

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

STEVEN HEWETT, )  
Plaintiff, )  
 )  
v. )  
 )  
CITY OF KING, NORTH CAROLINA, )  
Defendant. )  
 )  
THE AMERICAN LEGION AND )  
AMERICAN LEGION POST 290 )  
OF KING, NORTH CAROLINA, )  
Movant-Intervenors. )  
\_\_\_\_\_ )

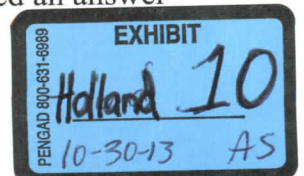
Civil Case No. 1:12-CV-1179

**BRIEF OF THE AMERICAN LEGION AND AMERICAN LEGION POST 290  
IN SUPPORT OF THEIR MOTION TO INTERVENE**

Movant-Intervenors, The American Legion and American Legion Post 290 of King, North Carolina (“American Legion Post 290”), respectfully submit this Brief in support of their Motion to Intervene of Right, or in the Alternative, for Permissive Intervention, as defendants in this action .

**NATURE OF THE MATTER BEFORE THE COURT**

On November 2, 2012, Mr. Steven Hewett (“Plaintiff”) filed a complaint (“Complaint”) against the City of King, North Carolina (“Defendant”) for declaratory relief, a permanent injunction, nominal damages and attorneys’ fees under U.S. CONST. AMEND. I and 28 U.S.C. § 1983, as well as, N.C. CONST. § 13, alleging that a statue of soldier kneeling before a cruciform headstone (“Statue”) which is part of the Veterans’ Memorial (“Veterans’ Memorial”) located in the City of King Central Park (“Central Park”) violates the Plaintiff’s rights. On January 13, 2013, the Defendant filed an answer



("Answer") to the Complaint. The Movant-Intervenors bring this Motion pursuant to Rule 24(a)(2), or alternatively Rule 24(b)(2) of the Federal Rules of Civil Procedure, to Intervene of Right, or in the Alternative, for Permissive Intervention, as a defendant in this action ("Motion"). Intervention by the Movant-Intervenors in this matter is necessary because the Movant-Intervenors have significant, distinct interests in this litigation and their ability to protect such interests may be impaired by the disposition of this case. Based on information and belief, the Plaintiff and Defendant in this action plan to oppose Movant-Intervenors' Motion to Intervene.

#### **STATEMENT OF RELEVANT FACTS**

American Legion Post 290 is a chapter of The American Legion, a national wartime veterans' service organization with a mission to advocate patriotism and promote devotion to American veterans.<sup>1</sup> Ex. A at ¶ 7; *see also* <http://www.legion.org/mission>. As a national organization, The American Legion is involved with numerous veterans' memorials throughout the county. Ex. A at ¶ 6. American Legion Post 290 participates in patriotic events at the Veterans' Memorial site several times a year, including on Memorial Day and the anniversary of September 11, 2001. Ex. A at ¶ 8.

The City of King, North Carolina is a municipality with a population of approximately 6,500. Ex. A at 9. Due to its size, there is significant overlap between

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<sup>1</sup> The Affidavit of Donald Holland in Support of Motion of The American Legion and American Legion Post 290 to Intervene of Right, or in the Alternative, for Permissive Intervention and Incorporated Memorandum in Support Thereof is attached to the Motion to Intervene as Exhibit A (hereafter cited as "Ex. A").

membership in the City of King Government and other civic organizations serving the municipal population, such as American Legion Post 290. *Id.*

The Veterans' Memorial is situated in Central Park and consists of a series of pentagonal, stone platforms, surrounded by paving stones bearing the names of veterans from Stokes County, North Carolina, the county which encompasses King, North Carolina, and which includes eleven flag poles for display of various national- and service-related flags. Ex. A at ¶ 10.

