

The Honorable Robert S. Lasnik

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

T-MOBILE WEST, LLC and  
INDEPENDENT TOWERS HOLDINGS,  
LLC,

Plaintiffs,

vs.

CITY OF MEDINA, WASHINGTON,

Defendant.

Civil Action No.: C14-1455RSL

MEDINA RESIDENTS’ REPLY IN  
SUPPORT OF MOTION TO INTERVENE

NOTE ON MOTION CALENDAR: 12/12/14

**I. INTRODUCTION**

Plaintiffs T-Mobile West, LLC and Independent Towers Holdings, LLC’s (collectively, “Plaintiffs”) opposition to the intervention of Medina Residents, an unincorporated association, RespectMedina, a Washington non-profit organization and a number of individuals that own property directly abutting the City of Medina’s (“City”) Fairweather Park and Nature Preserve (collectively, “Medina Residents”) is unavailing considering the Ninth Circuit’s liberal application of the Federal Rules of Civil Procedure (“Rule”) 24(a)(2) in favor of intervention.

1 Medina Residents own property abutting the Park and Nature Preserve and participated in  
2 the City's permit review process of the Plaintiffs' application for an 80 ft. cell tower ("Proposed  
3 Tower"). The City, consistent with applicable local, state and federal law, denied Plaintiffs'  
4 application because it did not satisfy all applicable Medina Municipal Code standards. City of  
5 Medina Answer, ¶ 56. Instead of revising its application or working with the City, Plaintiffs ran  
6 to federal court to attack the well-reasoned decision. Medina Residents thus moved to intervene.

8 First, contrary to Plaintiffs' claims, Medina Residents have a significant protectable  
9 interest related to the legality of the City's denial of the Proposed Tower application. *Sagebrush*  
10 *Rebellion, Inc. v. Watt*, 713 F.3d 525, 528 (9th Cir. 1983). These protectable interests would be  
11 impaired or impeded without intervention. Ninth Circuit courts have long recognized such  
12 interests as sufficient for granting FRCP 24(a)(2) intervention. *Id.* Second, Medina Residents  
13 have made a compelling showing that the City's dual roles – as landlord with revenue contingent  
14 on permit issuance and as regulator – satisfy the Rule 24(a)(2) test for inadequate representation.

16 Medina Residents respectfully request that the Court grant their motion to intervene.

## 18 **II. ARGUMENT**

### 19 **A. Medina Residents Satisfy the Ninth Circuit's Rule 24(a)(2) Elements**

20 Intervention as of right is governed by Rule 24(a)(2).<sup>1</sup> Plaintiffs make no objection to

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22 <sup>1</sup> To intervene, Medina Residents must claim an interest which, as a practical matter, may be impaired or impeded  
23 without their intervention. *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1993).  
The Ninth Circuit has adopted a four-part test for analyzing Rule 24(a)(2) motions:

- 24 (1) the motion must be timely;
- 25 (2) the applicant must claim a "significantly protectable" interest relating to the property  
or transaction which is subject to the action;
- 26 (3) the applicant must be so situated that the disposition of the action may as a practical  
matter impair its ability to protect those interests; and
- 27 (4) the applicant's interests must be inadequately represented by the parties to the action.

28 *Wilderness Society v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (en banc).

1 Medina Residents' timeliness in bringing the motion or their impairment of interests. Plaintiffs'  
2 Opposition to Motion ("Opposition Motion"), pg. 4. These elements are uncontroverted.

3 Plaintiffs' arguments that Medina Residents: (1) lack a protectable interest to justify  
4 intervention and (2) their interests are adequately represented by the City in its dual role as  
5 regulator and Plaintiffs' contractual partner do not comport with the Ninth Circuit's application  
6 of Rule 24(a)(2). Accordingly, the Court should grant Medina Residents' motion to intervene.<sup>2</sup>  
7

8 **1. Medina Residents Have a Significant Protectable Interest in**  
9 **Advancing the Legality of the Decision to Deny the Proposed Tower**

10 Plaintiffs first challenge Medina Residents' protectable interest. Opposition Motion, pg.  
11 4-6. The Ninth Circuit has rejected the "notion that the Rule 24(a)(2) requires a specific legal or  
12 equitable interest." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980). Medina  
13 Residents' interests need not be protected by the federal Telecommunications Act to qualify as  
14 "significantly protectable" under Rule 24(a)(b). *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th  
15 Cir. 1993). The Ninth Circuit requires consideration of: (1) whether the interest is protectable  
16 under *some law* and (2) the relationship between the legally protected interest and the claim at  
17 issue. *Wilderness Soc'y*, 630 F.3d at 1179. The Ninth Circuit has long recognized that public  
18 interest groups which supported a measure were entitled to intervene as of right in an action  
19 challenging the legality of the measure. *Sagebrush Rebellion*, 713 F.3d at 528.  
20

