

STATE OF INDIANA)
) SS:
COUNTY OF HAMILTON) **IN THE HAMILTON SUPERIOR COURT**
CAUSE NO. 29D01-1803-MI-002761

DAVID BIDGOOD, SHEILA M. GRAVES,)
SALVATORE PAPPALARDO, DAVID J.)
REEVES, and ANGELO R. STANCO)
)
 Petitioners,)
)
 v.)
)
CARMEL BOARD OF ZONING APPEALS,)
)
 Respondent.)

AL-SALAM FOUNDATION INC.’S MOTION FOR INTERVENTION

The Al-Salam Foundation, Inc. (the “Foundation”), by and through their counsel, respectfully submit that this Court grant its Motion for Intervention under Indiana Trial Rule 24(A). In the alternative, the Foundation submits that this Court permit it to intervene permissively under Indiana Trial Rule 24(B). In support thereof, the Foundation pleads as follows:

1. The Foundation should be allowed to intervene as of right because under the Indiana Code, the Foundation has both an unconditional right to intervene and meets the three-part test for intervention as of right.

2. The Foundation, as the sole property owner and prospective developer of the property at issue, has an immediate and direct interest in the subject of the action. Its interest is not only economic but based in the ability of Carmel’s Muslims to assemble and worship in their hometown. This action’s disposition practically impedes the Foundation’s protection of that interest.

3. Because neither of the existing parties own the land at issue, neither of them can adequately represent the Foundation's interest as the sole owner with a fixed interest in developing the property to serve Carmel's Muslim community.

4. Finally, the Foundation is filing this motion before any discovery or judgment in this action, within weeks of this Court's Order on Respondent's Motion to Dismiss, and prior to the telephonic conference scheduled for July 19, 2018. Its motion is therefore timely.

5. For all the reasons above, the Foundation should also be allowed to intervene permissively under Indiana Trial Rule 24(B).

6. The Foundation has filed contemporaneously herewith a memorandum of law that contains additional legal argument and authorities supporting the dismissal of the Petition.

WHEREFORE, the Foundation, by and through its counsel, respectfully requests that the Court grant the Foundation's Motion for Intervention as of right or, in the alternative, allow it to intervene permissively.

Respectfully submitted,

BECKMAN LAWSON, LLP

/s/ Brian C. Heck

Patrick R. Hess, 19395-02

phess@beckmanlawson.com

Brian C. Heck, #33289-02

cpgattorney@beckmanlawson.com

BECKMAN LAWSON, LLP

201 West Wayne Street

Fort Wayne, Indiana 46802

Telephone: (260) 422-0800

Facsimile: (260) 420-1013

Johnathan J. Smith

Juvaria S. Khan

Nimra H. Azmi

MUSLIM ADVOCATES

Post Office Box 66408

Washington, D.C. 20035

Attorneys for the Al-Salam Foundation

CERTIFICATE OF SERVICE

The undersigned certifies that on the 18h day of July, 2018, the foregoing document was electronically filed using the Indiana E-Filing System (IEFS). The undersigned further certifies that a true copy of the foregoing document was served upon the following person(s) via IEFS.

John R. Molitor
Jmolitor@prodigy.net

Michael J Andreoli
Mandreoli@datlaw.com

Robert W. Eherenman
rwe@hallercolvin.com

Andrew L. Teel
ateel@hallercolvin.com

/s/ Brian C. Heck

Brian C. Heck

STATE OF INDIANA)
) SS:
COUNTY OF HAMILTON) **IN THE HAMILTON SUPERIOR COURT**
CAUSE NO. 29D01-1803-MI-002761

DAVID BIDGOOD, SHEILA M. GRAVES,)
SALVATORE PAPPALARDO, DAVID J.)
REEVES, and ANGELO R. STANCO)
)
 Petitioners,)
)
 v.)
)
CARMEL BOARD OF ZONING APPEALS,)
)
 Respondent.)

