IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

KAREN UNDERWOOD	**Plaintiff**)	CASE NO. ST-95-CV-0000459
	)	
	)	ACTION FOR: DECLARATORY RELIEF
	)	
vs	)	
BRUCE STREIBICH,ESQ.	)	
WARREN STRYKER	)	
MARGARET STRYKER	)	

Defendant

NOTICE OF ENTRY OF MEMORANDUM OPINION AND ORDER

TO: HENRY C. SMOCK,ESQ.
MICHAEL FITZSIMMONS,ESQ.
BRUCE W. STREIBICH,ESQ.
MARIA TANKENSON HODGE,ESQ.

Please take notice that on February 19, 2019 a(n) MEMORANDUM OPINION AND ORDER dated February 15, 2019 was entered by the Clerk in the above-entitled matter.

Dated: February 19, 2019

Estrella H. George
Clerk of the Court

DONNA DONOVAN
COURT CLERK SUPERVISOR

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

KAREN R. UNDERWOOD, Plaintiff, v. BRUCE W. STREIBICH, Defendant.	CASE NO. ST-95-CV-459 ACTION FOR DECLARATORY RELIEF, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, AND DAMAGES
WARREN STRYKER and MARGARET STRYKER, Intervening Plaintiffs.	

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CARTY, RENÉE GUMBS, JUDGE

MEMORANDUM OPINION

THIS MATTER is before the Court on Arthur Schmauder, Elizabeth McGuire, and Blue Water Retreat, LLC's (hereinafter "Intervening Defendants") Motion to Intervene pursuant to V.I. R. Civ. P. 24(a) filed on October 26, 2018. Intervening Plaintiffs Warren and Margaret Stryker filed their opposition to the motion to intervene on November 5, 2018. On November 9, 2018, Plaintiff Karen

Underwood filed a joinder in Opposition to Intervene. Thereafter, Intervening Defendants filed their reply to Intervening Plaintiffs' opposition on November 14, 2018.

Intervening Defendants seek to defend their property rights for Parcel No. 4-22B and Parcel No. 4-25, which are implicated by the pending matter. Specifically, they assert that the proposed creation and enforcement of roadways through Parcel No. 4-26 would adversely affect the peaceful use of their property and cost for road repairs.[2]

I. LEGAL DISCUSSION

a. Motion to Intervene Standard

V.I. R. Civ. P. 24(a) provides, as an intervention of right, that: "On timely motion, the court must permit anyone to intervene who:

> (2) claims 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.[3]

V.I. R. Civ. P. 24(b)(1)(B) also provides, as a permissive intervention, that:

> "On timely motion, the court may permit anyone to intervene who... has a claim or defense that shares with the main action a common question of law or fact."[4]

An intervention of right is distinguishable from a permissive intervention because such an intervenor has an interest in the litigation that cannot be protected without joining the litigation, while the permissive intervenor does not but invokes the discretion of the court to permit an intervenor, subject to similar criteria.[5] The Third Circuit in *Harris v. Pernsley* established the four (4) factors that the Court must take into account when analyzing a motion to intervene as a matter of right are whether: "1.) the application for intervention is timely, 2.) the applicant has a sufficient interest in the

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1 Intervening Defendants' Motion to Intervene, p. 1.
2 Intervening Defendants' Reply to Opposition, p. 4.
3 V.I. R. Civ. P. 24(a)(2).
4 V.I. R. Civ. P. 24(b)(1)(B).
5 *Rosa v. V.I. Water & Power Auth.*, 32 V.I. 89, 90-91 (Terr. Ct. 1995).

litigation, 3.) the interest may be affected or impaired, as a practical matter by the disposition of the action, and 4.) the interest is not adequately represented by an existing party in the litigation."[6] In accordance with the Third Circuit, the Virgin Islands Supreme Court reinforced these rules in *Anthony v. Indep. Ins. Advisors, Inc.*, now known as the *Anthony* factors, and also added that the applicant for intervention bears the burden of persuading the Court as to each element in order to succeed.[7] Further, *In the Matter of Q.G.* the Court established that the failure of the party moving for intervention to satisfy any one factor defeats intervention.[8]

i. **Parameters for Determining the Timeliness of a Rule 24 Motion**

In order to determine the first *Anthony* factor, timeliness, the Court has to look to the totality of the circumstances and must consider 1.) the stage of the proceeding, 2.) the prejudice that delay may cause the parties, and 3.) the reason for the delay.[9] To further expand on each of the time requirements, when considering the stage of the proceeding, the critical inquiry is whether proceedings of substance on the merits have occurred, and whether the litigation proceedings are far too advanced.[10] Next, prejudice to the opposing party is demonstrated by "either increased expense to the opposing party arising from extra costs... or increased difficulty in the opposing party's ability to present or defend their claim."[11] Thus, courts are required to look into whether the addition of the intervenors will cause additional discovery, the recalling of additional witnesses, irreparable loss of evidence, or other severe burdens or costs that may result in a substantial delay.[12] Lastly, with respect to delay, the intervening party must provide a "compelling reason" to justify the delay either by

