STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	Case No.: 2019-CP-22-01116
The Belle W. Baruch Foundation,	)	
Plaintiff,	)	**ORDER DENYING MOTION TO INTERVENE OF DEBORDIEU COLONY COMMUNITY ASSOCIATION, INC.**
v.	)	
The State of South Carolina,	)	
Defendant.	)	

This matter is before the Court on the Motion to Intervene of the Debordieu Colony Community Association, Inc ("DCCA") filed on February 12, 2020. The Court conducted a hearing on March 12, 2020. Appearing for Plaintiff, The Belle W. Baruch Foundation (the "Foundation"), were Thomas F. Tisdale and G. Trenholm Walker. Brian C. Duffy appeared on behalf of DCCA. J. Emory Smith of the Office of the Attorney General who represents the State of South Carolina (the "State") was unable to appear because of a scheduling conflict but communicated to the Court before the hearing that the State did not oppose the Motion.

Having fully considered the filings, the arguments of counsel, and the applicable law, the Court denies the Motion.

Background

According to the allegations of Paragraphs 1 and 3 of the Complaint, the Foundation was created under the will of Belle W. Baruch "for the purpose of teaching and/or research in forestry, marine biology, and the care and propagation of wildlife and flora and fauna in South Carolina in connection with colleges and/or universities in the State of South Carolina." These purposes are carried out on a large undeveloped tract owned by the Foundation known as Hobcaw Barony.

According to the filings of the parties, Hobcaw Barony is approximately 8,000 acres generally located at the southern end of the peninsula known as the Waccamaw Neck that is bounded on the East by the Atlantic Ocean.

Hobcaw Barony's northern boundary is a gated development community known as Debordieu Colony. According to the Affidavit of Blanche Brown filed with the Motion to Intervene, DCCA is a nonprofit entity that "is the vehicle by which the owners of property in Debordieiu Colony govern its internal and external affairs." As Ms. Brown attests, the membership of DCCA is comprised of the owners of properties within Debordieu Colony.

The Foundation brought this non-jury action against the State under S.C. Code Ann. § 48-39-220[1] for a determination of the legal title to the marshlands surrounding Hobcaw Barony. As alleged in the Paragraphs 12 and 15 of the Complaint, the Foundation bases its claim of legal title to these tidelands on six grants from the English sovereign and six State grants that are described in Exhibit 1 to the Complaint along with references to their relevant plats.

The Attorney General answered on behalf of the State, asserting the State's presumptive ownership of the tidelands and counterclaiming for declaration of a prescriptive easement and an easement by prior use in favor of the public over the tidelands.

DCCA asserts in its Motion and in the materials accompanying the Motion that DCCA has paid to dredge canals that allow its members to use boats for access to the surrounding marshlands and North Inlet, adjacent to Hobcaw Barony. The filings allege that owners within Debordieu

[1] "(A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State…." S.C. Code Ann. § 48-39-220 (A).

Colony have approximately 120 private docks that were built to enable access to North Inlet and the surrounding marshlands. Blanch Brown avers in her Affidavit that "Debordieu Colony's owners have continuously used and accessed the marshlands surrounding the community for over 45 years, through fishing, kayaking, boating, paddle boarding, crabbing, harvesting oysters, and other recreational activities." According to the Affidavit of Geoffrey Groat, "[o]ne of the main attractions and selling points of Debordieu is its access to North Inlet and the surrounding marshlands."

DCCA asserts as a basis for its Motion to Intervene that if "Plaintiff prevails in the Baruch Action [this case], Debordieu owners' rights of access to and use of the Disputed Marshlands will be terminated." DCCA further alleges that if the Foundation prevails, "Debordieu's owners will suffer a loss in the value of their investments in docks, boats, and waterfront properties, and the loss of the right of access to the Disputed Marshlands." DCCA contends in its filings in support of intervention that "Debordieu owners – and the public – will be prohibited from using the Disputed Marshlands if Plaintiff prevails" because a "declaration of fee simple ownership of the Disputed Marshlands would certainly give Plaintiff the right to terminate public access."

DCCA filed a proposed Answer that denies that the Foundation has a title superior to the State's for any of the marshlands and asserts a counterclaim alleging it holds a prescriptive easement. Significantly, DCCA does not assert that it holds title to any of the marshlands in question.

For the multiple reasons set forth herein, the Motion to Intervene should be denied.

