IN THE SUPREME COURT OF GUAM

MARY ANN C. SABLAN,
Petitioner-Appellee,

v.

GUAM LAND USE COMMISSION and DEPARTMENT OF LAND MANAGEMENT,
Respondents-Appellees,

and

YOUNEX INTERNATIONAL CORPORATION,
Real Party In Interest-Appellant.

OPINION

Cite as: 2011 Guam 12

Supreme Court Case No.: CVA011-006
Superior Court Case No.: SP0223-07

Appeal from the Superior Court of Guam
Argued and submitted on June 29, 2011
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] This appeal arises from an order denying a motion to intervene filed by Younex International Corporation ("Younex"). Younex sought to intervene after the trial court granted a petition for writ of judicial review to Petitioner-Appellee Mary Ann C. Sablan declaring null and void the approval of an application for a zone variance previously granted to Younex for a condominium development in the neighborhood of Jonestown, Tamuning. Sablan's petition named the Guam Land Use Commission and the Department of Land Management, but not Younex, as respondents and challenged the approval on grounds that Sablan was entitled to notice of the public hearing at which the application was discussed, but was not provided with notice. In denying Younex's motion to intervene, the trial court found that Younex was not diligent in protecting its interest and its delay was significant and unreasonable, and therefore, the motion was untimely. Younex timely appealed. For the reasons set forth below, we reverse the trial court's denial of the motion to intervene.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Real Party In Interest-Appellant Younex International Corporation began construction on a condominium development in 2007 in the neighborhood of Jonestown, Tamuning. In order to exceed height restrictions, Younex submitted an application for a zone variance for this development. A public hearing was held before the Guam Land Use Commission (GLUC) on November 13, 2007. Thereafter, on November 29, 2007, the GLUC and the Department of Land Management (DLM) approved Younex's application and construction on the development proceeded. Also, as part of the conditions of the zone variance approval, Younex undertook

certain improvements to the infrastructure of the surrounding neighborhood at its own expense, including construction of a sewer line, water line, and landscaping. Younex claims that it has, to date, invested and expended around $70 million toward the subject development in reliance upon the validity of the approval for zone variance.

[3] Plaintiff-Appellee Mary Ann C. Sablan sought a writ of judicial review and injunction in the Superior Court, naming the GLUC and the DLM as respondents. Sablan challenged the approval of Younex's application for a zone variance, claiming that she was entitled to notice of the public hearing at which the application was discussed, but that she was not provided with notice. Sablan filed a second amended petition for judicial review, seeking to bring Younex in as the Real Party in Interest. The trial court, however, did not accept the second amended petition because it was filed beyond a court-ordered deadline. Additionally, the GLUC and DLM moved to dismiss Sablan's petition for failure to join Younex in the suit as an indispensable party.

[4] The trial court denied this motion, finding that Younex was not a necessary party to that particular action, which challenged the GLUC's compliance with statutory notice requirements. The trial court found, in essence, that although Younex had an interest in the litigation and stood to be impacted by the court's disposition, the complete relief that Sablan sought – i.e., the nullification of the GLUC's application approval for failure of the GLUC to comply with statutory procedures – could be granted without having Younex as a party. The trial court stated that the failure to join Younex "does not subject [the GLUC and DLM] 'to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.'" Appellant's Excerpts of Record ("ER") at 28 (Dec. & Order - Mots. to Dismiss and Amend, Nov. 27, 2009); *see also* Guam R. Civ. P. 19(a)(2)(ii).

[5] Thereafter, the trial court granted Sablan a writ of judicial review and declared null and void the decision of the GLUC to approve Younex's application for zone variance. After the issuance of the original writ of judicial review on February 10, 2011, Younex ascertained from the Attorney General, who served as the counsel for the GLUC and DLM, that it did not intend to move the trial court to reconsider its writ of judicial review. Thereafter, on February 24, 2011, Younex filed a motion to intervene in the trial court proceedings. Younex proffered in that motion, as it does on appeal, that it has a significantly protectable interest by way of the zone variance it obtained and in good faith relied upon, as well as the $70 million it has already invested in the Jonestown development. Younex further asserts that while its interests had previously been adequately represented by the Attorney General, when the Attorney General declined to seek reconsideration of the writ of judicial review there was a divergence of interests, triggering Younex's decision to move for intervention. *See* ER at 120 (Decl. of Rodney J. Jacob, Feb. 24, 2011).

