UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	CV 97-2154 **(NG) (SG)**
Plaintiff,	:	
STATE OF NEW YORK and BARBARA DEBUONO, M.D., as COMMISSIONER of the NEW YORK STATE DEPARTMENT OF HEALTH	:	
Plaintiff-Intervenors,	:	
- against -	:	
CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
Defendants,	:	
CROTON WATERSHED CLEAN WATER COALITION, INC.; *et al,*	:	
Defendants-Intervenors,	:	

INTERVENORS' MEMORANDUM
IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION

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INTERVENORS' MEMORANDUM

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Introduction

This memorandum is submitted in support of the motion of the Croton Watershed Clean Water Coalition and each of the individuals listed in Schedule One of the RESTATED PROPOSED INTERVENORS ANSWER (Intervenors) for reconsideration pursuant to Local Rule 6.3 and Federal Rules of Civil Procedure (FRCP) Rule 59 of the Court's Memorandum and Order denying intervention.

There are three distinct bases for allowing intervention: (1) when a statute of the United States confers an unconditional right to intervene (FRCP 24(a)(1); (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest (FRCP 24(a)(2) and (3) permissive. (FRCP 24(b))

Although Intervenors sought – and were denied – intervention on all three grounds, this motion and memorandum address primarily the Court's denial of intervention as of right pursuant to FRCP 24(a)(2). In particular, it addresses the rights of intervenors who are "water rate payers." Intervenors submit that the Court may have overlooked applicable precedent in the Second Circuit that is contrary to one of the principal cases relied upon by the Court, *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985). The issue involved is the one that the Court found controlling as to Intervenors' FRCP 24(a)(2) application: whether Intervenors possessed sufficient "interest" to support intervention as of right.

Argument

Intervention by those Intervenors described as rate-payers is required by applicable precedent in this Circuit. The reasoning of the Court in 36.96 of Land has either not been followed or applied in the limited instance of condemnation actions by the United States.

Before looking at the applicable decision in the Second Circuit, perhaps it should be emphasized that the intervenors who are "rate payers" have a direct non-contingent interest in this controversy. In its complaint, plaintiff EPA's prayer for relief includes:

> " * * *
>
> 2. Order the City to site, design, construct, and operate a filtration plant on an expeditious schedule …"
>
> "4. Order the City to pay a civil penalty … of up to the statutory maximum of $25,000 for each day of each violation…"
>
> (U.S. Complaint dated 4/24/97, WHEREFORE clause, p. 12)

Thus it is a principal aspect of the EPA's posture in this action to force the construction of a billion dollar filtration plant and the payment of millions of dollars of fines. Those costs

will be perforce born by the water rate payers and no one else. That is how the finances of the New York City water supply are constructed.[1] There is nothing contingent about it. By operation of law, if a filtration plant is built or fines paid, they will be paid by the water rate payers who seek to intervene in this action.

The Court of Appeals has readily recognized the right of those with a financial stake in the proceedings to intervene as of right. See *NYPIRG v. Regents*, 516 F.2d 350 (2d Cir. 1975). In that case individual pharmacists and a pharmacist association sought to intervene in action in which plaintiff NYPIRG sought to have declared unconstitutional a New York State law banning the advertising of prescription drug prices. Noting that such a ban was of financial benefit to the pharmacist and the fact that lifting the ban would undoubtedly cost them money, the Court of Appeals said:

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[1] New York State Public Authorities Law provides with respect to the New York City Water Board:

§ 1045-j. Imposition and disposition of sewer and water fees, rates, rents or charges

1. The water board shall establish, fix and revise, from time to time, fees, rates, rents or other charges for the use of, or services furnished, rendered or made available by, the sewerage system or water system, or both, as the case may be, owned by the water board pursuant to this title in such amount at least sufficient at all times so as to provide funds in an amount sufficient together with other revenues available to the board, if any,

(i) to pay to the authority, in accordance with any agreement with the authority, an amount sufficient for the purpose of paying the principal of and the interest on the outstanding notes or bonds of the authority as the same shall become due and payable and maintaining or funding a capital or debt service reserve fund therefor and, to the extent requested by the city in, or annually pursuant to, the agreement to pay to the city, in accordance with the agreement, an amount sufficient for the purpose of paying the principal of and interest on general obligation bonds thereof issued for or allocable to the water system or sewerage system or both, as the case may be, as the same shall become due and payable, and to maintain or fund reserves therefor,