DCCA's Claim is not Ripe.

DCCA's predicates its proposed intervention on its supposition that the motive of the Foundation in bringing this action is to allow it to restrict recreational use of North Inlet in the

future if title is adjudicated in its favor. The Complaint of the Foundation, however, seeks only a determination of title to the tidelands. There is no allegation in the Complaint that requests a determination that threatens DCCA's members' recreational use of the tidelands in question or the navigable waters of North Inlet. The Foundation does not allege that it has excluded any members of DCCA from these tidelands nor that it intends to try to exclude them. DCCA also does not allege that the Foundation has taken steps to prevent its members from using these tidelands.

It is axiomatic that a controversy must be ripe for this Court to have jurisdiction to decide it. The *anticipated* exclusion of recreational boaters and fishermen from North Inlet and the other tidelands is an event that has not occurred and may never occur. At this stage, the anticipated threat is contingent and hypothetical, and is not yet ripe.

"A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from this dispute of a contingent, hypothetical or abstract character." *Orr v. Clyburn*, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982). In *Orr* the plaintiff sheriff alleged that the Human Affairs Commission had begun an investigation of him for discrimination and sought to restrain it. Our Supreme Court determined there was no justiciable controversy since the Commission might end up not bringing a formal action or asserting charges against him. 290 S.E.2d 807.

Similar to *Orr*, there is no showing in this case that the Foundation will take action against boaters who use these tidelands for recreational purposes. In fact, since the Constitution protects the right of the public to use navigable waters, the only reasonable conclusion is the opposite. S.C. Const. art. XIV, § 4 ("All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, toll, impost or wharfage shall be imposed ... unless the same be authorized by the General Assembly.")

A determination of title to the tidelands does not equate to the exclusion of boaters and fishermen from North Inlet. Title has nothing to do with rights of navigation over waterways. As just explained, the South Carolina Constitution protects the right of the public to use navigable waters and that right is ensured regardless of whether the land underneath those waters is titled in the State or someone else. *State v. Head*, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1998) (public's constitutional and statutory right to use navigable waters does not deprive the owner of title to the soil covered by navigable watercourse). Therefore, if there is a judicial determination that the Foundation owns the tidelands, the members of DCCA and the public still have the right to boat and navigate in the tidelands in question and North Inlet generally. According to their own filings, the members of DCCA will not suffer an injury if they have free navigable access over North Inlet and its surrounding the tidelands. DCCA and its owners will still have the benefit of all their described improvements to facilitate boating in North Inlet, and their docks and property values will not be diminished based on loss of navigable access to North Inlet.

For these reasons, DCCA's claims and contentions do not present a ripe controversy.

DCCA also fails to establish the right to intervene under Rule 24(a).

Even if the controversy alleged by DCCA were ripe, DCCA has failed to establish the basis for intervention as a matter of right under Rule 24 (a) SCRCP.

Rule 24, SCRCP, governs intervention. Rule 24(a) describes the conditions for when a party may intervene as a matter of right:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property 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 that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24 (a), SCRCP.

DCCA fails to meet either of the criterion for intervention as a matter of right. There is no statute that confers an unconditional right on DCCA to intervene, nor does DCCA claim an interest relating to the title to the tidelands in questions and is so situated that the disposition of the case may as a practical matter impair or impede his ability to protect that interest. Moreover, DCCA's alleged interest is adequately represented by the State.

The statutory section that is the basis for the Foundation's claim specifies that "[a]ny person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, *may institute an action against the State of South Carolina* for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State…." S.C. Code Ann. § 48-39-220 (A) (emphasis added). In its filings in support of intervention, DCCA does not allege that it holds title to any of the tidelands surrounding Hobcaw Barony nor has it alleged an action or crossclaim against the State, that would come within the terms of the statute.

DCCA also fails to assert an interest that is sufficient to satisfy intervention as a matter of right under Rule 24(a)(2). Intervention is "a procedural device whereby a third party who is not a named party in an existing lawsuit … may become a party to the action" ***if*** the moving party adequately demonstrates he has an interest in the outcome of the litigation sufficient to warrant allowing the party to enter the case. *In re Horry Cty. State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004) (double emphasis added).