[6] The trial court issued an amended writ of judicial review on April 5, 2011.[1] Thereafter, on April 11, 2011, the trial court denied Younex's motion to intervene in a written decision and order, finding that Younex's delay in seeking to intervene was significant and unreasonable, and thus that the motion was untimely. The decision and order was entered on the docket on April 11, 2011, and Younex timely appealed. *See* Not. of Appeal, filed April 13, 2011.

[1] Except for the addition of a footnote in the amended writ of judicial review clarifying that 21 GCA § 61303(c) was in effect at the time Younex submitted its application to the GLUC, nothing of substance was changed from the original writ of judicial review. *Compare* ER at 29-36 (Writ of Judicial Review, Feb. 10, 2011 and ER at 214-21 (Amended Writ of Judicial Review, Apr. 5, 2011).

II. JURISDICTION

[7] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-23 (June 26, 2011)) and 7 GCA §§ 3107(b), 3108(a) (2005). An order denying a motion to intervene is treated as a final order for purposes of appeal. *See Limtiaco v. Camacho (Guam Music Inc.)*, 2009 Guam 7 ¶ 7; *Shin v. Fujita Kanko Guam, Inc. (Cho & Tumon Partners, LLC)*, 2009 Guam 21 ¶ 16.

III. STANDARD OF REVIEW

[8] The trial court's determination of the timeliness of a motion to intervene as a matter of right pursuant to Guam Rules of Civil Procedure ("GRCP") 24(a) is reviewed for an abuse of discretion. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 8. Issues other than timeliness which factor into the GRCP 24(a) considerations are reviewed *de novo*. *Shin (Cho & Tumon Partners)*, 2009 Guam 21 ¶ 17.

IV. DISCUSSION

[9] Rule 24(a) of the Guam Rules of Civil Procedure provides a method by which a party may intervene in a case as a matter of right. Relevant here is Rule 24(a)(2), which states that

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Guam R. Civ. P. 24(a)(2) .

[10] An applicant for intervention must satisfy each of the following four criteria before a motion to intervene may be granted: (1) the motion to intervene must be timely; (2) the applicant must have a significantly protectable interest regarding the property or transaction that is the

subject of the suit; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by an existing party. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 10. Rule 24 is construed liberally in favor of the proposed intervenor. *Shin (Cho & Tumon Partners)*, 2009 Guam 21 ¶ 28.

A. Timeliness of Younex's Motion to Intervene

[11] This court has held that "[t]imeliness is a threshold requirement for application to intervene as of right." *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 11 (citing *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) and *NAACP v. New York*, 413 U.S. 345, 369 (1973)). If the court determines that a motion to intervene is not timely, it may deny intervention without considering the other factors in the analysis. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 11 (citing *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996)). "The United States Supreme Court has stated that '[t]imeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.'" *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 11 (quoting *NAACP*, 413 U.S. at 366).

[12] The trial court in this case based its decision to deny intervention entirely on the issue of timeliness, finding that other factors in the intervention analysis favored granting intervention. In considering whether a motion to intervene is timely, this court has previously been guided by the considerations pronounced by other courts including the Ninth Circuit. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 12. Namely, these are: "(1) the stage of the proceedings at the time the applicant seeks to intervene; (2) the prejudice to the other parties if the motion is granted; and (3)

the reason for and length of the delay." *Id.* (citing *League of United Latin Am. Citizens*, 131 F.3d at 1302 and *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984)).

1. Stage of the Proceedings

[13] In this case, Younex's motion to intervene was brought post-judgment, after the trial court's issuance of the original writ of judicial review. This court has previously held that post-judgment motions to intervene may still be considered timely if made before the time to appeal has run. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 12 (citations omitted). Further, this court has stated that post-judgment motions to intervene "are tolerated when a party with interests similar to the applicant's fails to take further action." *Id.* at ¶ 14. Timeliness must be determined in light of all the circumstances and is a determination left to the sound discretion of the court, overturned only upon a ruling that the court abused its discretion. *Shin (Cho & Tumon Partners)*, 2009 Guam 21 ¶ 21. A court abuses its discretion when it applies the wrong legal standard or makes a clearly erroneous finding of fact. *Id.*