**AL-SALAM FOUNDATION INC.’S MEMORANDUM OF LAW IN SUPPORT OF
ITS MOTION FOR INTERVENTION**

The Al-Salam Foundation, Inc. (the “Foundation”), by and through its counsel, respectfully submits this brief in support of its motion to intervene as of right or, in the alternative, permissively.

The Foundation has an unconditional right to intervene. Petitioners should have included the Foundation—the sole applicant before the zoning board—as a party to this appeal under I.C. § 36-7-4-1606(d)(1); T.R. 24(A)(1). Because Petitioners failed to do so,¹ the Foundation is allowed to intervene as of right.

The Foundation also meets the requirements for intervention as of right under Indiana Trial Rule 24(A)(2). First, as the owner of the property at issue in this litigation, it has a direct and immediate interest in this action. As such, a negative disposition that would prevent the Foundation from building on and coming into full ownership of the property will practically impede the Foundation’s ability to protect its interest. Since the Foundation is the only party with

¹ By moving to intervene, the Foundation does not waive its right to raise on appeal the Petitioners’ failure to join them as an indispensable party.

a fixed interest in the property's development as a mosque, neither of the existing parties can adequately represent its interests. Finally, this motion is timely and will not cause undue prejudice to the existing parties or delay the proceedings. In support of its motion, the Foundation states as follows:

FACTUAL BACKGROUND

The Foundation is comprised of residents of Carmel, Indiana, who have spent decades without a proper house of worship to serve their community and are at last on the cusp of having a suitable religious space. Specifically, the Foundation hopes to establish an Islamic Life Center ("ILC"), a place of worship and community that will include a prayer hall and multi-use meeting space for worship, youth groups, family gatherings, and interfaith projects.

For years, the Muslim community in Carmel has worshiped in a small rented office, far too small and wholly inadequate for the community's needs. To address this issue, the Foundation tried for years to secure an appropriately zoned parcel of land on which to build the ILC. Despite its many challenges in obtaining the property it needed, the Foundation was finally able to purchase a parcel of land on 141st Street and Shelborne Road in Carmel. This area is commonly known as a "corridor of faith" because of the multitude of houses of worship, including churches, synagogues, and temples, that are situated in the vicinity.

In December 2017, the Foundation submitted its application for a Special Use Permit for the ILC. On January 22, 2018, Respondent Carmel Board of Zoning Appeals ("BZA") held a public hearing to address the Foundation's Special Use Permit. The hearing was unprecedented

in the number of people who participated and spoke for and against a local house of worship.² As a result, the BZA continued the public hearing until February 26, 2018.

At the February hearing—which hundreds of people from Carmel and the surrounding areas attended—the BZA heard hours of public comment and had the opportunity to thoroughly question the Foundation about the Special Use Permit. At the conclusion of the hearing, the BZA granted the Foundation’s Special Use Permit by a vote of 3-2.

Despite the thorough and extensive process undertaken by the BZA in reviewing the Foundation’s Special Use Permit—a process that included listening to hours of public comment, reviewing hundreds of letters from the public, and giving careful consideration to the application (and supporting documentation) submitted by the Foundation—Petitioners have filed this meritless appeal in an attempt to relitigate the BZA’s decision. Should the Foundation’s grant of a Special Use Permit be overturned, the contract on which it purchased the property will be jeopardized. As a result of Petitioners’ efforts, Carmel’s Muslim population is no longer sure it will be able to share the same privilege enjoyed by the town’s many other residents of faith who already have suitable places to worship in their community.

As the owner of the land at issue in this appeal and the recipient of the Special Use Permit, the Foundation has a critical and unique stake in the disposition of this action and in protecting its interest in developing the ILC. It therefore seeks to intervene.

PROCEDURAL BACKGROUND

On March 28, 2018, Petitioners filed a Verified Petition for Writ of Certiorari, Judicial Review and Declaratory Judgment (“Petition”) with this Court. This Petition sought to overturn Respondent BZA’s grant of the Special Use Permit to the Foundation. Although the land at issue

² See, e.g., Chris Sikich, *Carmel mosque decision is delayed after public packs zoning meeting*, INDYSTAR (Jan. 22, 2018, 4:06 PM), <https://www.indystar.com/story/news/local/hamilton-county/2018/01/22/carmel-mosque-considered-zoning-appeals-board-tonight/1054985001/>.

belongs to the Foundation and the Foundation was the applicant before the BZA, this Petition did not name the Foundation as a party.