The Complaints seeks only a declaration of title to the tidelands. As just discussed in the context of Section 48-39-220(A), DCCA does not allege that it holds title to any of the marshlands

through a sovereign grant or grant from the State. Instead, DCCA's proposed pleading asserts a counterclaim seeking to establish a prescriptive easement that would have no effect on title. South Carolina law is clear – "An easement gives no title to land on which servitude is imposed." *S.C. Pipeline Corp. v. Lone Star Steel Co.*, 345 S.C. 151, 153, 546 S.E.2d 654, 656 (2001). Putting aside the complete absence of legal precedent in South Carolina, or anywhere else, for the proposition that a person or group can establish a prescriptive easement across tidelands through boating and other recreational use,[2] the allegation of a prescription easement does not assert an interest in ***title***.

DCCA argues that its intervention is fully supported by the recent decision of the Court of Appeals in *Hoyler v. State*, 428 S.C. 279, 833 S.E.2d 845 (Ct. App. 2019), *reh'g denied* (Oct. 17, 2019). DCCA asserts its position is directly akin to the neighboring property owners in *Hoyler* whom the Court allowed to intervene. But, the allegations and facts of this case are much different from those in *Hoyler*.

In *Hoyler*, the plaintiff property owner sued the state alleging he owned the marsh in front of the neighbors' properties and specifically alleged he not only had title to the marsh but also that he had the right to prevent the neighbors from building docks across that marsh including the dock of intervener Merry Land that the State had already permitted. 833 S.E.2d 845 at 857 ("Hoyler's complaint references the dock construction permit obtained by one of the adjacent property owners. The complaint seeks not only a declaration that Hoyler owns the disputed marsh but also

[2] In fact, legal precedent is entirely to the contrary. "The State of South Carolina holds presumptive title to all land below the high water mark in trust for the benefit of its citizens." *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003) . "Adverse possession does not run against the state or its duly constituted political subdivisions." *Davis v. Monteith*, 289 S.C. 176, 179, 345 S.E.2d 724, 726 (1986).

a declaration that he 'possesses all rights of a fee simple property owner[,] including the right to exclude dock construction.'").

If DCCA had alleged it had a permit to build a dock across the tidelands in question or that it intended to build one, then the facts would be analogous to *Hoyler*, and the Court would grant its Motion to Intervene. But, here a determination that the Foundation has legal title to the tidelands will not prevent DCCA's members from boating or other similar recreational uses in those tidelands. Unlike the plaintiff in *Hoyler*, the Foundation has not alleged in its Complaint that it has the right to terminate the recreational use of the proposed intervener or that it intends to do so. The public's constitutional right to navigable waterways is entirely unaffected by this action.

The Court rejects DCCA's argument that its interest rises to the level of those of the intervenor in *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). In *Berkeley Elec. Co-op.*, the Supreme Court endorsed intervention of SCE&G in a case brought by the plaintiff Co-op, a competing electric company, because a determination of the issues joined in the original case would necessarily determine the exclusive right to service a particular customer territory that was also claimed by SCE&G. In contrast, a determination of whether the Foundation or the State has title to what DCCA labels the Disputed Marshlands does implicitly or explicitly determine whether DCCA has a prescriptive easement over those tidelands. Further, DCCA does not assert, nor could it, that its so-called prescriptive easement is exclusive, hence preventing others from access over these tidelands.

DCCA's position does not mirror that of SCE&G, the intervener in *Berkeley Elec. Co-op.* There the state Supreme Court found that SCE&G was in a position that if intervention were not granted, disposition of the action might impair or impede its ability to protect its alleged right to

provide electrical service within the area where the Co-op claimed an exclusive right of service in its complaint. The following finding of the Supreme Court cannot be established here:

> SCE&G may be impaired or impeded in its ability to protect its asserted interests unless allowed to intervene in this action. A declaration by the trial judge in favor of Berkeley would, as a practical matter, prevent SCE&G from serving customers that it believes it is legally entitled to serve and impair its ability to protect investments it has already made in reliance on its beliefs. Also, it would be extremely difficult for SCE & G to collaterally attack any ruling adverse to them if not made a party to the original action.

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 191, 394 S.E.2d 712, 715 (1990). Again, a ruling in this case will not prevent DCCA from doing anything at all; its members will still be able to boat and exercise their constitutional right to navigate over the waters of these tidelands. A ruling as to legal title to the tidelands does not prevent or hinder DCCA from doing anything that it can do now or later.