[14] The parties with interests similar to those of Younex – namely, the GLUC and DLM – expressed that they did not intend to seek reconsideration of the trial court's writ of judicial review. Further, they were tentative about whether they would even appeal the writ to the Supreme Court, and firm about the fact that, if they did appeal, they would not seek to expedite that appeal. ER at 120 (Decl. of Rodney J. Jacob); *see also* Decl. of Rodney J. Jacob, May 5, 2011, filed in support of emergency motion to expedite appeal.[2] In essence, Younex was in a situation where it was (or very likely could have been) "left without a party willing to mount a post-judgment challenge." *See Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 18. As such, the stage

[2] The GLUC and DLM eventually did appeal the issuance of the writ of judicial review after the trial court denied Younex's motion to intervene. That matter is Supreme Court Case No. CVA11-007 (Notice of Appeal filed April 18, 2011).

of the proceedings under these circumstances – i.e. post-judgment – does not weigh against Younex on the issue of timeliness.

2. Prejudice to the Existing Parties

[15] "The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1916 (3d ed.). Moreover, "the prejudice to the original parties to the litigation that is relevant to the question of timeliness *is only that prejudice* which would result from the would-be intervenor's failure to request intervention" at an earlier time. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) (emphasis added) (citations omitted). As one federal circuit court has stated, "[t]he requirement of timeliness is not a tool of retribution to punish the tardy would-be intervener, but rather a guard against prejudicing the original parties by the failure to apply sooner." *John Doe No. 1 v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001) (internal citation and quotation omitted). It follows, therefore, that where no party would be prejudiced by granting intervention, a motion to intervene is not untimely as a matter of law. *See Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1027 (7th Cir. 2006).

[16] There were arguably instances earlier on in the litigation below which could have signaled to Younex that it might be prudent to seek intervention. One such instance might have been when the trial court ruled in November 2009 that Younex was not an indispensable party for purposes of GRCP 19(a), though it found Younex was unable to protect its interests while the court decided the petition for judicial review. Indeed, Sablan's argument hones in on this very point: that Younex had ample warnings at various stages throughout the litigation that its interests may not be adequately protected and that its reliance on counsel for the GLUC and

DLM was not reasonable. While the court is not making a determination one way or the other on whether Younex should have sought earlier intervention, the issue on which our timeliness determination ultimately rests is the issue of prejudice to the existing parties.

[17] The trial court found that Sablan will suffer no prejudice as a result of Younex's failure to move for intervention earlier and that the GLUC and DLM will also suffer no prejudice and in fact did not oppose Younex's motion to intervene. ER at 225 (Dec. & Order - Mot. To Intervene, Apr. 11, 2011) ("there is no prejudice to the Government hence the Attorney General does not [oppose] intervention, and the prejudice to [Sablan] is considered modest at best . . . ."); *see also Id.* at 227. In the case of *Aurora Loan Services*, the Seventh Circuit stated that although it might have been prudent for the would-be intervenor to have moved earlier for intervention, in the absence of any prejudice to the existing parties, the motion to intervene cannot be adjudged untimely as a matter of law. *Aurora Loan Servs.*, 442 F.3d at 1027. That court further stated: "We don't want a rule that would require a potential intervenor to intervene at the drop of a hat; that would just clog the district courts with motions to intervene." *Id.; see also Shin (Cho & Tumon Partners)*, 2009 Guam 21 ¶ 22 ("Courts should discourage premature intervention that wastes judicial resources.").

[18] Similarly here, while Younex might have taken a cue from the earlier rulings of the trial court and sought to intervene sooner, where there is no showing that either Sablan or the GLUC and DLM would suffer any prejudice, the motion to intervene cannot be found untimely as a matter of law. This is consistent with the policy behind the requirement of timeliness in seeking intervention, which is above all to protect the current parties from prejudice. *See, e.g., Glickman*, 256 F.3d at 375.

[19] In its decision and order, the trial court stated:

> In order to show prejudice, [Sablan] must point to results that would not have been obtained but-for Younex's failure to file its motion to intervene earlier. *See e.g. Ross v. Marshall*, 426 F.3d 745, 756 (5th Cir. 2005). . . . [Sablan's] financial resources have been severely strained in her attempt to enforce her right and have her voice heard at a properly noticed GLUC meeting. Nonetheless, the inconveniences cited by [Sablan] . . . are those commonly associated with defending a ruling on appeal, and could have arisen regardless of whether Younex sought to intervene before the Court entered its Writ. Accordingly, the Court finds that [Sablan] will suffer no prejudice as a result of Younex's failure to seek an earlier intervention.

