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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

MOTION TO INTERVENE BY BARBARA AND EVERETT KNUDSON

2/16/2024
Without Oral Argument

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MOTION TO INTERVENE

Barbara and Everett Knudson move to intervene in the above-caption matter on the side of defendant City of Walla Walla. The Knudsons should be granted intervention as a matter of right under Fed. R. Civ. P. 24(a) or, alternatively, permissive intervention under Fed. R. Civ. P. 24(b).

The Knudsons own and live on property abutting the site proposed for the new cell tower and own and operate a bed and breakfast located less than 500 feet from the site proposed for the new cell tower. The Knudsons participated in the underlying action before the Walla Walla Hearing Examiner. The Knudson's undersigned counsel is authorized to state that defendant City of Walla Walla stipulates to intervention by the Knudsons. Plaintiff does not so stipulate and has said it will oppose this motion.

A. The Knudsons Meet the Standard for Intervention as of Right.

The Knudsons meet the standard for intervention as of right under Fed. R. Civ. P. 24(a) because they meet the four-part test set out by the Ninth Circuit: "(1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the

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applicant's interest."[1] These "requirements are broadly interpreted in favor of intervention."[2]

One, this motion is timely. The complaint was filed approximately less than two months ago and the City of Walla Walla's answer was filed less than three weeks ago. This motion is made at an early stage of the proceedings prior to the Court's prehearing conference, discovery has not commenced, the parties would not suffer prejudice from the grant of intervention at this early stage, and intervention would not cause disruption or delay in the proceedings. "These are traditional features of a timely motion."[3]

Two, the Knudsons have a significant protectable interest relating to the property or transaction that is the subject of this action. "[T]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process."[4] The Knudsons live on land abutting

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[1] *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (quotation omitted).

[2] *Id*. *See also Wash. State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982) ("Rule 24 traditionally has received a liberal construction in favor of applicants for intervention."), *cert. denied*, *Don't Waste Washington Legal Def. Found. v. Washington*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

[3] *Id*.

[4] *Wilderness Soc'y v. United States Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir.

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the site proposed for the new cell tower.[5] The bed and breakfast property that they own and operate, the Inn at Blackberry Creek, is approximately 500 feet from the site proposed new cell tower.[6] The Knudsons have a significant protectable interest in protecting the aesthetic qualities of their home, tourist business, and neighborhood.

The Knudsons participated extensively in the proceeding below before the Walla Walla Hearing Examiner. Through their undersigned counsel, they submitted a comment letter opposing the project to the Examiner on September 21, 2023.[7] Their undersigned counsel was the only attorney to offer argument in opposition to the project during the hearing before the Examiner.[8] Through their undersigned counsel, they submitted a post-hearing comment letter opposing the project to the Examiner.[9] The Knudsons have a significant interest in defending the result reached by the hearing examiner. The Ninth Circuit construes Fed. R. Civ. P. 24(a)(2) "broadly in favor of

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2011) (internal quotation marks and citations omitted).

[5] Declaration of Barbara Knudson ("Knudson Decl."), attached hereto as Attachment A, at ¶¶ 2–3.

[6] Knudson Decl., ¶¶ 4–5.

[7] Knudson Decl., ¶¶ 6–7 and Exhibit 1.

[8] Knudson Decl., ¶ 8.

[9] Knudson Decl., ¶ 9 and Exhibit 2.

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proposed intervenors."[10] "In keeping with that policy, we have held that Rule 24(a)(2) does not require a specific legal or equitable interest and noted that the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process[.]"[11]

Three, the disposition of the action may, as a practical matter, impair or impede the Knudsons' ability to protect their interest. The Knudsons have a protectable interest in defending the result that they helped bring about in the hearing examiner's review—a result that protects their home and business. The Knudsons' ability to protect this interest could be impaired or impeded by an adverse ruling in this case.

Four, the existing parties may not adequately represent the Knudsons' interest. "The burden of showing inadequacy of representation is minimal and satisfied if the applicant can demonstrate that representation of its interests may be inadequate."[12] "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be

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[10] *United States v. City of Los Angeles,* 288 F.3d 391, 397 (9th Cir.2002) (internal quotation marks omitted).

[11] *Wilderness Soc'y*, *supra*, 630 F.3d at 1179 (internal quotations and citations omitted).

[12] *Citizens for Balanced Use*, *supra*, 647 F.3d at 898 (internal quotations and citation omitted).

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treated as minimal."[13] The Knudsons easily meet that "minimal" burden.

In the proceedings below, only the Knudsons' undersigned attorney presented legal argument to the Examiner in opposition to the proposed cell tower. City staff did not make a recommendation for or against the proposed project.[14] The Knudsons advanced additional arguments for denying the project that were not adopted by adopted by the Examiner.[15] This Court can affirm on grounds not cited by the Examiner. By analogy to appellate practice, this Court can the Examiner's decision on grounds that the Examiner did not rely on "if those grounds are adequate, apparent in the record, and sufficiently illuminated by counsel on appeal."[16]

As in *Citizens for Balanced Use*, *supra*, the Court "cannot conclude that the [agency] will undoubtedly make all of Applicants' arguments, nor can [it] be assured

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[13] *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538, n.10, 92 S. Ct. 630, 636, 30 L. Ed. 2d 686 (1972). *See also Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983) ("[T]he requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate and that the burden of making this showing is minimal.").

[14] Knudson Decl., ¶ 10.

[15] Knudson Decl., ¶ 11.