In 2003, the City of King voted to build the Veterans' Memorial in Central Park. Ex. A at ¶ 11. In 2004, the City of King established the King Veterans' Committee ("Veterans' Committee"), consisting primarily of members of Movant-Intervenor American Legion Post 290, in order to raise money for the construction of the Veterans' Memorial. *Id.* Members of American Legion Post 290 spearheaded this fundraising effort through selling paving stones to individuals and organizations bearing the names of veterans from the Stokes County area. Ex. A at 12. These paving stones were used in the construction of the Veterans' Memorial. *Id.* American Legion Post 290, through the Veterans' Committee, also solicited donations of services for completion of the Veterans' Memorial. *Id.* In total, American Legion Post 290, through the Veterans' Committee, raised approximately \$180,000 in monetary and service donations for construction of the Veterans' Memorial. *Id.* The total cost of the Veterans' Memorial was approximately \$300,000. *Id.*

In 2009, the Stokes County Arts Council suggested adding the Statue to the Veterans' Memorial to the King Community Appearance Committee ("CAC"). Ex. A at

¶ 13. The CAC is a subcommittee of the King City Council which has its own budget and recommends community beautification projects to the City Council for approval. Ex. A at ¶ 14. The Stokes County Arts Council obtained the pattern for the Statue from The Winfield Collection, a company selling patterns for use in wood and metal craft projects. Ex. A at ¶ 15; *see also* <http://www.thewinfieldcollection.com/product/4285/People>.

At the time the Statue was planned and approved, Mrs. Barbara Hensucker, the wife of the then-current American Legion Post 290 Commander, Mr. Coley Hensucker, was the chairwoman of the CAC. Ex. A at ¶ 16. Chairwoman Hensucker presented the idea for the Statue to American Legion Post 290 for the organization's input. Ex. A at ¶ 17. American Legion Post 290 suggested that the pattern be slightly altered from that available in The Winfield Collection catalogue through replacing the generic rifle silhouette with one that reflected the rifles used from World War II through the Vietnam War. Ex. A at ¶ 18.

The CAC accepted American Legion Post 290's recommendation to alter the Statue to reflect a rifle type used in World War II and the Vietnam War. Ex. A at ¶ 19. The CAC then presented the pattern to the King City Council who approved the CAC using \$400 of its budget to fabricate the Statue. Ex. A at ¶ 20. A member of American Legion Post 290, Mr. Butch Callaway, volunteered his time and skill to create the Statue. Ex. A at 21. The CAC provided sheet metal and the pattern, but Mr. Callaway created the silhouette using the altered pattern obtained from The Winfield Collection. *Id.*

## ARGUMENT

Movant-Intervenors The American Legion and American Legion Post 290 should be permitted to intervene of right in order to protect their interests in continued display of the Statue. To intervene of right under Fed. R. Civ. P. 24(a)(2), a movant must “claim an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.” *Houston General Insurance Co. v. Moore*, 193 F.3d 838, 839 (4th Cir. 1999).

In order to intervene, a movant “must meet all four of the following requirements: (1) the application to intervene must be timely; (2) the applicant must have an interest in the subject matter of the underlying action; (3) the denial of the motion to intervene would impair or impede the applicant’s ability to protect its interest; and (4) the applicant’s interest is not adequately represented by the existing parties to the litigation.” *Id.*

First, this Motion to Intervene is timely because the case is still at a preliminary stage. Determining whether a motion to intervene is timely is discretionary and determined by a number of factors, including how far the case has progressed, the prejudice that delay might cause other parties, and any reasons for tardiness in moving to intervene. *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989). Here, the Movant-Intervenors filed the instant Motion within forty days of the Defendant filing its Answer. Further, there is no prejudice to the parties due to delay, and the motion is not tardy.

Second, the Movant-Intervenors have an interest in the continued display of the Statue because its members were involved with the Statue's design, approval and construction, as well as providing funding for construction of the Veteran's Memorial where the Statue resides. Additionally, Movant-Intervenors have an organizational interest in ensuring that the Statue continues to honor veterans, living and dead, who served in the United States Military.

Third, a judgment in this action in favor of Plaintiff would practically impair or impede the Movant-Intervenors' ability to protect their interests in the Statue because Plaintiff seeks to have the Defendant remove the statue from public display.