ER at 227 (Dec. & Order - Mot. to Intervene).

[20] When questioned by this court on the issue of prejudice during oral argument, counsel for Sablan asserted that Sablan will be additionally burdened by having two, rather than just one, respondent to defend against, and that she is incurring additional expenses to defend her right to notice. *See* Digital Recording at 10:48:55-10:51 (Oral Argument, June 29, 2011). However, we agree with the trial court that the time, effort, and money Sablan has spent (or will have to spend) are those normally associated with defending a ruling on appeal, which she would have incurred whether Younex had sought to intervene pre-judgment or post-judgment. Counsel for Sablan further stated at oral argument that even though there may be no prejudice to Sablan, the court should still not allow intervention at this late stage in the proceedings. *See* Digital Recording at 10:51:42-10:51-58 (Oral Argument, June 29, 2011). This, however, is contrary to both the case authority on this issue as well as the policy concerns behind the requirement of timeliness for purposes of intervention. Thus, the "prejudice" factor of the timeliness analysis weighs in favor of granting intervention.

[21] The trial court's finding *in favor* of Younex on the factor of prejudice – a factor that is inextricably tied to the timeliness determination – further supports our holding that the trial court

abused its discretion in finding Younex's motion untimely. *See Crumble v. Blumthal*, 549 F.2d 462, 468-69 (7th Cir. 1977) (ruling that the district court abused its discretion by denying permissive intervention where the requirements of permissive intervention had been met and there was "no evidence" that intervention would prejudice the existing parties). Furthermore, the parties to this appeal do not dispute that the substantive case (namely, the merits of the amended writ of judicial review) presents purely legal questions, and that there are no factual issues in dispute. This further weighs against a finding of prejudice by any delay Younex's post-judgment intervention may cause, since there is no risk of witnesses becoming unavailable or memories fading, as there would be in a case where there were facts in dispute.[3]

3. The Reason for and Length of the Delay

[22] The critical issue for the trial court was the third prong of the timeliness analysis, which is the length of and reason for Younex's delay in seeking to intervene. The case of *Shin v. Fujita* is factually and conceptually similar to this case, at least with respect to the timeliness analysis. In that case, there was ongoing litigation between Kevin Shin and Fujita Kanko Guam, Inc., regarding a contract dispute in which Shin sought specific performance or damages for anticipatory breach of an agreement for the sale of real estate. *Shin (Cho & Tumon Partners)*, 2009 Guam 21 ¶ 1. Cho and Tumon Partners, LLC ("Cho/TPLLC"), by virtue of a separate agreement with Shin relative to funding the purchase of subject real estate, had interests similar to those of Shin. *Id.* at ¶ 4. Thus, they relied on Shin's counsel to protect their interests and believed that their interests were being adequately represented by Shin's counsel. *Id.* at ¶ 20.

[3] In this case, intervention would likely not cause any undue delay prejudicing the rights of the existing parties. In fact, Younex has indicated its desire to become a party in part to move for *expedited* review of the merits of the trial court's writ of judicial review, which, if granted, would actually speed the litigation along rather than cause undue delay.

Cho/TPLLC argued that when Shin fired his counsel, that was the point at which their interests diverged and they were no longer being adequately represented by an existing party. *Id.*

[23] In the *Shin* case, the applicants for intervention sought to intervene some fourteen months after Shin filed the original complaint, and approximately nine months after the proposed intervenors entered into a litigation agreement with Shin seeking to obtain control of the litigation. *Id.* at ¶¶ 6, 19. The trial court denied Cho/TPLLP's motion to intervene, finding it untimely. *Id.* at ¶ 19. On appeal, this court held that the trial court abused its discretion in finding the motion untimely.[4] This court determined that the relevant point from which timeliness should be determined is the point at which the proposed intervenor became aware that its interests were no longer being represented by an existing party's counsel. *Id.* at ¶ 22. The holding reads in part:

> Cho/TPLLC contend that the [trial court] should have given more weight to the fact that, pursuant to the Litigation Agreement, their interests in the Fujita litigation were adequately represented until the moment Shin terminated Pipes as counsel. We agree. Cho/TPLLC would not have been able to overcome the presumption of adequate representation until they could present evidence that their interest had diverged from the interest of the existing party, Shin. This divergence was presumably only demonstrable from the moment Shin's substitute counsel informed Pipes that Shin would not appeal the adverse ruling and filed a statement of non-opposition to a summary judgment motion by Fujita to extinguish his claims. Cho/TPLLC's motion to intervene, filed the day after Shin terminated Pipes as counsel, was timely.