On April 4, 2018, this Court issued an Order to Show Cause Why Writ of Certiorari Should Not Issue. By this same Order, the Court scheduled a telephonic pretrial conference for May 25, 2018 at 8:30 a.m.

On May 23, 2018, Respondent BZA filed a responsive pleading, which denied most of the allegation in the Petition and raised, *inter alia*, Petitioners' failure to file the original or certified copy of the underlying record—or seek an extension from this Court for such filing—within 30 days of filing their Petition, in contravention of I.C. § 36-7-4-1613; and that Petitioners had failed to comply with the requirements for initiating an appeal under the applicable statute for appealing a BZA decision, as set forth under a provision of Indiana law commonly known as the “1600 Series” (I.C. §§ 36-4-7-1600, *et seq.*). Respondent BZA requested that this Court not issue a Writ of Certiorari and instead enter judgment in its favor.

On May 24, 2018, the Court notified Petitioners and Respondent BZA that the May 25, 2018 phone conference would be continued due to an ongoing jury trial.

On May 25, 2018, fifty-eight days after they originally submitted their Petition to this Court, Petitioners moved for an extension of time to file the underlying record—despite the requirement under I.C. § 36-7-4-1613 to file such record within 30 days of initiating the appeal. On May 29, 2018, this Court granted Petitioner's motion, expanding Petitioners' time to file the underlying record until June 20, 2018.

On June 1, 2018, Respondent BZA filed a Motion to Reconsider the Order Granting an Extension of Time to File Record and Motion to Dismiss; Petitioners filed their opposition on June 7, 2018. The Court heard argument on this motion on June 11, 2018.

On June 26, 2018, this Court entered an order denying Respondent BZA's Motion to Reconsider and Dismiss and scheduled a telephonic pretrial conference for July 19, 2018.

The Court's June 26, 2018 Order also advised that the Foundation may file a request for intervention for the Court's determination. Moreover, Petitioners' Response in Opposition of Respondent's Motion to Reconsider Order Granting an Extension of Time to File Record and Motion to Dismiss stated that they would "not oppose intervention if it is sought for and on behalf of [t]he Foundation."

LEGAL STANDARD

Indiana Trial Rule 24(A) allows for intervention as of right in two circumstances. First, a party may intervene as of right when a statute confers an unconditional right to intervene. T.R. 24(A)(1).

Second, a party may intervene as of right "when the applicant claims an interest relating to a property, fund 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 his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties." T.R. 24(A)(2).

Indiana courts have set forth a three-part test for determining whether an applicant's intervention of right should be granted. The moving party must show: "(1) an interest in the subject of the action; (2) disposition of the action may as a practical matter impede the protection of that interest; and (3) representation of the interest by existing parties is inadequate." *Flat Rock Wind, LLC v. Rush Cnty. Area Bd. of Zoning Appeals*, 70 N.E.3d 848, 856 (Ind. Ct. App. 2017). Indiana courts must also consider whether the motion to intervene was filed in a timely manner. *See Herdrich Petroleum Corp. v. Radford*, 773 N.E.2d 319, 325 (Ind.

Ct. App. 2002) (citing *Bryant v. Lake Cnty. Trust Co.*, 334 N.E.2d 730, 735 (Ind. Ct. App. 1975)). Allegations in a motion for intervention must be taken as true and the motion is evaluated on its sufficiency. *Flat Rock Wind, LLC*, 70 N.E.3d at 856 (quoting *Allstate Ins. Co. v. Keltner*, 842 N.E.2d 879, 882 (Ind. Ct. App. 2006)).