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6 *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987).
7 *Anthony v. Indep. Ins. Advisors, Inc.*, 56 V.I. 516, 526 (V.I. 2012).
8 *In the Matter of Q.G.*, 60 V.I. 654, 661-62 (V.I. 2014).
9 *Anthony*, 56 V.I. at 527; *In the Matter of Q.G.*, 60 V.I. at 663.
10 *Anthony*, 56 V.I. at 527 (explaining that the mere passage of time does not render an application untimely, but it is dependent on the factors of the case). *See also Rosa v. V.I. Water and Power Auth.*, 32 V.I. 89, 91-92 (V.I. Super. Ct. 1995) (finding that the timeliness requirement is rather flexible and the lapse in time must be taken in light of the circumstances of the case).
11 *Meyers v. George*, No. ST-12-CV-394, 2016 V.I. LEXIS 230, at *16 (V.I. Super. Ct. Oct. 24, 2016).
12 *Anthony*, 56 V.I. at 528.

demonstrating that the intervenor only recently learned of the lawsuit, or that "despite having knowledge of the existence of the suit, only recently learned that its interest was at risk or that their interest is no longer being adequately represented by the current parties."[13]

ii. Parameters for Determining the Sufficiency of Interest in a Rule 24 Motion

To analyze the second *Anthony* factor, sufficient interest in the litigation, courts have since established that in determining what amounts to a sufficient interest, the applicant's interest must be a "direct," "legally cognizable," "significantly protectable," and "legally tangible interest" that may not be general or indefinite in nature, and must go beyond an economic interest.[14] Therefore, the determination of the third *Anthony* factor, whether the movant's interest will be impaired as a practical matter by disposition of the case, is intimately tied to there being a legally recognizable interest to protect.[15] Courts have generally cautioned however that without a definite showing of the first two *Anthony* factors, the court need not consider the final two factors.[16]

iii. Parameters for Determining the Adequacy of Representation in a Rule 24 Motion

With regard to the fourth *Anthony* factor, whether the movant's interest is not adequately represented by an existing party in the litigation, *In the Matter of Q.G.*, the Virgin Islands Supreme Court held that where a movant shares the "same ultimate objective" as an existing party, the court will presume an adequacy of representation exists, but provides that the presumption can be rebutted through compelling evidence to the contrary.[17] The Court does however conclude that the burden in establishing this factor should be treated as minimal, but requires the movant to show a "more

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13 *Anthony*, 56 V.I. at 528-29; *see also Mountaintop Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370 (3d Cir. 1995).

14 *See generally Donaldson v. United States*, 400 U.S. 517, 530-31 (U.S. 1971); *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987); *Mountaintop Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366-67 (3d Cir. 1995) (emphasizing that a purely economic interest is insufficient for a motion to intervene); *Rosa*, 32 V.I. at 92.

15 *Meyers*, 2016 V.I. LEXIS 230, at *29-30.

16 *See Rosa*, 32 V.I. at 94, *Anthony*, 56 V.I. at 530.

17 *In the Matter of Q.G.*, 60 V.I. at 663-64.

rigorous" offer of inadequacy when movants and existing parties share the same ultimate objective.[18] The Third Circuit further qualified that the determining factor in adequacy of representation is whether the interest of the movant is comparable to the interest of the existing parties, and if not then movant must make a "compelling showing" to demonstrate that the existing parties representation is inadequate.[19]

II. LEGAL ANALYSIS

a. The Court Determines that the Motion to Intervene was Timely Filed

Here, movants assert that although the case has been pending for many years, there have been no decisions on any filed dispositive motions, no set trial date, and no discovery conducted.[20] As such they have a compelling reason to show that the proceedings are still in the early phases and no adjudication on the merits have occurred, thus satisfying the stage of the proceeding requirement as well as adequately demonstrating that there will be little to no prejudice to the existing parties because of delay as there has been little action in almost a decade.[21]

Also, movants have presented a justification for their delay. Movants contend that their interest only arose in 2017 upon adjudication of the prior owner Verna Ruan's estate.[22] Therefore, their interest only arose upon acquiring ownership and active management of the other implicated parcels, Parcel No. 4-25 and Parcel No. 4-22B, and they are not privy to their predecessors-in-interest, Violet Schmauder and Verna Ruan's, choice against intervention.[23] Accordingly, movants proffered

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18 *Id.*

19 *Mountaintop Condo. Ass'n*, 72 F.3d at 368-69 (ruling that "if the interest of the absentee is not represented at all, or if all existing parties are adverse to him, then he is not adequately represented. If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate").