21 *Sagebrush Rebellion* is fatal to Plaintiffs' opposition. Medina Residents' interest is in  
22 defending the legality of the City's permit denial and protecting the continued use of the park as  
23 a recreational amenity, open space and nature preserve. Adkins Declaration, ¶ 6. Medina  
24 Residents participated at every level of the action. First Amended Complaint, ¶ 53. Notably,  
25  
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27 <sup>2</sup> Because Medina Residents satisfy all the FRCP 24(a)(2) requirements, it is not necessary to address the request for  
28 permissive intervention per Rule 24(b). Medina Residents incorporate the arguments in their motion by reference.

1 Medina Residents participated in support of the City’s denial of the Proposed Tower application  
 2 at the September 17, 2014 hearing on reconsideration. *Id.*, ¶¶ 58-59. It is undisputed that  
 3 Medina Residents have an interest in supporting the City’s well-reasoned decision and in  
 4 continued use of the Park and Nature Preserve as a recreational and natural area.<sup>3</sup> Among other  
 5 remedies, Plaintiffs seek an injunction ordering the City to approve the Proposed Tower and “all  
 6 ancillary approvals and permits necessary for construction...” First Amended Complaint, pg. 16.  
 7  
 8 Should Plaintiffs prevail or reach a settlement with the City in this matter, Medina Residents’  
 9 ability to protect their interests will be impaired. *Sagebrush*, 713 F.3d at 528; *see also Coalition*  
 10 *for a Sustainable Delta v. Carlson*, 2008 U.S. Dist. Lexis 65420 at \*5 (E.D. Cal. 2008) (same).  
 11  
 12 There is a direct, linear relationship between Medina Residents’ interests and Plaintiffs’ claims.

13 Plaintiffs attempt to artificially restrict Medina Residents’ interest by claiming it must  
 14 introduce evidence in order to “advance” its claims. Opposition Motion, pg. 6. This is false. The  
 15 Ninth Circuit does not limit an intervenor’s interest to a particular statute to qualify as  
 16 “significantly protectable.” *Sierra Club*, 995 F.2d at 1484. Plaintiffs’ arguments regarding  
 17 potential evidence, if any is permissible, go to the merits of the claims, not to the evaluation of  
 18 Medina Residents’ interests in the legality of the decision and/or continued use of the Park and  
 19 Nature Preserve as a recreational area and whether those interests would be impaired or impeded.  
 20

## 21 **2. Rule 24(a)(2) Recognizes a Protectable Interest in the Medina Code**

22 Next, Plaintiffs allege that “no law” protects Medina Residents’ aesthetic, visual and/or  
 23 property value interests. Opposition Motion, pg. 5. Courts in the Ninth Circuit recognize that a  
 24 protectable interest may arise out of municipal land use regulations. *Mi Pueblo San Jose, Inc. v.*  
 25 *City of Oakland*, 2007 U.S. Dist. Lexis 15396 at \*11 (N.D. Cal. 2007) (applicable conditional  
 26

27 <sup>3</sup> Plaintiffs argue that Medina Residents’ objection is “to the Code.” Opposition Motion, pg. 8. This is not true.  
 28 The Code worked, twice, in denying the application. Plaintiffs’ objection is to non-compliance with the Code.

1 use permit criteria to consider adverse impacts on the “surrounding neighborhood” sufficient to  
 2 convey protectable interest as “some law”). Plaintiffs misrepresent the Medina Municipal Code  
 3 (“MMC” or “Code”) with its claim that the Code “explicitly allows” the Proposed Tower.  
 4 Opposition Motion, pg. 8. In fact, the Code conditions approval upon the satisfaction of  
 5 numerous criteria, including provisions requiring consideration of Medina Residents’ interests.  
 6

7 The Code regulations for the Proposed Tower application require, among other elements,  
 8 that any facilities are the “least intrusive on the residential setting of the community.” MMC  
 9 20.37.140.B.2. The Code imposes a 500-foot setback from any residential property line to the  
 10 Proposed Tower. Plaintiffs requested a variance to the setback. Thus, the Code required  
 11 showing that the Proposed Tower will not be “injurious to the property or improvements in the  
 12 vicinity and zone” adjacent to the Park and Nature Preserve. MMC 20.72.030.G.  
 13

