest [of the intervenor] compares with the interests of existing parties." *Id.*

A presumption of adequate representation arises when the representative is a governmental body acting on behalf of its constituency. *Arakaki*, 324 F.3d at 1086. In the absence of a "*very compelling* showing to the contrary," it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. *Id.* (emphasis added). When parties share the same ultimate objective, differences in litigation strategy do not justify intervention. *Id.*

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(a) The City and the Movants share the same interest.

Movants' (insufficient) interests are well represented by, and fully aligned with, the City of Walla Walla. The City is already acting on behalf of its constituency, including the Movants. Movants and the City both seek to defeat AT&T's Application. Unlike in *Sw. Ctr. For Biological Diversity*, a case cited by Movants, the City here did not acknowledge "that it will not represent proposed interventors' interest in this action." 268 F.3d at 823. Nor is it enough that Movants cannot "anticipate specific differences in trial strategy." Dkt. 8, 7:21-22. Because the City and the Movants share the same ultimate interest, there can be little doubt that the City will advance the same arguments the Movants would advance were they allowed to join the case.[1]

(b) The City will make the arguments proferred by Movants.

The City is capable of making (and indeed has already made) the same arguments that Movants would make in this matter. AT&T's Complaint contains two counts: (1) effective prohibition; and (2) a lack of substantial evidence supporting the denial. To prevail on its first count, AT&T must prove: (a) there is

[1] *See, e.g., L.A. SMSA L.P. v. City of L.A.,* 817 Fed. Appx. 350, 352 (9th Cir. 2020) (affirming denial of intervention because the City of Los Angeles had never taken a position adverse to the putative intervenors, and there was nothing in the record to suggest the City would "fail to mount as vigorous a defense" as the putative intervenors.).

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a gap in its coverage in the area of the Proposed Facility, and (b) the Proposed Facility is the least intrusive means for closing that gap. The City's Answer denies that AT&T has a gap in coverage (Dkt. 6, ¶ 1.6), and that AT&T's proposal is the least intrusive design. Dkt. 6, ¶ 1.7. Were Movants to enter the case, they would have to make the same arguments. There are no novel defenses to a claim for effective prohibition, and the Movants have not suggested any.

AT&T's second claim is that the City's denial is unsupported by substantial evidence. To prevail on this claim, AT&T must show that the administrative record does not support the City's Decision. The City is more than capable of identifying the evidence in the record to support its defenses. Thereis no unique defense for the Movants to offer. Moreover, no new evidence can be submitted in regard to that claim since it is limited to the contents of the existing administrative record.

Movants argue that their interest in this case is "aesthetic." As stated, the main basis for the City's denial was the contention that the Proposed Facility did not meet the City's "stealth" requirement because the Facility would not be adequately disguised as a pine tree, or blend in with the surrounding environment. Dkt. 6, ¶ 1.7. These are Movants' exact concerns. All of the Movants' supposedly unique arguments are already contained in the adminstrative record. Failure by the City to make and support these arguments essentially would concede AT&T's

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second cause of action, which the City has denied. As a result, the City will clearly make Movants' arguments as part of its defense of AT&T's claim. Movants have not shown how the City will fail to make these arguments, and Movants have certainly not met their high burden of offering ***very compelling*** evidence or reasoning that the City will not support their interests or make the same arguments in defense of AT&T's claims.

(c) Movants offer no necessary elements the City might neglect.

Movants do not articulate a single necessary element that they will offer that the City might neglect. While they assert they would "advance additional defenses," they do not identify those defenses, let alone state why they are necessary to uphold the City's Decision. Dkt. 8, 9:5-8. Indeed, the defenses to AT&T's claims are limited, as set out above, and the City has already set them out in its Answer. There is nothing that Movants will add to this case that the City is not already advancing. The Court should accordingly deny the motion for mandatory intervention.

B. Movants May Not Permissively Intervene Under Fed. R. Civ. P. 24(b).

Movants also cannot meet the requirements for permissive intervention, which requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between movant's claim or defense and the main action. *Freedom from Religion Foundation, Inc. v. Geithner*, 644 F.3d 836,

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843 (9th Cir. 2011).

Movants cannot demonstrate "a common question of law and fact between the movant's claim or defense and the main action." *Id.* They have not identified any claim or unique defense that they have against AT&T, and certainly not one that shares a common question of law or fact with the main action. As noted, while Movants claim to supposedly have certain unique defenses, they have not articulated them. There is nothing in Movants' motion that demonstrates a common question of law and fact with the main action, and Movants' request for permissive intervention should be denied.

Even if an applicant proves the existence of "a common question of law and fact," "the district court [still] has discretion to deny permissive intervention." *Donnelly v. Glickman,* 159 F.3d 405, 412 (9th Cir. 1998). *See also Venegas v. Skaggs*, 867 F.2d 527, 530 (9th Cir. 1989) ("The existence of a common question of law or fact does not automatically entitle an applicant to intervene"). Fed. R. Civ. P. 24(b) "necessarily vests 'discretion in the district court to determine the fairest and most efficient method of handling a case.'" *Id.* This includes considering "whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Upon weighing Movants' inability to "prove a common question of law and fact between the movant's claim

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or defense and the main action," on the one hand, and the potential for undue delay and prejudice to "the adjudication of the original parties' rights" (Fed. R. Civ. P. 24(b)(3)), Movants' request for permissive intervention should be denied.

IV. CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Court deny the Motion to Intervene.

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