[16] *Walton v. Powell*, 821 F.3d 1204, 1212 (10th Cir. 2016).

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that the [agency] is capable of making and willing to make such arguments."[17] The Knudsons were the only participants in the proceedings before the Hearing Examiner to offer legal argument supporting a denial of the applicant's conditional use application. They are prepared to offer support for, and defenses of, the Hearing Examiner's decision that may not be advanced by the City.

Moreover, the Knudsons have different interests than the City of Walla Walla. The Knudsons are primarily interested in protecting the aesthetics of their home and their bed and breakfast business. The City of Walla Walla is, presumably, primarily interested in ensuring compliance with its land use code. As the Washington State Supreme Court stated in construing the nearly identical state rule, "the county must consider the interests of all the residents of the county, where the affected property owners represent a more sharply focused and sometimes antagonistic viewpoint to that of the county as a whole."[18]

Moreover, while both the Knudsons and the City will seek a ruling affirming the Examiner's decision, it is likely that they will advance different arguments in this proceeding. "[I]t is not Applicants' burden at this stage in the litigation to anticipate specific differences in trial strategy. It is sufficient for Applicants to show that, because

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[17] *Citizens for Balanced Use*, *supra*, 647 F.3d at 901.

[18] *Loveless v. Yantis*, 82 Wn.2d 754, 759 (1973).

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of the difference in interests, it is likely that Defendants will not advance the same arguments as Applicants."[19] In *Loveless v. Yantis, supra,* the Court further supported its intervention ruling by noting that it sustained the appeal on grounds advanced by the intervenor, not the county, even though they were on the same side.[20] The same outcome is possible here.

For all these reasons, the Knudsons meet the standard for intervention as of right under Fed. R. Civ. P. 24(a).

B. Alternatively, the Knudsons Meet the Standard for Permissive Intervention.

"A district court's discretion to permit intervention is broad."[21] "Rule 24(b)(1) provides that, on timely motion, the court may permit anyone to intervene who has a claim or defense that shares with the main action a common question of law or fact."[22] The Knudsons defenses share common questions of law or fact with the main action.

Permissive intervention "requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim

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[19] *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 824 (9th Cir. 2001).

[20] *Loveless v. Yantis, supra*, 82 Wn.2d at 759.

[21] *Brumback v. Ferguson*, 343 F.R.D. 335, 345 (E.D. Wash. 2022).

[22] *Brumback, supra*, 343 F.R.D. at 345 (quotation, internal ellipses, and brackets omitted).

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or defense and the main action."[23] The Knudsons meet all three requirements for permissive intervention.

One, the "independent ground for jurisdiction" requirement drops away when the applicant for intervention brings no new claims.[24] The Knudsons will advance additional *defenses* to the Hearing Examiner's decision, not enlarge this action by bringing new claims.[25] The "independent jurisdictional grounds requirement does not apply to proposed intervenors in federal-question cases when the proposed intervenor is not raising new claims."[26]

Two, this motion is timely. As shown above, this litigation is in its earliest stage. Intervention by the Knudsons will not "unduly delay or prejudice the adjudication of the original parties' rights."[27]

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[23] *Brumback, supra*, 343 F.R.D. at 345 (quotations and citation omitted).

[24] *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011) ("Where the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away.").

[25] *See* 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1917 (3d ed. 2010) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant . . .").

[26] *Freedom from Religion Found.*, *supra*, 644 F.3d at 844.

[27] Fed. R. Civ. P. 24(b)(3).

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Three, there are common questions of law and fact between the Knudsons' defenses of the Hearing Examiner's decision and the main action. "A common question of law and fact between an intervenor's claim or defense and the main action arises when the intervenor's claim or defense relates to the subject matter of the action before the district court or, stated another way, when such claims or defenses are clearly a critical part of the instant case."[28] The defenses that the Knudsons seek to bring clearly relate to the subject matter of the main action, namely, whether and on what grounds the decision of the Hearing Examiner should be upheld.

When the prerequisites for permissive intervention are met, a district court is entitled to consider other factors in making its discretionary decision on the issue of permissive intervention. "The Ninth Circuit has provided additional relevant factors for consideration of an application for permissive intervention:

> [T]he nature and extent of the intervenors' interest, their standing to raise relevant legal issues, the legal position they seek to advance, and its probable relation to the merits of the case. The court may also consider whether changes have occurred in the litigation so that intervention that was once denied should be reexamined, whether the intervenors' interests are adequately represented by other parties, whether intervention will prolong or unduly delay the litigation, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and

[28] *Brumback, supra*, 343 F.R.D. at 346 (quotations, citations, internal ellipses, and brackets omitted).

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equitable adjudication of the legal questions presented."[29]

The Knudsons have a strong and legally protectable interest in defending their quiet enjoyment of their home and their valuable investment in their bed and breakfast business. Their interests are "potentially more narrow and parochial than the interests of the public at large,"[30] therefore, the City may not adequately defend the Knudsons' interests in this action.

Intervention by the Knudsons will not prolong or unduly delay this litigation. On the contrary, the Knudsons, by and through their undersigned counsel, will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

CONCLUSION

For all the forgoing reasons, the Knudsons should be granted intervention as a matter of right under Fed. R. Civ. P. 24(a) or, alternatively, permissive intervention under Fed. R. Civ. P. 24(b).

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[29] *Id*. (citation omitted).

[30] *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998).

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Dated this 16th day of January, 2024.

Respectfully submitted,

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I hereby certify that on January 16, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice. I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants on January 16, 2024:

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