Further, and just as important, there is no concern or consideration about collateral attack similar to that in *Berkeley Electric Co-op*. As already stated, the determination of legal title will not impair DCCA's ability to assert its so-called prescriptive easement if at some point there is a ripe controversy because the Foundation has attempted to exclude boating and other similar recreational use of North Inlet or any other navigable water.

In addition to DCCA's failure to demonstrate an interest in the these tidelands that may be impaired or impeded if intervention is not granted, DCCA has also failed to satisfy the further requirement of Rule 24 (a) that its alleged interest is not adequately represented by the State.

To prove a right to intervene under Rule 24(a), a movant must:

> (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) ***demonstrate that its interest is inadequately represented by other parties.***

Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990)(double emphasis added).

In this case the State has counterclaimed asserting a prescriptive easement in the tidelands on behalf of the public. Again, putting aside the entire lack of legal precedent recognizing a prescriptive easement in tidelands, the alleged "interest" of DCCA is identical to that asserted by the State.

Our Court of Appeals has discussed the burden on the proposed intervenor to establish inadequate representation as follows:

> The burden to show that the representation may be inadequate is on the applicant. 3B J. Moore, Moore's Federal Practice Section 24.07[4] (2d ed. 1987). ***When an applicant for intervention and an existing party have the same interests or ultimate objective in the litigation a presumption arises that its interests are adequately represented and the application should be denied unless a showing of inadequate representation is made by demonstration of adversity of interest, collusion, or nonfeasance***. See, *International Tank Terminals Ltd. v. M/V Acadia Forest*, 579 F.2d 964 (5th Cir.1978); *Commonwealth of Virginia, supra; Moore's Federal Practice, supra*; 59 Am.Jur.2d Parties Section 141 (1987). We are unable to discern from the Commission's argument that its ultimate objective in this case is different from that of the Auditor and Treasurer. The Commission conceded at oral argument that the County Officers' objective was to retain the tax for the county and its objective is to have the court rule the tax was not a county tax from which Milliken's property is exempt. We see no difference of interest.

S.C. Tax Commn. v. Union County Treas., 295 S.C. 257, 260-261, 368 S.E.2d 72, 74 (Ct. App. 1988).

Our appellate courts have applied these same principles in a case somewhat similar to this one. In *In re Horry Cty. State Bank*, 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004), the bank sought intervention as a defendant in an action to terminate an existing easement. The appellate court upheld the denial of the motion to intervene, finding that the original defendant was adequately defending the claim to terminate the easement and that the interests of the bank and the defendant were "essentially the same." 604 S.E.2d 726.

DCCA argues that representation of an interest by a governmental entity is normally inadequate, relying on the following comment of the Supreme Court in *Berkeley Elec. Co-op.*:

> It has been held that a governmental entity's representation of a private party's interests does not constitute adequate representation. *National Farm Lines v. Interstate Commerce Commission*, 564 F.2d 381 (10th Cir.1977). Mt. Pleasant lacks a direct economic interest in the outcome of the proceedings in that it will receive franchise fees regardless of who supplies the property. While we do not adopt the *National Farm Lines* rule as a per se rule, it is likely that here, Mt. Pleasant would be an inadequate representative of SCE & G's asserted economic interest.

394 S.E.2d 716.

As the excerpt demonstrates, the Supreme Court did not adopt the rule that a governmental entity's representation of a private party's interest is per se inadequate. Rather, the Supreme Court made a fact specific determination that Mt. Pleasant would "be an inadequate representative of SCE & G's asserted economic interest." In stark contrast, here the State is asserting the equivalent of SCE&G's competing economic interest by alleging in its answer that it, not the Foundation, owns the tidelands, alleging the legal presumption that it holds title to all tidelands under the public trust doctrine. It further alleges, in the alternative, a counterclaim for prescriptive easement that is identical to the cause of action in DCCA's proposed Answer.

The Attorney General routinely advances the interests of the citizens of South Carolina in a representative capacity. That is the specific job of the Attorney General. We are not dealing with a mere municipality represented by its in-house or outside counsel. Here we are dealing with the State itself represented by the extremely experienced and able counsel of the Office of the Attorney General.