ARGUMENT

A. The Foundation Meets the Legal Standard for Intervention of Right.

The Court should grant the Foundation’s motion to intervene as of right. First, the Foundation has an unconditional right to intervene. *See* T.R. 24(A)(1). The Indiana Code makes clear that the applicant at the hearing before the BZA should be “a party to the petition for review.” I.C. § 36-7-4-1606(d)(1). Here, the applicant before the BZA was the Foundation—yet despite I.C. § 36-7-4-1606(d)(1)’s unambiguous requirement to include the Foundation as a party, Petitioners failed to do so. The Foundation therefore files this motion under I.C. § 36-7-4-1606(f). This provision provides that parties with standing—parties that must include those who should have been originally joined as “a party to the petition for review”—have an “unconditional right to intervene in a proceeding for review [to be] filed in the manner provided by the rules of procedure governing civil actions in courts.”³

The Foundation also meets the three-part requirement for intervention as of right under Indiana case law. First, as the owner and prospective developer of the property at issue, the Foundation has an immediate and direct interest in the subject of the action. Second, as a practical matter, this action’s disposition directly impedes the Foundation’s protection of its

³ In further support of its argument, the Foundation notes that I.C. § 36-7-4-1606(f) allows for an “unconditional intervention as of right” when a person has standing under I.C. § 36-7-4-1603(a). Such persons with standing, moreover, include the “person to whom the zoning decision is specifically directed at” I.C. §§ 36-7-4-1603(a)—which, here, is the Foundation. Put simply, a plain reading of these provisions makes clear that the Foundation should have *always* been a party to this case and may therefore intervene as of right in light of Petitioners’ failure to add it as an indispensable party.

property interest. And third, neither of the existing parties own the property at issue or are trying to create the ILC, so only the Foundation can represent its interest as an owner with a fixed interest in developing the property for the ILC.

Finally, the Foundation is filing this motion well before any final disposition of this proceeding: it comes within weeks of this Court's Order on Respondent's Motion to Dismiss, prior to discovery, and prior to the telephonic conference scheduled for July 19, 2018. The motion is therefore timely and allowing intervention will not cause prejudice. *See* T.R. 24(A)(2).

i. As the Property Owner, The Foundation Has A Direct And Immediate Interest In The Subject Of This Action.

The Foundation is the sole owner of the property that is the subject of this action. As such, it has a clear interest in intervention. It is well-established that ownership of the property subject to dispute by prospective intervenors demonstrates an "immediate and direct interest in the litigation" recognized by the law is sufficient to satisfy this prong.⁴ *See In re Remonstrance Appealing Ordinance Nos. 98-004 98-005, 98-006, 98-007 & 98-008, of Town of Lizton*, 737 N.E.2d 767, 769–70 (Ind. Ct. App. 2000) (holding that landowners were entitled to intervene as a matter of right). Moreover, an interest arising from a conditional contract of sale—such as this sale to develop the ILC—has been found to constitute an "immediate and direct" interest. *See E. N. Maisel & Assocs.*, 398 N.E.2d 1366, 1367 (Ind. Ct. App. 1980) (finding that applicant was entitled to intervene as a matter of right where interest was based on conditional contract).

Finally, the Foundation's interest in the property extends far beyond the purely economic. Its ability to build a religious community space on the property is directly threatened by this action and will impede the ability of Carmel's Muslims to worship freely in their community. *Cf.*

⁴ And as stated above, I.C. § 36-7-4-1606 acknowledges the interest of the applicant before a board of zoning appeals by requiring the applicant to be a party to the petition for judicial review of a board's decision. I.C. § 36-7-4-1606(d)(1).

NBD Bank, N.A. v. Bennett, 159 F.R.D. 505, 507 (S.D. Ind. 1994) (finding that an exclusively economic interest in a property is insufficient to support a motion for intervention).

ii. As the Owners Who Intend To Build On The Property, Disposition Of This Action Will Practically Impede the Foundation's Ability To Protect Its Interest.

This Court's determination on the Special Use Permit directly impacts the Foundation's ability to use and develop the property it has purchased for developing the ILC. Indiana courts have found this second prong of the intervention test satisfied where, as here, disposition of an action directly affects property owners' ability to build on a parcel of land. *See Town of Lizton*, 737 N.E.2d at 769–70. Absent participation in this lawsuit, the Foundation has no other remedies available to protect its interest in its property.

