

Municipal Lawyer

A publication of the Local and State Government Law Section of the
New York State Bar Association

A top-down illustration of a road scene. A dark grey road curves through a landscape of green bushes and plants. Several vehicles are shown from a top-down perspective: a blue car, a white bus, a white car, a green car, an orange car, and a yellow car. White dashed lines mark the road's edge and lane divisions.

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the Courts: NEPA as a
Vehicle for Addressing
Interstate Disputes**

**Buying In: How a
Long Island Town
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**2024 Annual Meeting
Highlights**

Do Members of the Public Have a Right To Intervene in Telecommunications Act Cases Involving Municipal Defendants?

By Christopher B. Fisher and Brendan M. Goodhouse

A 2023 decision from the Second Circuit Court of Appeals substantially limits the ability of residents opposed to wireless projects to intervene in Telecommunication Act (TCA) cases challenging local permitting denials. And the broader case, including the District Court's decision, provides strategic guidance for litigants in TCA cases regarding the benefits and risks of using early motion practice.

District Court Decision

In *ExteNet Systems, LLC v. Village of Kings Point*, 21-cv-5772 (KAM) (ST) (E.D.N.Y. May 31, 2022) *aff'd in part* 22-1265 (2d Cir. June 16, 2023), ExteNet sued the Village following the Village's denial of ExteNet's applications to install 31 small wireless facilities in rights of way. Upon receiving the Village's Answer, ExteNet sought and received permission to move for a mandatory preliminary injunction, which would direct the Village to issue approvals and construction permits for the small cells pending ultimate resolution of the case.

Shortly thereafter, a group of residents (the "Residents"), who had submitted opposition materials to the Village Board during the administrative review, some of which the Board relied on and referred to in its application denial, moved to intervene.

Federal Rule of Civil Procedure 24 governs intervention and it requires that absent a right conferred by statute, a proposed intervenor must (1) file a timely motion; (2) assert an interest relating to the property or transaction that is the subject of the action; (3) be situated so that without intervention, the disposition of the action may impair its ability to protect its interest; and (4) have an interest that is not adequately represented by other parties to the action. In *ExteNet*, the Residents argued that the small cells that were proposed proximate to their homes would cause them aesthetic harms and would decrease their properties' values if installed, and that they could not rely on the Village to adequately protect their interests because the Village would necessarily have to consider benefits and risks to the municipality as a whole, which could include considerations of cost that would lead to settlement, whereas the Residents were singularly focused on specific small cells near their homes.

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In a lengthy decision, the Court decided both motions, granting ExteNet's motion for a preliminary injunction and denying the Residents' motion for intervention.

Intervention Denial

The Court first addressed the motion to intervene. It found that the movants' claims regarding a diminution of property values were based on speculative real estate broker letters, which failed to establish an interest in the property or transaction at issue in the litigation. *Id.*, at *9. The Court also found that the Residents' interests were aligned with the Village even though the Village had submitted a letter stating that it might be unable to adequately address specific issues the Residents might raise. *Id.*, at *10. The Court determined that statement was insufficient to overcome the presumption of adequate representation that the Second Circuit applies in cases where a proposed intervenor shares an identity of interest in outcome of the litigation with an existing party. *See Bulter, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001).

Issuance of Preliminary Injunction

While noting that an applicant seeking a mandatory preliminary injunction that would alter the status quo faced a higher burden, the Court found ExteNet met that burden.

Notably, the Court held that since ExteNet sought special permits for small cells, ExteNet was not required to satisfy the "public necessity" zoning standard applicable to wireless applicants seeking a variance in New York or the federal prohibition of service standard under part of its substantial evidence claim pursuant to Section 332(c)(7) of the TCA. *ExteNet v. Kings Point*, at *15; *see also Cellular Tel. Co. v. Rosenberg*, 82 N.Y.2d 364 (1993) (holding that wireless facility qualifies a public utility under New York law and is entitled to relaxed "public necessity" variance standard); *see also TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002) and *Sprint Spectrum LP v. Willoth*, 176 F.3d 630 (2d Cir. 1999) (discussing standards for federal effective prohibition of services claims). The Court focused on administrative record statements from Village officials, including its Mayor, that acknowledged ExteNet had satisfied the requirements of the Village's local code for a special exception permit, and found this was dispositive

of the substantial evidence claim. *ExteNet v Kings Point*, at * 14. The Court went on to find that even if the separate tests were relevant to permitting in Kings Point, ExteNet had also satisfied the public necessity standard and the federal effective prohibition of service standard. *Id.*, at *15-19.

The Court found that ExteNet would suffer irreparable harm from a continued delay in its ability to deploy small cells and noted that granting the motion was consistent with the Second Circuit holding mandatory injunctions are the appropriate remedy for TCA violations. *Id.*, at * 12-13; see also *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Doc. N. 17-19 (Rel. Sept. 27, 2018) *aff'd in rel. part City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) *cert. denied* 141 S.Ct. 2855 (2021).

Shortly after the decision was issued, ExteNet and the Village settled the underlying case and the Village issued permits to ExteNet.

Appeal

The Residents, however, appealed the denial of their motion and sought to re-open the case. In their appeal, the Residents argued that the District Court erred in applying a presumption of adequate representation to their motion. In particular, the Residents argued that recent case law in the Second Circuit and the Supreme Court overruled or, at a minimum, called into question the practice of applying a presumption of adequate representation in intervention cases.

The Second Circuit rejected the Residents' argument. The Court held that the Supreme Court case relied on by the Residents, *Berger v. North Carolina State Conference of the NAACP*, 142 S.Ct. 2191 (2022) did not affect the presumption of adequate representation, because that case dealt with a state law that expressly authorized a state agent to intervene in certain cases, making a presumption of adequate representation inappropriate. Instead, the Second Circuit re-affirmed that a party seeking to intervene in a case where it shares that same interest in the outcome of the litigation as a party to the litigation is presumed to have its interests adequately represented and must rebut that presumption. *ExteNet v. Kings Point* (2d Cir.), at * 2. The Court found that in this case, the Residents' interests and the defendant Village's interests for purposes of the litigation were identical—a ruling upholding the Village's denial of permits—and the Residents had not presented any evidence to rebut the presumption of adequate representation. *Id.*, at *3.

Takeaway

The District Court's and Second Circuit's holdings in *ExteNet v. Kings Point* are impactful for several reasons. The District Court's holding is notable in two key respects. First, by confirming that local permitting decisions must be based on locally legislated right of way and permitting requirements, which are distinct from New York's public necessity standard for use variances and the federal prohibition of service standard, the holding should prevent wireless project opponents and municipalities from trying to assert such "requirements" during the administrative review process, a tactic that is often employed. Second, the Court's willingness to entertain and ultimately grant ExteNet's motion for a preliminary injunction, thereby effectively resolving the case, should cause future TCA litigants and municipalities to evaluate the record and if that record might warrant a preliminary injunction motion to expedite resolution.

The Second Circuit's opinion is impactful not only in intervention applications on TCA cases but any case where a resident wishes to litigate alongside a municipality in defending a local land use or other permit denial. The Court's ruling makes clear that the presumption of adequate representation where interests in litigation outcomes are aligned is still good law and applicable in the Second Circuit. To overcome this presumption, a would-be intervenor must show meaningful inadequacy on the part of the municipality such as "collusion, adversity of interest, nonfeasance, or incompetence." So while District Courts will continue to have broad discretion in determining intervention motions, the *ExteNet* holding provides strong support for anyone opposing intervention and a hurdle for those seeking to intervene.

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