20 *See* Intervening Defendants' Motion to Intervene, p. 3; *see generally* Intervening Defendants' Reply to Opposition, pgs. 3-5.

21 Intervening Defendants' Motion to Intervene, p. 3; *see generally* Intervening Defendants' Reply to Opposition, pgs. 3-5.

22 *See* Intervening Defendants' Exhibit B.

23 *See* Intervening Defendants' Reply to Opposition, p. 2; Intervening Defendants' Exhibit B.

evidence demonstrating compelling reasons that justify their delay and have sufficiently satisfied the first *Anthony* factor necessary to sustain a motion for intervention.[24]

b. <u>The Court holds that Movants have not pled a Sufficient Interest in the Underlying Action.</u>

Intervenors offered that their interest is in protecting their property rights implicated in this action.[25] They elaborated that due to their standing as "long-time property owners... who have a longstanding presence in the area,"[26] their interest in the disposition of the underlying claim between the existing parties is readily apparent because such an outcome could "materially increase traffic through and about their residential properties that will adversely affect their peaceful use of their property."[27] Movants also asserted that they anticipate serious damage and an inevitably higher cost of repair to the already paved road.[28]

Movants proffered Elizabeth McGuire's affidavit where she mentioned that a small water truck damaged the cement-paved right-of-way and echoed her concerns about the damage larger vehicles involved in future home construction could predictably cause to the common right-of-way.[29] However, within the same affidavit, McGuire also tendered that she is aware that the deeds of all relevant parties mandate a shared duty to maintain common roads in the subdivision, equalizing all parties' interest, thus in essence defeating the sufficient interest claim.[30] McGuire's affidavit, even when construed broadly, leaves this court to wonder how movants can assert that they believed the long-standing right-of-way was always intended for utilities only and not for a roadway, while in the same vein maintaining in her affidavit that movants, and defendant alike, are aware that they share

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24 *See Anthony*, 56 V.I. at 527-29.
25 Intervening Defendants' Motion to Intervene, p. 1.
26 *See generally* Intervening Defendants' Motion to Intervene, pgs. 1-3.
27 *See generally* Intervening Defendants' Motion to Intervene, p. 1-3.
28 Intervening Defendants' Reply to Opposition, p. 4.
29 *See generally* Intervening Defendants' Reply to Opposition, p. 4; Intervening Defendants' Exhibit B.
30 Intervening Defendants' Exhibit B.

the cost of maintaining roadways under the terms of their respective deeds.[31] The end result here is that the maps and deeds are the controlling authority and have made abundantly clear the nature of the use of the contested right-of-way.

Notably, movants have only highlighted a purely economic interest, which courts have noted are "insufficient" to support a motion to intervene.[32] Therefore, this court interprets movants' rationale as a solely economic-based interest. Thereby concluding that movants have not pled any evidence that purports to show that movants have a "direct," "legally cognizable," "significantly protectable," and "legally tangible" interest as required by the second *Anthony* factor.[33] Accordingly, in failing to plead a discernable sufficient interest, movants also fail as to the third *Anthony* factor, whether the interest will be impaired, as a practical matter, by the disposition of the case.[34]

c. <u>The Court finds that Movants are unable to show that their interest is not adequately represented by existing parties.</u>

On the issue of adequate representation by an existing party in the litigation, movants present that the change in Defendant Streibich's representation from utilizing an experienced litigator to *pro se* representation was critical in seeking intervention. Movants assert that because Defendant Streibich is a real estate lawyer by profession, "it is imprudent to simply rely on his defense and assume that he will properly protect and represent [their] interests."[35]

The court finds that movants applied an incorrect test. Adequacy of representation does not go to the ability of whether an existing party (either through an attorney or through self-representation) can adequately defend the claim in order to also safeguard the movants' interest. Instead the adequacy of representation looks to whether a movant shares the "same ultimate

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31 *See* Intervening Defendants' Motion to Intervene, p. 2; *but see also* Intervening Defendants' Exhibit B.
32 *See Mountaintop Condo. Ass'n*, 72 F.3d at 366.
33 *See supra* fn. 10.
34 *See generally Mountaintop Condo. Ass'n*, 72 F.3d at 368; *Rosa*, 32 V.I. at 93-94 (stating that "it necessarily follows that an applicant for intervention must first establish an interest in the litigation before attempting to establish the third and fourth prongs of the test").
35 *See generally* Intervening Defendants' Reply to Opposition, p. 2-4; Intervening Defendants' Exhibit B.