Id. at ¶ 23.

[24] Similarly, in the instant case, Younex and the existing parties (the GLUC and DLM) seemingly had a harmony of interests throughout the litigation, and counsel for the GLUC and

[4] In *Shin*, although this court held that the trial court abused its discretion in ruling that the motion was untimely, we affirmed the trial court's denial of Cho/TPLLC's motion to intervene based on a finding that Cho/TPLLC failed to show that they had a significantly protectable interest in the litigation. *Shin (Cho & Tumon Partners)*, 2009 Guam 21 ¶¶ 32-33, 56.

DLM fought against the nullification of the GLUC action approving Younex's application for a zone variance. The Attorney General appeared to be adequately protecting Younex's interests at that time, which arguably barred Younex from moving to intervene as a matter of right. *See* GRCP 24(a)(2) (an applicant who otherwise satisfies the criteria for intervention may move to intervene "unless the applicant's interest is adequately represented by existing parties"). Although the trial court ruled that "[b]ecause the Government adequately represented Younex's interests throughout the duration of these proceedings," it "[did] not find Younex's divergence argument convincing," it also ruled that Younex unreasonably delayed in moving to intervene – findings which appear to be at odds. ER at 228 (Dec. & Order - Mot. to Intervene).

[25] As GRCP 24(a)(2) conveys, and as this court has previously clarified, "[a]n applicant should not be expected to petition for intervention in instances in which it has no reason to believe its interests are not being properly represented." *Shin (Cho & Tumon Partners)*, 2009 Guam 21 ¶ 22. "The timeliness clock runs *either* from the time the applicant knew or reasonably should have known of his interest . . . *or* from the time he became aware that his interest would no longer be protected by the existing parties to the lawsuit." *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (emphases added) (citations omitted). The proper legal standard in undertaking a timeliness determination, therefore, requires the court to consider when the proposed intervenor became aware that its interests were no longer being protected by a party. In this case, as in the *Shin* case, it appears that the trial court imputed a premature duty upon the would-be intervenor to move for intervention at a time when it was arguably still being adequately represented by an existing party.

[26] The trial court in this case found that "Younex was poised to intervene" since the time the trial court issued its decision and order on the motion to dismiss and motion to amend in

November 2009, suggesting that Younex delayed for nearly fifteen months in bringing the motion (from November 27, 2009 to February 24, 2011). ER at 226 n. 2 (Dec. & Order - Mot. to Intervene). Using *Shin* as guidance, however, the triggering event here, as Younex asserts, was when Younex ascertained from counsel for the GLUC and DLM that he would not move for reconsideration and would not seek to expedite any appeal. Considering the circumstances from this standpoint, there was scarcely any delay[5] in Younex bringing its motion to intervene. As such, the trial court was in error in finding the motion untimely, particularly with a finding of no prejudice to the existing parties.

[27] Having found that Younex's motion was not untimely, we now address the other factors in the intervention analysis.

B. Significantly Protectable Interest

[28] Even though its analysis could have ended once it determined that Younex's motion to intervene was untimely, the trial court nonetheless went on to make findings as to the other intervention criteria. Among those is the requirement that a proposed intervenor must show that it has a significantly protectable interest in the litigation in order to merit intervention. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 27. The trial court found in its decision and order that Younex had a significantly protectable interest in the underlying litigation, and thus satisfied this factor of the intervention analysis. In reaching this decision, the trial court cited a recent Ninth Circuit case for the holding that a prospective intervenor satisfies this prong if it will suffer a practical impairment of its interest as a result of the litigation. *Id.* (citing *Wilderness Soc. v. U.S. Forest Serv.*, 630 F. 3d 1173, 1179 (9th Cir. 2011)).

[5] According to the declaration of counsel for Younex, he ascertained from counsel for the GLUC and DLM on February 23, 2011, that the GLUC and DLM would not seek reconsideration. ER at 120. Younex filed its motion to intervene the next day, February 24, 2011.

