IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION, INC.	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-CV-5023**
	:	
CITY OF PHILADELPHIA	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **July 15, 2005**

On October 26, 2004, CSX Transportation, Inc. ("CSX"), a Virginia corporation with its principal place of business in Florida, brought suit against the City of Philadelphia ("the City") seeking to enforce a contract related to a parcel of land directly east and adjacent to the Schuylkill River, which is known as the Schuylkill River Park ("Park"). This tract of land is bordered on the west by the River and on the east by active railroad tracks owned and operated by CSX. Complaint at 2. In brief, CSX claims that the City has a contractual obligation to erect a permanent barricade across two city streets that run across its tracks to the River (Race and Locust Streets), in order to prevent members of the public from using these roads to enter the Park. Id. at 3-4. On November 19, 2004, CSX moved for a preliminary injunction to force the City to construct such a barricade.[1] Currently before the Court is a Motion to Intervene in this suit brought by various individuals in the Philadelphia area who claim an interest in use of the Park (collectively "Movants"). For the reasons set forth below, this Motion will be denied.

[1] Following a hearing on January 5, 2005, the parties requested that this Court hold the Motion for Preliminary Injunction to give them the opportunity for additional briefing and to conduct settlement negotiations.

I. Background

CSX claims breach of contract and promissory estoppel based on Construction and Acquisition Agreements entered into between CSX's predecessors in interest and the City in 1979, when the City first acquired certain parcels of land from the company for conversion into a park. See Complaint; Exhibit A; Exhibit B. The City defends this action by arguing: (1) to the extent that the relevant contracts so compel, it has already constructed an effective barricade across these streets, meaning that there is no breach of contract; and (2) to the extent that any agreement mandates that the streets be closed entirely, it is ultra vires and unenforceable, given that Race and Locust Streets are public streets over which the City has not surrendered its rights. Defendant's Opposition To Motion for Preliminary Injunction ("Opposition") at 9.

The Movants seeking to intervene in this suit include: (1) Free Schuylkill River Park, an unincorporated association of over one hundred City residents; (2) Logan Square Neighborhood Association, a Pennsylvania non-profit corporation with 300 members; (3) Bicycle Coalition of Greater Philadelphia, a Pennsylvania non-profit corporation with 1,500 dues-paying members; (4) Philadelphia Parks Alliance, a Pennsylvania non-profit corporation with over 700 members; (5) Darrell L. Clarke, City Council representative for the 5th District of the City of Philadelphia; (6) Jack Kelly, City Council at-large member; (7) Anna C. Verna, City Council representative for the 2nd District and City Council President; (8) Babette Josephs, elected member of the state House of Representatives, representing the 182nd District of the Commonwealth; and (9) Vincent J. Fumo, elected member of the state Senate, representing the 1st Senatorial District. Movants seek intervention and press counterclaims against CSX based on their use, or their members' use, of the Park, and the Race and Locust Street entrances.

II. Intervention as of Right

Movants claim intervention as of right or, in the alternative, request permissive intervention. Intervention as of right is governed by Federal Rule of Civil Procedure 24(a)(2), which entitles a party to intervene if: (1) the application is timely; (2) the applicant has a sufficient interest in the litigation; (3) that interest may be impaired by the disposition of the action; and (4) that interest is not adequately represented by an existing party in the litigation. See, e.g., Harris v. Pernsley, 820 F.2d 592, 596 (3d Cir. 1987). If a party fails on one prong of this test, there is no entitlement to intervention. Id.; Sch. Dist. of Philadelphia v. Pennsylvania Milk Mktg. Bd., 160 F.R.D. 66, 68 (E.D. Pa. 1995). Here, there is no dispute that Movants have made a timely application, so this Court's analysis will focus on the issues of interest, impairment, and adequacy of representation.

