

DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Ave., Suite 100 Fort Collins, CO 80521	DATE FILED: May 6, 2015 3:52 PM FILING ID: DECB00982165D CASE NUMBER: 2015CV30270
Plaintiffs: ED KLEN and LIAM WESTON v. Defendants: CITY OF LOVELAND	▲ COURT USE ONLY ▲
Attorneys for Plaintiff: Name: Michael Roche, #21454 Keith P. Ray, #31567 LATHROP & GAGE LLP Address: 950 Seventeenth Street, Suite 2400 Denver, CO 80202 Phone Number: 720.931.3200 Fax Number: 720.931.3201 Email Address: MRoche@LathropGage.com KRay@LathropGage.com	Case Number: 2015 CV 30270
MOTION TO INTERVENE	

Movant-Intervenor Thornton Long Term Investments. L.L.C. ("Thornton") submits the following Motion to Intervene pursuant to C.R.C.P. Rule 24(a).

CERTIFICATION PURSUANT TO C.R.C.P. 121, § 1-15(8)

Undersigned counsel has conferred with counsel for both parties. Counsel for the City of Loveland does not object to Thornton's intervention in this case; counsel for plaintiffs does object.

BACKGROUND

Plaintiffs have brought this action for injunctive and declaratory relief to enjoin the City of Loveland (“Loveland”) from moving forward with a \$2.2 million loan, and other incentives, (“Incentives”) from Loveland to Thornton for the purposes of constructing a building for Sprouts Farmers Market in Loveland. Thornton seeks to intervene as of right in this action as a defendant as it has an interest relating to the transaction that is the subject of the current action.

MOTION

Thornton’s request to intervene is governed by C.R.C.P. Rule 24(a)(2), which provides that:

Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

“Rule 24 should be liberally interpreted to allow, whenever possible and compatible with efficiency and due process, issues related to the same transaction to be resolved in the same lawsuit and at the trial court level.” *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

A. Thornton Has an Interest in the Incentives.

“The existence of an interest of a proposed intervenor should be determined in a liberal manner.” *O’Hara Group Denver, Ltd. v. Marcor Housing Systems, Inc.*, 595 P.2d 679,687 (Colo.1979). “Once an intervenor can point to an ‘interest relating to the transaction’ which is the basis of the ongoing lawsuit, it should be allowed to participate if it appears that all of its interests may not be adequately represented by those already parties to that lawsuit.” *Id.* at 688.

The focus is on “what interest is claimed by the intervenor, not whether he or she will ultimately be successful.” *Bruce W. Higley, DDS, MS v. Kidder, Peabody & Col, Inc.*, 920 P.2d 884, 890 (Colo.App. 1996). The interest at issue here for Thornton is the Incentives it is entitled to receive from Loveland. Thus, Thornton clearly has an interest relating to the transaction that is the basis of this lawsuit.

B. Thornton’s Ability to Protect its Interest May be Impaired

“[T]he party seeking intervention must show that it is so situated that the disposition of the underlying action may as a practical matter impair its ability to protect its interest.”

Cherokee Metropolitan District v. Meridian Service Metropolitan District, 266 P.3d 401, 406 (Colo.2011).

In this case, there can be no question that the disposition of this action may impair Thornton’s ability to protect its interest in obtaining the Incentives. In reliance on those Incentives, Thornton has expended substantial funds in pursuit of the project. Here, plaintiffs seek rulings from this Court that the Incentives are “null and void as violating Colorado Law.” Complaint at ¶¶ 34, 40, 47, and 60. Plaintiffs’ claims for declaratory and injunctive relief may as a practical matter impair Thornton’s ability to protect its right to obtain the Incentives awarded by Loveland. *Cherokee*, at 406.

C. Thornton’s Interests Are Not Adequately Represented

In *Cherokee* the Colorado Supreme Court again set forth the test for determining whether a potential intervenor’s interest is adequately protected.

(1) If the interest of the absentee is not represented at all, or if all existing parties are adverse to the absentee, then there is no adequate representation. (2) On the other hand, if the absentee's interest is *identical* to that of one of the present parties, or if there is a party charged by law with representing the absentee's interest, then a compelling showing should be required to demonstrate why this representation is not adequate. (3) *But if the absentee's interest is similar to, but not identical with, that of one of the parties, a discriminating judgment is required on the circumstances of the particular case, although intervention ordinarily should be allowed unless it is clear that the party will provide adequate representation for the absentee.*

Id. at 407 (citation omitted). As to the third category, “all reasonable doubts should be resolved in favor of allowing the absentee . . . to intervene” *Id.* (*Emphasis added*).

In the *Cherokee* case, Cherokee Metropolitan District (“Cherokee”) and Meridian Service Metropolitan District (“Meridian”) entered into an agreement to build a wastewater treatment facility. *Id.* at 403. That agreement dictated the terms of wastewater treatment and return flows into a designated ground water basin (“UBS basin”). *Id.* The owner of the UBS basin (“UBS”) brought an action for against Cherokee for violating a pre-existing agreement between Cherokee and UBS requiring certain wastewater returns from Cherokee. *Id.* Meridian sought to intervene on the basis that the UBS action affected its water rights set forth in the agreement between Meridian and Cherokee. *Id.*

The Supreme Court found that Meridian fell into the third category relating to the adequacy of representation and held that while Meridian's interest in protecting its water rights were similar, but not identical, to those of Cherokee. *Id.* at 407. Additionally, the court determined that while both Cherokee and Meridian likely wanted to enforce their agreement and did not want the water court to grant the requested declaratory judgment, they both had separate water rights to protect. *Id.*

In this case, Thornton and Loveland want to enforce their agreement to provide the Incentives. While the interest of Thornton in obtaining the Incentives is similar to the interest of Loveland in providing the Incentives, their interests are not identical. Thornton has expended funds in pursuit of the project in reliance on the Incentives. Loveland's interest, as the provider of the Incentives, is based on

serving the public purposes of producing significant economic, cultural, and social benefits to the citizens of Loveland, primarily in the form of (i) economic development, (ii) elimination of blight which constitutes an economic and social liability to the community' and (iii) prevention of further physical and economic deterioration in the vicinity of the Project by stimulating redevelopment, attracting capital investment; (v) additional jobs; and (vi) increased tax revenues.

Exhibit 1 (Resolution #R-80-2014). That interest is similar, but not identical, to Thornton's interest as the recipient of the Incentives in developing the property for its tenant.

WHEREFORE, for the foregoing reasons, Thornton Long Term Investments, L.L.C. respectfully requests that this Court enter an order granting its request to intervene in this action as a defendant.

Dated: May 6, 2015

By: *s/ Keith P. Ray*

Michael Roche
Keith P. Ray

*Attorneys for Plaintiff
120 Wadsworth, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2015, I caused a true and correct copy of the foregoing instrument to be filed via ICCES e-filing system and served upon the following:

Shawn D. Mitchell
Law Office of Shawn D. Mitchell
12530 Newton Street,
Broomfield, CO 80020

Steven J. Dawes
The Law Office of Steven J. Dawes, LLC
100 Fillmore Street, Suite 500
Denver, CO 80206

s/ Christine Muldoon
Christine Muldoon
Legal Administrative Assistant