

STATE OF NORTH CAROLINA
COUNTY OF CHATHAM

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
18 EHR 03161

TOWN OF PITTSBORO)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA DEPARTMENT OF)
ENVIRONMENTAL QUALITY, DIVISION)
OF WATER RESOURCES)
)
Respondent.)
_____)

**MOTION TO INTERVENE BY
HAW RIVER ASSEMBLY**

N.C.G.S. § 1A-1, Rule 24
N.C.G.S. § 150B-23
26 N.C.A.C. 3.0117

NOW COMES the Haw River Assembly, pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, N.C.G.S. § 150B-23, and 26 N.C.A.C. 3.0117, and hereby moves this Court for leave to intervene in the above-captioned matter. In support of this motion, the Haw River Assembly shows the Court the following:

FACTUAL AND PROCEDURAL BACKGROUND

1. The Haw River Assembly (“HRA”) seeks to intervene in this action as a matter of right and to participate fully as a party in the challenges by the Town of Pittsboro (“Petitioner”) to a letter dated May 3, 2018 and signed by Linda Culpepper, interim director of the Department of Environmental Quality, Division of Water Resources (“DWR”), notifying Petitioner that it is required to implement and enforce the commitments made in the Environmental Impact

Statement titled “Proposed Wastewater Treatment Plant and Discharges into Robeson Creek and the Haw River” dated February 4, 2010 (“EIS”).

2. Chatham Park Investors, LLC is working to develop Chatham Park, a massive mixed-use development on 7,120 acres in Pittsboro, North Carolina. The proposed site for Chatham Park includes important and sensitive natural resources, including wetlands and other important habitat. The site is adjacent to the Haw River, as well as Robeson Creek and Jordan Lake, which serves as the drinking water supply for at least 300,000 North Carolinians. These three water bodies are already designated as impaired for excessive nutrients and for aquatic life due to high turbidity and pH. The principal cause of these impairments is stormwater runoff. As currently planned, Chatham Park would exacerbate existing water quality problems by significantly increasing stormwater runoff, sedimentation, and nutrient loading. The development would also harm important habitat for federally endangered and at-risk species.

3. In anticipation of new development overwhelming existing wastewater treatment capacity, in 2009 Petitioner applied for a National Pollutant Discharge Elimination System permit (“NPDES permit”) to construct a new wastewater treatment plant. Because this would require large state subsidies, environmental review under the North Carolina Environmental Policy Act (“SEPA”) was required. As a result of this environmental review, and to secure the necessary permits for the new wastewater treatment plant, in 2010 Petitioner committed to mitigation strategies to offset any new development’s significant direct, indirect, and cumulative environmental damage. Petitioner has failed to follow through with these legally enforceable commitments.

4. On May 3, 2018, Linda Culpepper, on behalf of DWR, sent a letter to Cindy Perry, the Mayor of Pittsboro, and Paul Messick, Pittsboro’s town attorney, noting that

commitments and mitigation strategies included in the EIS for wastewater treatment plant upgrades in the Town of Pittsboro were not being properly implemented and enforced. In response, on June 7, 2018, the Town of Pittsboro filed a Petition for a Contested Case Hearing regarding the letter. Four days prior, on June 3, Chatham Park Investors filed its own Petition for a Contested Case Hearing regarding the letter.

5. On July 11th, 2018, Chatham Park Investors, LLC, the Town of Pittsboro, and DWR filed a Joint Motion for a Temporary Stay, which was granted on July 18, 2018 with the stipulation that “[t]he Parties shall submit to the Undersigned a Status Report no later than October 9, 2018 that shall include a brief statement regarding the status of the matter.”

6. On October 9, 2018, Petitioner, Chatham Park Investors, LLC, and DWR filed a Joint Motion for a Temporary Stay requesting that the Court leave the Stay in place and order the parties to submit a second status report on December 10, 2018. The motion was granted on October 15, 2018.

7. HRA is a § 501(c)(3) nonprofit citizens advocate organization founded in 1982, with its principal place of business located in Bynum, North Carolina. HRA has approximately 1,000 members, most of whom live, work, and/or recreate in the vicinity of the Haw River, Robeson Creek, and Jordan Lake. HRA’s mission is to promote environmental education, conservation and pollution prevention; to speak as a voice for the river in the public arena; and to put into peoples’ hands the tools and the knowledge they need to be effective guardians of the Haw River. HRA was created and organized to restore and protect the Haw River and Jordan Lake. HRA has an interest in preventing contamination of the Haw River and the creeks and reservoirs that flow into the Haw River. Stormwater runoff caused by the Chatham Park

development would harm the organization's interests, its members, and its work to preserve and safeguard the Haw River

ARGUMENT

The Motion to Intervene is Timely

8. HRA's Motion to Intervene satisfies the timeliness requirement of Rule 24 of the North Carolina Rules of Civil Procedure, which sets forth the criteria and procedure for intervention in a civil action. The rule authorizes intervention as of right upon "timely application" when the applicant "claims an interest relating to the . . . 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." N.C. R. Civ. P. 24(a)(2)

9. HRA's Motion to Intervene likewise satisfies the timeliness requirement of 26 NCAC 03 .0117, which states that "Timeliness will be determined by the administrative law judge in each case based on circumstances at the time of filing."