The Petitioners seek to have this Court declare the Foundation's Special Use Permit "null and void." If this Court were to grant the Petition, the Foundation would be impeded from developing the ILC on its property. Under Indiana law, the Foundation must therefore be allowed to intervene because its property interest is conditioned upon the occurrence of a prior event—the grant of its Special Use Permit—and any event that would prevent the ripening of the condition—such as the vacatur of the Permit through this appeal—constitutes an impediment to protecting that interest. *See, e.g., E. N. Maisel & Assocs.*, 398 N.E.2d at 1367 (holding that where interest was conditioned upon receipt of sheriff's deed, vacatur of the deed would impair potential intervenor's ability to protect his interest).

Put simply, if this Court grants the Petition and vacates the Foundation's Special Use Permit, the Foundation will be unable to develop its property. As a result, the Foundation would be forced to reapply for a permit, a process that would take a substantial amount of time and expense as it prolongs the Carmel Muslim community's need for an adequate house of worship.

In light of this, the disposition of this appeal greatly impedes the Foundation's interest and warrants intervention.

iii. Because the BZA May Change its Position at Any Time, No Current Party Adequately Represents The Foundation's Interest.

There is no party able to adequately represent the Foundation's interests in the property—except, of course, the Foundation. Petitioners are directly adverse to the Foundation's desire to build a mosque and community center on their purchased land. And while Respondent BZA's current litigating positions are not adverse to the Foundation's interest, that present status does not preclude intervention. Indiana courts, when evaluating motions for intervention, have regularly recognized that government entities may not adequately represent an intervenor's interest as they may modify or reverse their prior decision, or elect to settle the litigation, when an intervenor would not. *See, e.g., Flat Rock Wind, LLC*, 70 N.E.3d at 856 (permitting intervention of Remonstrators—who had no ownership interest in property at issue but simply lived in its vicinity and were advancing the same position as the BZA—because the BZA had ability to take a position in opposition to Remonstrators' or decide to settle the lawsuit). This possibility is not mere speculation. Indiana case law is well worn with examples of town and landowners' interests dividing over time. *See, e.g., Town of Lizton*, 737 N.E.2d at 770 (finding that while the Town and Landowners had initially adopted the same position, they took positions at “cross-purposes” as the case progressed).

Here, nothing prevents the Respondent BZA from deciding to modify or reverse its decision or staking out a position in opposition to the Foundation's interests. Were the BZA to reverse its decision and abandon this lawsuit, the Foundation and its interests would be left wholly unrepresented. As the only party with a fixed interest in developing the property for the

ILC, the Foundation is not adequately represented by the BZA and therefore satisfies this third prong.

iv. The Foundation’s Motion for Intervention is Timely.

The Foundation’s Motion for Intervention—coming a mere three weeks after the Court’s denial of Respondent BZA’s Motion to Dismiss, prior to the telephonic pretrial conference, and well before the initiation of discovery or final judgment—is timely. As such, the Foundation’s intervention will cause no delay to the ongoing proceedings.

In the context of intervention, timeliness is a fact-specific inquiry. *See Herdrich Petroleum Corp.*, 773 N.E.2d at 325 (citing *Bryant*, 334 N.E.2d at 735). Timeliness is flexible and not to be a tool to sanction would-be intervenors—it is a shield, not a sword. *See id*; *see also JPMorgan Chase Bank, N.A. v. Claybridge Homeowners Ass’n, Inc.*, 39 N.E.3d 666, 670 (Ind. 2015) (“Timeliness is primarily a shield that protects the existing parties and the courts, not a sword to sanction would-be intervenors. . . .”) (internal quotes removed).