A. Interest in the Litigation

As an initial matter, CSX argues that Movants do not have Article III standing and therefore should not be permitted to participate in this case. The Supreme Court has not definitely stated whether a party must meet the requirements of Article III standing for intervention by right at the district court level. See Diamond v. Charles, 476 U.S. 54, 68-69 (1986) (specifically reserving the question of "whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III"); accord McConnell v. Fed. Election Comm'n, 540 U.S. 93, 233 (2003) (recognizing question still open). The Courts of Appeals have diverged on this issue, see Diamond, 476 U.S. at 68 n.21, and the Third Circuit has not indicated that Article III standing is necessary. See In re Grand Jury, 111 F.3d 1066, 1071 n.8 (3d Cir. 1997) (recognizing that parties have been deemed

to meet the standard for intervention under Rule 24(a)(2) though they do not necessarily possess the requisite Article III standing, and declining to clarify the relationship between the two inquiries). There is no dispute that there is a justiciable controversy currently before the Court. As a result, this Court need not determine whether Movants meet the requirements of Article III; instead, the Court will focus on whether Movants have demonstrated the requisite interest under Rule 24.

Intervention by right under Rule 24(a)(2) requires a "significantly protectable" legal interest, which is direct, as compared to contingent or remote. Diamond, 476 U.S. at 68; see also Harris, 820 F.2d at 601 (stating party must cite a legal interest, as opposed to one of a general or indefinite nature); Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc. ("Mountain Top"), 72 F.3d 361, 366 (3d Cir. 1995). The Third Circuit has emphasized that this is a pragmatic analysis and that there is no set list of interests that qualify as sufficient for intervention. See Kleissler v. U.S. Forest Service, 157 F.3d 964, 969-70 (3d Cir. 1998). Interference with contract rights, direct economic interests, and the potential interference with free speech rights have all been deemed sufficient interests for intervention. Id. at 972. "[I]ntervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought." Id. A group has the requisite interest to bring suit provided that its members do. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc. ("Laidlaw"), 528 U.S. 167, 181 (2000); Arizonans for Official English v. Arizona, 520 U.S. 43, 65-66 (1997).

The interest claimed by Movants in this case is the legal right to use and enjoy the Park and River, and the right to maintain unimpeded access to these public trust assets over at-grade

public streets. In response, CSX argues that there is no threat to the Movants' enjoyment of the River or Park merely by closing certain Park entrances (since others will remain open), and that the alleged injury is merely less convenient access to the Park.

Movants' asserted interest in the use of Race and Locust Streets, and the right to use these streets to access a public park, would seem to represent a sufficient legally cognizable interest. It is well established that the "highways belong to the commonwealth in trust for the great body of the people." Hindin v. Samuel, 45 A.2d 370, 372 (Pa. Super. 1946); see also Chestnut Hill & Mt. Airy Bus. Men's Ass'n v. City of Philadelphia, 87 Pa. D. & C. 209, 221 (Pa. Com. Pl. 1954). Although one of the ultimate issues of this case is whether these public streets have been vacated or whether the City has otherwise pledged to barricade them, there is no serious dispute that members of the public ordinarily have a right to the use and enjoyment of these streets. Furthermore, analogizing to situations where courts have found sufficient standing to sue (which similarly requires a direct and concrete interest), Movants' asserted interest in access to and use of the Park would seem to be sufficient for purposes of intervention. Several of Movants have averred that they use the Race and Locust Street entrances to the Park, and that their access to the Park would be impeded by CSX's proposed barricade. Cf. Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972) (recognizing legally cognizable interest in the aesthetic or recreational potential of parks and other public spaces); Laidlaw, 528 U.S. at 181-82 (finding averments of use of river sufficient to demonstrate injury flowing from potential pollution of river). Thus, the reduction of access to and enjoyment of the Park and River stemming from the closing of certain streets, coupled with the legal interest members of the public have in access to public streets, is a direct, concrete interest, which will permit intervention in this suit. Cf. Kleissler, 157 F.3d at 970.