Fourth, neither the Plaintiff nor Defendant, the present parties to this action, can be expected to adequately represent the Movant-Intervenors' interest in the statue. The burden of establishing that representation of their interests "may be inadequate" is "minimal" and is clearly met in this case. *See Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). As noted above, the Plaintiff wants the Statue removed from display, while the Defendant's interest is in defending its right to display the Statue as originally designed and installed. While the Movant-Intervenors agree with the Defendant that display of the Statue is legal, the Movant-Intervenors' primary concern is defending the Statue in its current or an alternate form as a monument dedicated to veterans of the United States Military. Additionally, as noted above, The American Legion, as a national organization, is involved with numerous veterans' memorials across the country. The disposition of this case could create adverse precedent that would affect the The American Legion's activities in other locations. Since the

Movant-Intervenors' objectives extend beyond merely defending the legality of the Statue in its current form, they meet the "minimal" burden of proving that the Defendant's representation of the Movant-Intervenors' interest "may be inadequate" as required by prior precedent. *United Guar. Residential Ins. Co. of Iowa v. Philadelphia Sav. Fund Soc.*, 819 F.2d 473, 475-76 (4th Cir. 1987).

For the foregoing reasons, Movant-Intervenors should be permitted to intervene of right. Movant-Intervenors have a property interest in preserving the Statue as they spent substantial time, resources, and money to erect in order to further their mission of honoring our Nation's veterans. The courts have held that persons with an interest in property, like the Movant-Intervenors and their interest in the Statue, have a right to intervene in an action involving that property where their interests conflict with those of the parties involved in the action. *See Genesis Press, Inc. v. MAC Funding Corp.*, 2008 WL 4695114, 1 (D. S.C. 2008) (finding the intervenors satisfied the requirements for intervention as of right based on a property interest and noting "[i]nterests in property are the most elementary type of right that Rule 24(a) is designed to protect") (quoting *Diaz v. S. Drilling Corp.*, 427 F.2d 1118, 1124 (5th Cir. 1970)); *ECOS, Inc. v. Brinegar*, 671 F.Supp. 381, 387 (M.D.N.C. 1987) (noting "strong facts favoring the allowance of the[] motion to intervene" as the party "claimed an interest relating to the property which was, in part, the subject of the . . . action, and the disposition of the . . . action could have easily, as a practical matter, impaired [it]'s ability to protect that interest"); *Morgantown Energy Associates v. Public Service Comm'n of West Virginia*, 2013 WL 140235, 4 (S.D.W.Va. 2013) (finding the intervenors satisfied the requirements for intervention as

of right because they had a “property interest[]” in “the subject matter of the litigation”); *Day v. DB Capital Group, LLC*, 2011 WL 887554, 23 (D.Md. 2011) (finding the intervenors satisfied the requirements for intervention as of right because they had “a direct interest in the [] property at issue in this case”); *GMAC Mortgage, LLC v. Flick Mortgage Investors, Inc.*, 2011 WL 841409, 3 (W.D.N.C. 2011) (finding the intervenors satisfied the requirements for intervention as of right based on a property interest contingent on the outcome of the litigation).

Alternatively, the Movant-Intervenors seek permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1)(B), which says that this Court may permit the Movant to intervene if they have “a claim or defense that shares with the main action a common question of law or fact.” FRCP Rule 24(b)(1)(B). As established above, Movant-Intervenors’ claims and defenses in the present action share common questions of law and fact as set forth in the Movant-Intervenors’ declarations. Movant-Intervenors’ participation will not delay or prejudice the adjudication of the rights of the parties, and this Motion to Intervene is timely.

Filed herewith is the Movant-Intervenor’s Answer, filed in compliance with Fed. R. Civ. P. 24(c).

### **CONCLUSION**

For the foregoing reasons, Movant-Intervenors The American Legion and American Legion Post 290 should be permitted to intervene as defendants in this action.



This the 20th day of February 2013.

/s/ Kearns Davis

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*\* Notices of Special Appearances pursuant to LR83.1(d)(1) forthcoming*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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This the 20th day of February 2013.

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