The timeliness requirement is meant to prevent prejudice to the original parties and disruption to the court’s processes. *See Herdrich Petroleum Corp.*, 773 N.E.2d at 325 (citing *Bryant*, 334 N.E.2d at 735). Accordingly, intervention after judgment to raise new issues of fact or law is disfavored, although even that presumption can be overcome. *See Bryant*, 334 N.E.2d at 735 (holding that raising new issues of fact or law upon intervention can be justified by “unusual” or “extraordinary” circumstances).

The Foundation is filing its Motion for Intervention within weeks of the denial of the BZA’s Motion to Dismiss and prior to the beginning of discovery or even the entering of a

scheduling order. Its intervention would not unduly prejudice either party. And prior to the denial of the BZA's Motion to Dismiss, the Foundation had reason to believe that the case would be expeditiously resolved and saw no reason to intervene. *See Bd. of Comm'rs of Benton Cnty. v. Whistler*, 455 N.E.2d 1149, 1154 (Ind. Ct. App. 1983) (finding that an 18-month delay in intervening was justified where intervenors had no reason to intervene until filing of adverse judgment that constituted the "first real threat to the disposition" of intervenors' money). Now, immediately upon the denial of the BZA's Motion to Dismiss, the Foundation has moved to intervene to prevent any stalling of court processes and prejudice to the current parties. Accordingly, the Foundation's motion is timely. *Contrast with JPMorgan Chase Bank, N.A.*, 39 N.E.3d at 670 (denying motion to intervene submitted three years after foreclosure order and six years after lawsuit had been filed).

The Foundation has therefore amply satisfied the requirements for intervention as of right under Indiana Trial Rule 24(A)(2), as intervention will permit the Foundation to protect its interest in this appeal⁵ and will not prejudice the rights of any other parties in this action.

B. Alternatively, This Court Should Allow The Foundation To Intervene Permissively.

Indiana Trial Rule 24(B) also provides for permissive intervention when an applicant's claim or defense have a question of law or fact in common with the underlying proceeding. T.R. 24(B).⁶ When exercising its discretion, the court considers undue prejudice and the adjudication

⁵ The Foundation also plans to join the Respondent BZA's Motion to Certify Order for Interlocutory Appeal and For Stay of Proceedings Pending Appeal, filed with this Court on July 16, 2018.

⁶ Indiana Trial Rule 24(B) states, in full:

Upon timely filing of his motion anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive administrative order, the governmental unit upon timely

of the rights of the original parties. Indiana courts counsel against granting permissive intervention if it would open new areas of inquiry or raise unrelated issues. *City of New Haven v. Chemical Waste Mgmt. of Indiana, L.L.C.*, 685 N.E.2d 97, 100–01 (Ind. Ct. App. 1997). For the reasons stated above, the Foundation has demonstrated that it meets the requirements for permissive intervention and that its involvement would not open new areas of inquiry or raise unrelated issues.

CONCLUSION

For the foregoing reasons, the Foundation respectfully requests that the Court grant its Motion for Intervention as of right or, in the alternative, grant the Foundation the ability to intervene permissively.

Respectfully submitted,

BECKMAN LAWSON, LLP

/s/ Brian C. Heck

Patrick R. Hess, 19395-02

phess@beckmanlawson.com

Brian C. Heck, #33289-02

cpgattorney@beckmanlawson.com

BECKMAN LAWSON, LLP

201 West Wayne Street

Fort Wayne, Indiana 46802

Telephone: (260) 422-0800

Facsimile: (260) 420-1013

Johnathan J. Smith

Juvaria S. Khan

Nimra H. Azmi

MUSLIM ADVOCATES

Post Office Box 66408

Washington, D.C. 20035

Attorneys for the Al-Salam Foundation

application may be permitted to intervene in the action. In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 18h day of July, 2018, the foregoing document was electronically filed using the Indiana E-Filing System (IEFS). The undersigned further certifies that a true copy of the foregoing document was served upon the following person(s) via IEFS.

John R. Molitor
Jmolitor@prodigy.net

Michael J Andreoli
Mandreoli@datlaw.com

Robert W. Eherenman
rwe@hallercolvin.com

Andrew L. Teel
ateel@hallercolvin.com

/s/ Brian C. Heck

Brian C. Heck