(ii) to pay to the city, in accordance with the agreement, an amount sufficient for the purpose of paying the costs of administering, maintaining, repairing and operating and the cost of constructing capital improvements to the water system or sewerage system or both, as the case may be,

(iii) to pay to the city in accordance with the agreement entered into pursuant to section one thousand forty-five-i of this title an amount sufficient for the purpose of paying liabilities issued for or allocable to the water system or sewerage system or both, as the case may be, as the same shall become due and payable,

(iv) to meet any requirements of any agreement including requirements relating to the establishment of reserves for renewal and replacement and for uncollected charges and covenants respecting rates,

(v) to pay all other reasonable and necessary expenses of the authority and the water board in relation thereto, and

(vi) to the extent requested by the city in or pursuant to the agreement, to pay or provide for such other purposes or projects as such city considers appropriate and in the public interest. Any surplus of funds remaining in the water board after such payments have been made shall be returned to the city for deposit in the general fund.

> "Clearly the pharmacists have an interest in the transaction which is the subject of the action regardless of the intent of the Regents in promulgating the regulation. There can be little doubt that the challenged prohibition against advertising the price of prescription drugs, which is claimed to result in consumer ignorance as to where such drugs can be purchased at the cheapest price, affects the economic interests of members of the pharmacy profession. Pharmacists also have an interest in a regulation which they claim is designed to encourage "the continued existence of independent local drugstores by the prevention of destructive competition through advertising. … Pharmacists also have an interest in the action as professionals since any lifting of the prohibition against advertising prescription drug prices might well lead to significant changes in the profession and in the way pharmacists conduct their businesses. Moreover, the fact that one of the reasons for promulgating the regulation was concern for consumer interests such as deterring consumer purchases of antagonistic or deteriorated prescription drugs does not mean that pharmacists do not also have interests at stake … Indeed, the Regents acknowledge that protecting the economic interests of certain pharmacists is one basis for sustaining the regulation. With respect to the association of pharmacists, we hold that it has a sufficient interest to permit it to intervene since the validity of a regulation from which its members benefit is challenged….
>
> "We think it is likewise clear that the pharmacists and the association are so situated that the disposition of the action may as a practical matter impair or impede their ability to protect their interests. We are not persuaded by the contention of plaintiffs that the pharmacists may protect their interests after an adverse decision in the instant case by attacking any new regulation on constitutional, antitrust or unfair competition grounds. Such contention ignores the possible stare decisis effect of an adverse decision.". (internal citations omitted). 516 F.2d at 351-352

As the Court properly noted in its memorandum, the question of sufficient interest to provide standing to commence an action may not be synonymous with a sufficient interest in the controversy to support intervention as of right. Thus it paraphrased *36.96 Acres*:

> (noting the "qualitative difference between the 'interest' which is sufficient to bring an action [under a statute] and the 'direct, significant, legally protectable interest required to intervene"), cert. denied, 476 U.S. 1108 (1986). (quotation omitted; emphasis supplied).

The full quotation demonstrates that *36.96 Acres* is a narrowly drawn decision that has not been consistently followed in the Second Circuit, as been found by at least one Judge to be "unpersuasive" when sought to be applied outside the parameters of a condemnation action and

in the context of condemnation action has been on at least one occasion ignored altogether. What the Seventh Circuit said was:

> "There is a qualitative difference between the "interest" which is sufficient for standing to bring an *action under the APA* and the 'direct, significant legally protectable interest' required to intervene in *a condemnation action*." (Emphasis supplied) 754 F.2d 855 at 859.

In *Herdman v. Town of Angelica,* 163 F.R.D. 180, 188 (W.D. NY. 1995), *36.96 Acres* was cited to the court in opposition to the intervention of an environmental organization *as a defendant* in an action involving the legitimacy of an ordinance banning a ash land fill. Noting that *36.96 Acres,* was a condemnation proceeding, he found it application to the land fill dispute "unpersuasive." 163 F.R.D. at 188.