[29] This court reviews *de novo* whether the trial court's finding on this criterion was correct. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 8. To determine whether an applicant for intervention has a significantly protectable interest, the applicant must establish: (1) that the claimed interest is protectable under some law; and (2) that there is a relationship between the protectable interest and the claims at issue. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 27 (citation omitted). Younex asserts that it has a constitutionally protected, vested property interest in the zone variance it applied for and received from the GLUC. *See* Appellant's Br. at 13 (June 1, 2011). Younex submits that it undertook an arduous and costly process to satisfy the application requirements, that it complied with all application procedures, and that it relied in good faith on the validity of the variance it eventually received. ER at 69-71 (Decl. of David B. Tydingco, Feb. 24, 2011); *see also* ER at 230 n.5 (Dec. & Order - Mot. to Intervene). Indeed, Younex relied on the approval for zone variance to the extent that it invested and expended tens of millions of dollars thus far on the Jonestown development, which now stands in jeopardy. *See* ER at 66, 70 (Decl. of David B. Tydingco); s*ee, e.g., Elkins v. Dist. of Columbia*, 527 F. Supp. 2d 36, 47 n.13 (D.C. Cir. 2007) ("The holder of a building permit or temporary building permit has a property interest in the continued effect of such permit, when the permit can only be revoked upon certain conditions."); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (finding that an applicant for intervention demonstrates a significantly protectable interest when the relief sought by a plaintiff will have direct, immediate, and harmful effects upon the applicant's legally protectable interests).

[30] This court has previously held that a similar type of interest in a license or permit is "significantly protectable" for intervention purposes. In *Limtiaco*, the proposed intervenors, Guam Music, Inc., ("GMI") had its licenses for gaming machines revoked in an action to which

it was not a party. 2009 Guam 7 ¶¶ 1, 4. GMI subsequently moved to intervene, and the trial court denied the motion. *Id.* at ¶ 5. In evaluating the "significantly protectable interest" factor of the intervention analysis on review, this court stated:

> Here too, GMI had former rights in its gaming licenses which were connected to its ownership of property, i.e. the gaming machines, and its status as a licensee. Moreover, GMI's profits are directly related to its ability to obtain licenses and legally operate its machines. Those licenses are protected under the regulatory licensing scheme implemented by the DRT, and the status of those licenses is the central issue in the present case. GMI therefore has a "significantly protectable interest" in this case.

Limtiaco (Guam Music), 2009 Guam 7 ¶ 31. Younex likewise has a property, business, and due process interest in the zoning variance, which it applied for, undertook significant steps and expense to obtain, and relied in good faith upon to their financial detriment once obtained. Upon *de novo* review, the trial court correctly found that Younex stands to suffer a practical impairment of its interest as a result of the litigation, and thus that it has a significantly protectable interest to merit intervention. *See Wilderness Soc.*, 630 F. 3d at 1179.

C. Impairment of Younex's Ability to Protect its Interests

[31] In its decisions and order denying the GLUC and DLM's motion to dismiss Sablan's petition for failure to join Younex as the real party in interest, the trial court stated that "Younex Corporation, as a practical matter cannot protect its interest while the Court determines whether or not the GLUC followed Guam laws and regulations . . . ." ER at 27-28 (Dec. & Order - Mots. to Dismiss and Amend). Further, in its decision and order denying intervention, the trial court stated that it "recognizes Younex's ability to protect its interest in the approval of its zone variance may be impaired if the Motion [to Intervene] is not granted." ER at 229 (Dec. & Order - Mot. to Intervene). However, it went on to also find that Younex had other remedies at law and in equity to protect its interest wholly separate from the judicial review proceedings. In

Limtiaco, the trial court's denial of GMI's motion to intervene was based in part on the trial court's finding that GMI had the ability to seek a remedy independent of the action in which it was seeking to intervene. *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 32. On appeal, this court stated that "the test is not whether a party's remedies are completely foreclosed – rather, this court must consider whether those remedies are impaired or impeded by not allowing intervention." *Id.* at ¶ 33 (citation omitted). In this case, the fact that Younex could simply start the administrative process from scratch and reapply to the GLUC for a zone variance – keeping its development project and its investment on hold during the application process, and with no assurances that its application would again be granted – does not mean that its ability to protect its interest would not be impeded or impaired absent intervention. As such, Younex satisfies this prong of the test.