However, recognition of such an interest does not enable intervention by each of the Movants. Only to the extent that these organizations have averred that their members actually use the Race and Locust Street entrances to the Park is there evidence that their legal rights would be directly affected. Cf. Sierra Club, 405 U.S. at 735 (finding no injury in fact where party did not allege that member individuals were specifically among the injured, and further noting that injury must be one discernable from that suffered by the public at large); Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992); Streater v. U.S. Dep't of Transp., 1996 WL 134807, at *5-6 (E.D. Pa. March 25, 1996) (ruling that increased bike or foot traffic in an area is not an injury specific to party and that party cannot merely assert the rights of others). Moreover, there is no basis for permitting intervention by right by public officials merely as a result of their official status. With the exception of Representative Babette Josephs, who asserts that she accesses the Park over the at-grade crossings, see Intervenors' Counterclaim at 2, none have averred that they even use the Park or that their direct, personal enjoyment of it will be somehow impeded by the outcome of this suit.[2] This Court has not been directed to a single case where a representative was permitted to intervene in a suit based exclusively on the interests of his or her constituents; to the contrary, cases have held that where a public official demonstrates only a general interest in the litigation, intervention is properly denied. See, e.g., Harris, 820 F.2d at 602 (stating that where a public official demonstrates only a general interest in litigation, his motion to intervene should be denied); cf. Arizonans for Official English, 520 U.S. at 65.

In sum, the Court determines that the following groups and individuals have

---

[2] Councilman Darrell L. Clarke represents that he uses the Park, but does not claim to access it through the Race or Locust Street entrances, or otherwise indicate how closing these entrances would directly affect him. Intervenors' Counterclaim at 2.

demonstrated a sufficient interest for intervention by right: Free Schuylkill River Park; Logan Square Neighborhood Association; Bicycle Coalition of Greater Philadelphia; Philadelphia Parks Alliance; and Representative Babette Josephs. See Affidavit of Richard D. Atkins, attached to Surreply on Behalf of Applicant Intervenors ("Surreply"); Affidavit of Edwin Bronstein, attached to Surreply; Affidavit of Russell Meddin, attached to Surreply; Intervenors' Counterclaim at 2. The Court will now proceed to examine the potential impairment of that interest and the adequacy of representation.

B. Impairment of Interest

To the extent that the Movants have an interest as described above, there is a real and substantial risk of impairment. The specific aim of CSX's suit is to force the City to barricade the portions of Race and Locust Streets that lead to the River. If CSX prevails, these roads will be shut down and Movants will be unable to use them to access the Park. Accordingly, there is a sufficient risk of impairment of interest to satisfy this prong.

C. Adequacy of Representation

Ultimately, however, Movants claim for intervention must fail because the City is adequately representing their interests in this suit. Representation can be considered inadequate on any of the following grounds: (1) although an intervenor's interests are similar to those of an existing party, they diverge sufficiently that the existing party cannot devote proper attention to the interests; (2) there is evidence of collusion between the representative party and the opposing party; or (3) the representative party is not diligently prosecuting the suit. See Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania ("Delaware Valley"), 674 F.2d 970, 973 (3d Cir. 1982); Brody By & Through Sugzdinis v. Spang, 957 F.2d 1108, 1123 (3d

Cir. 1992); Rallis v. Trans World Music Corp., 1994 WL 52753, at *2 (E.D. Pa. Feb. 22, 1994). The would-be intervenor bears the burden of showing that his interest is not adequately represented. Trbovich v. United Mine Workers of America, 404 U.S. 528, 538 n.10 (1972).

Although the burden of demonstrating inadequacy is generally described as minimal, there is a presumption of adequacy when a governmental entity charged with representing the public or a policy is the existing party to a suit. See Kleissler, 157 F.3d at 970; Delaware Valley, 674 F.2d at 973-74; United States v. City of Philadelphia, 798 F.2d 81, 90-91 (3d Cir. 1986). This presumption generally applies when a governmental agency brings suit, and is applicable when a government is acting in its capacity of sovereign, or representative of the people. See, e.g., Kleissler, 157 F.3d at 970. However, an analogy to the present case is clear – if the government is charged with holding the streets in trust for the public, and preserving public access to the streets and parks, then there is no reason the government would not adequately represent the Movants' interests in this case. Indeed, although the City first answers the suit by claiming that it has no contractual obligation to barricade the streets, it further argues that the streets are held in trust for the public and, therefore, could not be barricaded by the relevant Construction and Acquisition Agreements. Opposition at 9. Furthermore, the closing of a public street is a matter of sovereign interest under Pennsylvania law and while the City is acting as a private party to a contract in this suit, it is also functioning as the sovereign, charged with holding and preserving the streets in trust for the public. Cf. Delaware Valley, 674 F.2d at 973 (holding that party charged by law with representing another party's interests will be deemed adequate).