Even in a condemnation proceeding, Judge Lasker of the Southern District has permitted intervention by both a local town and an environmental organization where the dispute revolved around a new federal facility at the Westchester County Airport. *U.S. v. 27.09 Acres of Land*, 737 F. Supp. 277, 288-289 (S.D.N.Y. 1990). Although a case in which permissive intervention was allowed, Judge Lasker had this to say about the "interests" of the intervenors:

> " … Moreover, both PEPA and Harrison have primary interests in this action which differ from the County and which could not be adequately represented by the County or each other. Harrison is primarily interested in preserving the integrity of its zoning and planning scheme and town water supply and enforcing its local wetlands ordinance. PEPA's primary objective is to address the very specific environmental concerns of its members, some of whom live outside of Harrison. In contrast, the County is primarily interested in preserving the property for potential future use by the neighboring Westchester County Airport and in maximizing the amount of the compensation it will receive. Accordingly, the motions to intervene are granted." 737 F. Supp. At 288-289.

Given the holdings in by the Court of Appeals in *NYPIRG v. Regents,* supra; and the District Courts in *Herdman v. Town of Angelica,* supra; and *U.S. v.27.09 Acres of Land*, supra, it is clear that interests much less direct than the water rate payers have been recognized as sufficient to support intervention in the Second Circuit.

Norwalk-Core

In its memorandum, the court also cited *Norwalk CORE v. Norwalk Bd. of Ed.*, 298 F. Supp. 208, 210 (D. Conn. 1968) (Timbers, C.J.) for the proposition that "[i]ntervention is concerned with something more than standing to sue: it is concerned with protecting an interest which practically speaking can only be protected through intervention in the current proceeding." *Norwalk-Core* had not been argued by any of the parties to this proceeding.

While the principal is correct, *Norwalk-Core* has no factual application to the case at bar, and indeed, can be argued to support intervention. In *Norwalk Core*, a group of parents sought to intervene in an action seeking to desegregate de facto segregated Norwalk schools. Judge Timbers found that their goals were identical with the plaintiffs and therefore, they had no interest at risk.

In this case, it is absolutely certain that the goals of the intervening rate payers differ markedly from those of the governmental parties. Each of the three support filtration and the unneeded costs it will impose on the intervening rate payers. Intervenors maintain that their position is in the best interest of the environment and the watershed. Yet, the fact that their interests may include economic self-interest does not defeat but justifies their intervention. *NYPIRG v. Regents*, supra.

Timeliness and adequacy of representation.

There was no discussion of the issues of timeliness and adequacy of representation in the Court's memorandum. This action was commenced on April 24, 1997. On Wednesday, June 11, 1997, forty-nine days later, intervenors applied to the Court for an expedited hearing by way of order to show cause. The Court denied the request for an expedited hearing and directed counsel to proceed by notice of motion. Notice of Motion served on Monday, June 16, 1997 a scant two business days after the request for an expedited hearing was made. Under these circumstances, any claim of timeliness would be frivolous.

In so far as adequacy of representation, that was briefed because of an assertion by the City of New York of *parens patria*. However, crux of this case is a stipulation entered into on

October 30, 1992 between the City and the State DOH. ("Filtration Stipulation").[2] That stipulation provided in paragraph 10 (pp. 5-6) that:

> "10. It is further stipulated and agreed by the City and the Department that there exist valid and sufficient grounds as a matter of law for this Stipulation, and the City accepts this Stipulation, and the City accepts its terms and conditions and waives any right to challenge this Stipulation in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules, or in any other action or proceeding, except to the extent applicable to events beyond the City's control, as detailed in paragraph 8 of this Stipulation."

As evidence of the City's compliance with this covenant, it is noted that the City has not answered the complaint in this action and apparently has no intention of doing so. Because of the covenant and the City's failure to defend this action, it can not be said that City can adequately represent those who maintain that the stipulation of October 30, 1992 and the order of the Commissioner of January 13, 1963 adopting it violate the Safe Drinking Water Act.

CONCLUSION

Because of the demonstrated interests of Intervenors as supported by current judicial authority in the Second Circuit, the Court ought reconsider its Order of May 4, 1998 and grant the motion to intervene.

Dated: New York, New York
May 12, 1998

Respectfully submitted,

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[2] The stipulation appears as Exhibit A of the both the EPA's Memorandum of Law and the State's Complaint.