D. Inadequate Representation by the GLUC and DLM

[32] Younex asserts that its interests had been adequately represented throughout the underlying proceedings by the Office of the Attorney General, which represented respondents GLUC and DLM. However, Younex argues that there was a divergence of interests when it ascertained from the Attorney General that the GLUC and DLM would not seek reconsideration of the writ of judicial review. This, according to Younex, was the point at which its need to intervene arose. GRCP Rule 24 allows for intervention when an applicant claims an interest relating to the subject of the litigation and the disposition of the litigation may as a practical matter impair or impede the applicant's ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.* GRCP 24(a)(2).

[33] Younex contends that because its interests had been adequately represented by existing parties, namely the GLUC and DLM, there was no need to move to intervene in the matter below

– at least up until the point where its interests were no longer being adequately represented. The unwillingness of the GLUC and DLM to seek reconsideration of the writ of judicial review and its tentativeness about seeking appellate review rendered Younex "so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest[.]" GRCP 24(a)(2). As further evidence of the divergence of interests between Younex and the GLUC and DLM, the Attorney General stated at oral argument that presently, the government's interest in litigating this matter is different from Younex's. As counsel stated, the Office of the Attorney General is primarily concerned with knowing what notice procedures apply to such hearings before the GLUC for future reference, and also preparing to defend the government against any possible lawsuits that may be brought by Younex or other entities that may have their permits or approvals for zone variance declared null and void as a result of this case and the precedent it will set. *See* Digital Recording at 11:01:03-11:02:08 (Oral Argument, June 29, 2011).

[34] Once again, even though the trial court found Younex's motion to be untimely, it went on to address the other factors in the analysis. In doing so, it made the following statement: "Hence, the Court finds that Younex's interest was adequately represented throughout the proceedings. Nonetheless, Younex's interests are presently inadequately represented by the Government because the Government is unwilling to appeal the Court's decision." ER at 231 (Dec. & Order - Mot. to Intervene). The trial court, therefore, seems to have agreed with Younex's argument regarding the divergence of interest that occurred *after* the issuance of the writ of judicial review, which further cuts against its finding that Younex's delay in bringing its motion to intervene was "manifestly unreasonable." *Id.*

[35] Upon *de novo* review, the trial court's finding that the GLUC and DLM would not adequately represent Younex's interest post judgment was not in error. In determining whether the GLUC and DLM were adequately representing Younex's interests, a court must consider: (1) "whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments"; (2) "whether the present party is capable and willing to make such arguments"; and (3) "whether the intervenor would offer any necessary elements to the proceedings that the other parties would neglect." *Limtiaco (Guam Music)*, 2009 Guam 7 ¶ 35 (citing *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986)).

[36] All requirements seems to be satisfied here: (1) The GLUC and DLM were not "undoubtedly" going to make all Younex's arguments, particularly but not exclusively as they relate to reconsideration of the writ of judicial review; (2) the GLUC and DLM stated that they were unwilling to make an argument for reconsideration or to expedite appellate review; and (3) Younex representatives declared that they sought to intervene so that they may advance certain arguments or seek certain remedies that the GLUC and DLM would not – namely, to demonstrate the trial court's plain error in a motion for reconsideration and/or to file an appeal. *See* ER at 37-64 (Mot. to Intervene, Feb. 24, 2011). As such, the trial court was correct in finding that "Younex's interests are presently inadequately represented by the Government because the Government is unwilling to appeal the Court's decision."[6] ER at 231 (Dec. & Order - Mot. to Intervene).

[6] The fact that the GLUC and DLM eventually did appeal the amended writ of judicial review does not affect this finding.

V. CONCLUSION

[37] The trial court abused its discretion in ruling that Younex's motion was untimely, particularly after it found that there was no prejudice to Sablan or the GLUC and DLM, and indeed that the GLUC and DLM did not oppose intervention. Upon *de novo* review of the other intervention criteria, we hold that (1) Younex did have a significantly protectable interest; (2) Younex's ability to protect that interest would be impeded or impaired without intervention; and (3) at the time of the motion to intervene, Younex was not adequately represented by an existing party. As such, Younex should have been allowed to intervene as a matter of right.

[38] Accordingly, the Decision and Order of the trial court denying Younex's Motion to Intervene is **REVERSED**.

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Chief Justice