14 Medina Residents are the directly abutting neighbors to the Proposed Tower. Adkins  
 15 Declaration, ¶ 5. Under these circumstances, the Code *requires* consideration of Medina  
 16 Residents’ interests. MMC 20.72.030.G. For instance, the Adkins Property is only 169 feet  
 17 from the site of the Proposed Tower.<sup>4</sup> Medina Residents’ interests are not generalized. They are  
 18 a direct outgrowth of the Code’s recognition that wireless communication facilities will be more  
 19 visually intrusive on *adjacent properties*. Plaintiffs’ arguments in opposition are without merit.  
 20

21 For these reasons, Medina Residents respectfully request that the Court grant the motion.  
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23 <sup>4</sup> Plaintiffs’ attempt to distinguish *Nextel Communications of the Mid-Atlantic, Inc. v. Town of Hanson*’s recognition  
 24 of a protectable interest by abutting property owners is unavailing. 311 F. Supp.2d 142 (D. Mass. 2004). First, as  
 25 discussed *supra* in II.A.1, Medina Residents’ interests in this matter are recognized by the Ninth Circuit. Secondly,  
 26 Plaintiffs argue that intervention was based on a state law theory as to standing for a “person aggrieved” by the  
 27 underlying land use action and that Washington law would prevent similar challenges by Medina Residents.  
 28 Opposition Motion, pg. 6 (citing RCW 36.70C.060). However, Plaintiffs’ argument ignores that Washington’s Land  
 Use Petition Act also grants standing to parties who would be “aggrieved by a reversal or modification of the land  
 use decision.” RCW 36.70C.060(2). Under Washington law, Medina Residents would have standing to challenge  
 the potential reversal of the decision. Lastly, Plaintiffs argue “unusual facts” distinguish the case. Opposition  
 Motion, pg. 6. This is perplexing in light of the *Nextel* Court’s definitive pronouncement that “abutter interest in the  
 use property is well-settled.” A complex procedural posture does not muddle the clear interest in abutting property.

1           **B. Medina Residents’ Interests are Not Adequately Represented by the City**

2           Plaintiffs’ minimization of the conflict between the City acting as a regulator defending  
3 its Code and as the landlord in a proprietary lease with Plaintiffs is of no avail. *See Arakaki v.*  
4 *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). Where the government is acting on behalf of a  
5 constituency it represents, Rule 24(a)(2) intervention is appropriate upon a showing that  
6 representation of interests “may be” inadequate. *Sagebrush Rebellion*, 713 F.3d at 528.

8           It is uncontroverted that the City executed a lease with Plaintiffs. Morrison Declaration,  
9 Ex. A. The City is acting as a proprietary landlord at the same time it is defending its Code  
10 regulations. If the Plaintiffs prevail, the City stands to earn at least \$30,000 in revenue per year  
11 for up to 20 years. *Id.* Contrary to Plaintiffs’ characterization, the City’s dual role is readily  
12 distinguished from *Nextel West Corp. v. Township of Scio*, 2007 WL 2331871 (E.D. Mich.  
13 2007). In *Nextel*, the Township was acting as a regulator alone; the proposed permit site was  
14 owned by a third-party. Plaintiffs cite no authority to support its argument that the City is  
15 “capable and willing” to make all the arguments advanced by Medina Residents when doing so  
16 would frustrate the City’s interest in receiving \$600,000 in rent. Plaintiffs’ argument must fail.  
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19           Lastly, Plaintiffs allege so long as the City provides the administrative record, Medina  
20 Residents cannot offer any necessary element to the proceeding. Opposition Motion, pg. 10.  
21 This is incorrect. If the Plaintiffs meet their burden under the effective prohibition claim,  
22 Medina Residents will offer a necessary element regarding the alternatives analysis with  
23 technologically feasible, appropriately zoned locations. Adkins Declaration, ¶¶ 12-13. This  
24 perspective was not wholly reflected in the City’s staff record in the underlying proceeding.  
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27 ///

**III. CONCLUSION**

As demonstrated above, Medina Residents satisfy all requirements of FRCP 24(a)(2).

Medina Residents respectfully request that the Court grant the motion to intervene as of right.

Dated this 12<sup>th</sup> day of December, 2014.

Respectfully submitted,

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**DECLARATION OF SERVICE**

I hereby certify that on December 12<sup>th</sup>, 2014, I electronically filed the foregoing **MEDINA RESIDENTS' REPLY IN SUPPORT OF MOTION TO INTERVENE** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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