The Court finds that DCCA has failed to make a prima facie showing that the Attorney General of South Carolina is incapable of adequately representing the public's alleged ownership interest in the tidelands and the public's putative prescriptive easement over these tidelands if

DCCA establishes legal title to them. DCCA has not shown that its alleged interest is inadequately represented by the Attorney General on behalf of the State that is alleging legal title to the same tidelands and, in the alternative, a prescriptive easement in favor of the public which, by definition, includes the members of DCCA, if it is determined the Foundation is the legal owner of the tidelands.

DCCA has not established a basis for permissive intervention under Rule 24 (b), SCRCP.

As a backup, DCCA contends the Court should exercise its discretion and grant permissive intervention under the provisions of Rule 24 (b), SCRCP, that provides, in pertinent part, as follows:

> (b) Permissive Intervention. Upon timely application 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…. 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.

Rule 24 (b), SCRCP.

Because no statute confers a conditional right to intervene in this instance, DCCA argues for intervention under subpart (2) that applies "when an applicant's claim or defense and the main action have a question of law or fact in common."

In a recent appellate decision discussing permissive intervention under Rule 24(b), our Court of Appeals repeated the principles a court should follow in assessing a request for permissive intervention:

> 'Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties.' *Ex parte Gov't Emp.'s Ins. Co.*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007). Thus, this court 'should consider the practical implications of a decision denying or allowing intervention.' *Id.* 'However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP.' *Id.* 'A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a 'real party in interest.' *Id.* (quoting

> *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994)). 'A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action.' *Id*. (quoting *Bailey*, 312 S.C. at 458, 441 S.E.2d at 327).

Stoney v. Stoney, 425 S.C. 47, 64-65, 819 S.E.2d 201, 210 (S.C. App. 2018), reh'g denied (Oct. 19, 2018), cert. denied (June 28, 2019).

Even though the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties, DCCA's filings do not raise a common question of law or fact with respect to the Complaint brought by the Foundation. The Foundation's Complaint seeks only a declaratory determination of whether it or the State holds legal title to the tidelands. DCCA does not claim title to the tidelands.

On the other hand, DCCA's proposed amended answer does raise a question of law or fact in common with the Answer filed by the State. DCCA seeks intervention to file an Answer that asserts a counterclaim for prescriptive easement, just as the State has alleged in its Answer. However, as discussed in this Court's analysis of whether DCCA is entitled to intervention as a matter of right under Rule 24(a), DCCA has not shown that the State, represented by the Attorney General, does not adequately represent the interests of the public in prosecuting this counterclaim.

Further, Rule 24(b)(2) states that 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." The matters that DCCA desires to litigate will greatly expand the narrow reach of the issues joined in the pleadings, with the exception of the counterclaim for prescriptive easement of the State. Based on its filing, the subjects that DCCA seeks to introduce into the case are wide ranging and include such matters as DCCA's expenditure of funds for recreational amenities, the relationship of Debordieu owners' property values to boating in North Inlet, the use of private docks by DCCA members, and the use of North Inlet by its members over the last four decades.

DCCA's intended expansion of the issues and discovery in the case in this fashion will shed no light on the title to the tidelands nor the alleged prescriptive easement of the public that the state has alleged.

Another important consideration is that DCCA's proposed Answer demands a jury trial. Neither the Foundation nor the State demanded a jury trial in their pleadings. Switching to a jury trial and substantially expanding the scope of discovery and the issues as DCCA proposes will drastically increase the time, money, and other resources the nonprofit Foundation will have to expend simply to obtain a determination of whether it or the State holds title to the tidelands surrounding Hobcaw Barony. Yet, increasing the scope of the case and changing the method of trial as DCCA proposes will not bear on the issue of legal title to the tidelands.

Because DCCA is not claiming to hold title to any of the tidelands, because the State has the same interests as DCCA in prosecuting a claim for prescriptive easement across the tidelands for the benefit of the public including DCCA's members, and because the intervention of DCCA will unduly prejudice the non-profit Foundation, the Court exercises its discretion to deny DCCA's Motion for Intervention under Rule 24 (b) as well.

For the foregoing reasons, the Court denies the Motion to Intervene of DCCA.

AND IT IS SO ORDERED.

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Paul M. Burch
Circuit Judge

_____, 2020

_____, South Carolina

Georgetown Common Pleas

Case Caption: Belle W Baruch Foundation VS South Carolina State Of

Case Number: 2019CP2201116

Type: Motion/Intervene

So Ordered

s/Paul M. Burch, Judge #2048