objective" or a comparable interest to the outcome as an existing party.[36] Here, in applying the relevant test, the ultimate objective between Defendant and movants remains the same or at the very least comparable. Both parties are seeking, from this court, a judgment in favor of not finding that an easement runs across Parcel No. 4-26, in order to preclude Plaintiff from asserting a claim of right over Defendant's property.[37] Thus, the movants' contention that the change in representation affects their interests does not bear on the adequacy of representation, and absent any other compelling reason offered by movants that proves otherwise, this court must presume that the representation is adequate and the fourth *Anthony* factor remains unsatisfied.

III. CONCLUSION

Intervening Defendants have not set forth a legitimate, rational basis for their intervention. While the court recognizes that movants' legal interests may have just come into existence in 2017, the court agrees with Intervening Plaintiffs that it can be reasonably inferred that, as "long-time residents," predecessors-in-interest shared with movants about the existence of actions that could adversely interfere with their future property rights. Additionally, even more apparent to this court is that movants wish to continue the use and enjoyment of their properties while simultaneously depriving Plaintiff and Intervening Plaintiffs access, much less the use and enjoyment, of their own properties because movants wish to reduce traffic to two lots in a single-family residence subdivision.

Further, a review of the record finds that movants failed to demonstrate that they have a sufficient interest in the outcome of the litigation because they only offered evidence relating to purely economic interests. Consequently, due to the inextricable link between pleading a sufficient interest and the impairment of the interest, the lack of a sufficient interest bears greatly in determining whether the interest will be practically impaired by the disposition of the case. Thus, it only follows that

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[36] *See Mountaintop Condo. Ass'n*, 72 F.3d at 368-69; *In the Matter of Q.G.*, 60 V.I. at 663-64.
[37] Intervening Defendants' Motion to Intervene, p. 1.

movants have also failed to establish that their interest will be practically impaired by the disposition of the case. Finally, by asserting that a change in Defendant's actual representation could possibly affect their interest rather than highlighting how their objective of the case differs from Defendant, movants have failed to proffer relevant evidence indicating that their interests are not adequately represented by the existing parties.

Thus, in failing to satisfy three of the four *Anthony* factors, Intervening Defendants have not met their burden to intervene as a matter of right pursuant to V.I. R. Civ. P. 24(a), and this court also determines that movants have not asserted a clear enough legal interest as to warrant permissive intervention under V.I. R. Civ. P. 24(b)(1)(B). Accordingly, this court will deny movants' motion to intervene.

An Order consistent with this Memorandum Opinion shall follow.

Dated: February 15, 2019

Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella H. George
Clerk of the Court

By: _____
Donna D. Donovan
Court Clerk Supervisor 2/19/2019

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

KAREN R. UNDERWOOD, Plaintiff, v. BRUCE W. STREIBICH, Defendant.	)	CASE NO. ST-95-CV-459 ACTION FOR DECLARATORY RELIEF, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, AND DAMAGES
WARREN STRYKER and MARGARET STRYKER, Intervening Plaintiffs.	)	

ORDER

THIS MATTER is before the court on Arthur Schmauder, Elizabeth McGuire, and Blue Water Retreat, LLC's (hereinafter "Intervening Defendants") Motion to Intervene pursuant to V.I. R. Civ P. 24(a) filed on October 26, 2018. Intervening Plaintiffs Warren and Margaret Stryker filed their opposition on November 5, 2018. On November 9, 2018, Plaintiff Karen Underwood filed a joinder. Thereafter, Intervening Defendants filed their reply to Intervening Plaintiffs' opposition on November 14, 2018.

Intervening Defendants seek to intervene to defend their property rights for Parcel No. 4-22B and Parcel No. 4-25. They argue that creating and enforcing a roadway across Parcel No. 4-26 would adversely affect the use of their property. The court being satisfied in its premises, it is hereby

ORDERED that Intervening Defendant's motion to intervene is **DENIED;** and it is further

ORDERED that a copy of this Order shall be directed to Henry C. Smock, Esquire, Bruce W. Streibich, Esquire, Michael Fitzsimmons, Esquire and Maria Tankenson Hodge, Esquire.

Dated: February 15, 2019

Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella H. George
Clerk of the Court

By: _____
Donna D. Donovan
Court Clerk Supervisor 2/19/2019