Finally, there is no indication that the interests of the City and Movants diverge in this case: both parties are seeking to maintain Race and Locust Streets as open, at-grade crossings

into the Park. The City first defends against the suit on narrower grounds (initially arguing that it has no contractual obligation, and then, alternatively resting on the fact that the City could not contract to close public streets), and the Movants seek slightly different relief, but these superficial differences do not reflect any true divergence of interests. Cf. United States v. Hooker Chemicals & Plastics Corp., 749 F.2d 968, 987-88 (2d Cir. 1984) (stating government representation will not be inadequate merely because citizens would seek more drastic or different relief); Bumgarner v. Ute Indian Tribe of Uintah & Ouray Reservation, 417 F.2d 1305, 1308 (10th Cir. 1969) (declining to find inadequate representation where parties would have employed different tactics or handled a case differently). As a result, in the absence of any claims of collusion or a lack of a diligent defense, the convergence of the parties' interests leads this Court to conclude that the City is adequately representing the Movants in this litigation. Consequently, intervention as of right must be denied. See Mountain Top, 72 F.3d at 368-89 (describing comparison of interests as most important factor in gauging adequacy).

III. Permissive Intervention

Under Rule 24(b), a court may, in its discretion, permit a party to intervene if the applicant's "claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b); F.T.C. v. Mercury Mktg. of Delaware, Inc., 2004 WL 2110686, at *2 (E.D. Pa. Aug. 25, 2004); Pennsylvania Milk Mktg. Bd., 160 F.R.D. at 67. Unlike in cases of intervention by right, when intervention is merely permissive, an intervenor must establish an independent jurisdictional basis for its claims. Beach v. KDI Corp., 490 F.2d 1312, 1319-20 (3d Cir. 1974); Rallis, 1994 WL 52753 at *3; 1 Federal Procedure, Lawyer's Edition § 1:37.

While there are common questions of law and fact in the present suit and claims brought

by Movants, permissive intervention is not appropriate. First, it is not immediately clear what the basis for federal jurisdiction over Movants' claims would be, given that there is no federal cause of action and no amount in controversy has been specified. More importantly, however, given the number of Movants and the drastic nature of the relief sought, Movants' presence would inject undue complexity into the case and would hinder the speedy resolution of these issues between CSX and the City. See Kleissler, 157 F.3d at 970 (cautioning against intervention that would disrupt the focus of the litigation or render case management unduly complex); Rollins Cablevue v. Saienni Enterprises, 115 F.R.D. 484, 488 (D. Del. 1986) (noting court must consider if intervention will unduly delay or prejudice the adjudication of the rights of the original parties); see also Hoots v. Pennsylvania, 672 F.2d 1133, 1136 (3d Cir. 1982) (ruling district court within its right to deny permissive intervention where interests of applicant adequately represented by existing party). As a result, this Court will deny permissive intervention.

IV. Conclusion

Based on the above analysis, this Court will deny both intervention as of right and permissive intervention. However, this Court will consider all filings up to this point by Movants as submissions of amicus curiae. See Harris, 820 F.2d at 603 (stating that even if third parties do not meet the requirements of intervention, their participation may be desirable to the extent it contributes to a better understanding of the case); cf. Neonatology Associates, P.A. v. C.I.R., 293 F.3d 128, 131 (3d Cir. 2002) (permitting amici submissions when applicants have a sufficient interest in the case, the brief is desirable, and the brief discusses matters relevant to the disposition of the case).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CSX TRANSPORTATION, INC.	**:**	**CIVIL ACTION**
	:	
v.	**:**	**NO. 04-CV-5023**
	:	
CITY OF PHILADELPHIA	**:**	

ORDER

AND NOW, this 15th day of July, 2005, upon consideration of the Motion for Intervention (docket no. 12), the Second Motion to Intervene (docket no. 22), the responses thereto, and following a hearing on January 5, 2005, it is **ORDERED** that the Motions are **DENIED**.

BY THE COURT:

S/Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.