10. To determine whether a motion to intervene is timely, the court looks to "(1) the status of the case, (2) the possibility of unfairness or prejudice to the existing parties, (3) the reason for the delay in moving for intervention, (4) the resulting prejudice to the applicant if the motion is denied, and (5) any unusual circumstances." *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859 (2001) (quoting *Procter v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 183, 514 S.E.2d 745, 746 (1999)). In practice, "a motion to intervene is rarely denied as untimely prior to the entry of judgment." *Taylor v. Abernathy*, 149 N.C. App. 263, 267-68, 560 S.E.2d 233, 236 (2002) (quoting *Hamilton v. Freeman*, 147 N.C. App. 195, 201, 554 S.E.2d 856, 859-60 (2001)).

11. HRA's Motion to Intervene is timely. Although the contested case petition in this matter as filed on June 7, 2018, HRA did not learn of the two contested case petitions until late August, in response to a public records request filed with DWR. Notably, the public records request was submitted after unsuccessful written and oral requests to town officials in Pittsboro, including Mayor Perry, for an update on the Town's response to the May 3 letter.

12. This case has been stayed since July 18, 2018, and will continue to be stayed until at least December 9th, 2018. Upon information and belief, no scheduling order has been issued by this Court, no discovery has been conducted by Petitioner or Respondent, and mediation has not been scheduled. HRA files this motion after conferring with counsel for Petitioner and Respondent and before any hearing on the merits of Petitioner's claims or any entry of judgment. The proposed intervention will not unduly delay this litigation, nor will it unduly delay or prejudice the adjudication of the rights of the existing parties. Judicial economy is served by addressing HRA's interest relating to the subject matter of this contested case as Intervenors.

13. HRA will be prejudiced if this motion is denied. HRA's territory extends over the entire 110 miles of the Haw River, from its headwaters in the north-central Piedmont region of North Carolina down to where it joins the Cape Fear River in south Chatham County. There are almost one million people living in this fast-developing 1700 square mile watershed which includes Greensboro, Burlington, Chapel Hill, and part of Durham, as well as smaller towns and rural areas. It is one of the fastest growing parts of the state. The Chatham Park development would add an additional 55,000 people to the Town of Pittsboro, which currently has a population of approximately 4,000. In order to be "effective guardians of the Haw River" as HRA's mission statement declares, HRA must have a seat at the table where strategies are being

discussed to mitigate the harm of such a massive development located directly on the banks of the Haw River.

HRA is Entitled to Intervention With All Rights of a Party

14. Section 150B-23(d) of the Administrative Procedure Act (“APA”) provides that “any person may petition to become a party by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24.” N.C. Gen. Stat. §150B-23(d). Pursuant to Rule 24 of the North Carolina Rules of Civil Procedure, once a motion is determined to be timely, intervention is available of right “when the applicant claims an interest relating to the...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.” N.C. Gen. Stat. §1A-1, Rule 24(a)(2).

15. The mitigation measures outlined in the EIS are vital to protect the Haw River and Jordan Lake from the consequences of this massive development. HRA has a direct and substantial interest in protecting the Haw River, Robeson Creek, and Jordan Lake, and thus in ensuring that the commitments made in the EIS are implemented as intended.

16. HRA commented and participated in the public hearing for the NPDES permit issued in 2010 and has voiced concerns for years that the commitments to mitigation strategies made by Petitioner have not been incorporated into the planning and design for the Chatham Park development. In an effort to inform the discussions pursuant to this matter, on September 18, 2018 HRA submitted a letter to the North Carolina Department of Justice (“DOJ”) and DWR outlining the sections of the EIS that are the most critical to the protection of the Haw River, Robeson Creek, and Jordan Lake, and should be fully implemented.

17. Respondent DWR does not adequately represent HRA's interest in this matter. Where DWR must oversee the environmental concerns of the entire state, HRA's interest is much narrower: the protection of the Haw River, Robeson Creek, and Jordan Lake. HRA has the institutional and historical knowledge of these bodies of water that DWR lacks, as well as a deep understanding of the thousands of North Carolinians who drink, fish, swim, and paddle the Haw River; who place a high value on the quality of Chatham County's water resources; and who will be adversely affected by the degradation of water quality in the Haw River. Thus, DWR's interests in this matter are not directly aligned with HRA, and all parties would benefit from HRA's participation in this matter.

18. For these reasons, HRA is entitled to intervene in this proceeding as of right pursuant to Rule 24(a)(2) of the North Carolina Rules of Civil Procedure and as a party pursuant to 26 N.C.A.C. 3.0117(d)(2).

19. In the alternative, HRA is also entitled to permissive intervention pursuant to Rule 24(b)(2) of the North Carolina Rules of Civil Procedure and Section 150B-23(d) of the North Carolina Administrative Procedure Act. A moving party seeking to intervene under Rule 24(b)(2) shall be permitted to intervene in an action "when an applicant's claim or defense and the main action have a question of law or fact in common." N.C. Gen. Stat. § 1A-1, Rule 24(b)(2). HRA contends that the mitigation strategies to which Petitioner committed in the EIS are legally binding, as did DWR in the May 3 letter. The issues in this proceeding, which impact HRA's ability to meet its mission to protect the Haw River, involve common questions of law and fact.

20. Respondent DWR consents to the relief requested under Rule 24(b) and takes no position on intervention as of right. Petitioner Town of Pittsboro does not consent to this motion.

WHEREFORE, based upon the reasons set forth above, the Haw River Assembly respectfully requests that the attached proposed Order be entered granting this motion to intervene, and that the Haw River Assembly be allowed to proceed as a full party respondent-intervenor in this matter.

This the 15th day of November, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Intervene was provided to the following parties by electronic mail:

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This 15th day of November, 2018.



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