STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-18-008

MAINE SCHOOL ADMINISTRATIVE DISTRICT NO. 6,

Plaintiff

v.

ORDER

INHABITANTS OF THE TOWN OF FRYE ISLAND,

Defendant

Before the court are two interrelated motions: (1) a motion by three residents of Frye Island to intervene as defendants and counterclaimants in this case[1] and (2) a motion by plaintiff Maine School Administrative District No. 6 (MSAD 6) to dismiss count III of the counterclaim filed by defendant Inhabitants of the Town of Frye Island (Town).

This case involves the latest chapter of a two decades-long dispute relating to Frye Island's attempt to withdraw from MSAD 6. This dispute was previously the subject of litigation a decade ago. *See Town of Frye Island v. State*, 2008 ME 27, 940 A.2d 1065.

Because the court construes the motion to intervene as primarily a vehicle to raise the constitutional claims in Count III of the Town's counterclaims in the event that the Town is not found to have the right to assert those claims, the motion to dismiss will be addressed first.

[1] The three residents are Betsy Gleysteen, Jim Hodge, and Ed Rogers (hereafter "Intervenors") and are represented by the same counsel that represents the Town of Frye Island.

Motion to Dismiss

Count III of the Town's counterclaims alleges that if the 1997 statute allowing Frye Island to secede from the Town of Standish (the "Secession Act"), as amended by a clarifying statute in 2001 (the "Clarifying Act"),[2] is interpreted to prohibit Frye Island from withdrawing from MSAD 6, it will violate the equal protection and due process rights of Frye Island and its residents under the U.S. and Maine Constitutions, the Special and Emergency Legislation clauses of the Maine Constitution, the right of Frye Island and its residents to petition for redress of grievances under the Maine Constitution, the right of Frye Island and its residents to equal taxation under the Maine Constitution, and the contract clause of the Maine Constitution.

As an initial matter, the Town does not offer any authority – and the court is aware of none – for the proposition that it has standing to assert the constitutional rights of its residents.[3] The remaining question is whether the claims in Count III of the Town's counterclaim can be asserted by the Town in its own right.

The court concludes that, with one exception, the Town does not have the right to assert any of the claims in Count III of the counterclaim. *Town of Frye Island v. State,* 2008 ME 27 ¶ 11 n.3, citing *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 40 (1933); *South Portland v. State*, 476 A.2d 690, 693 (Me. 1984). The exception is Frye Island's claim under the

[2] The legislation allowing Frye Island to secede from Standish is P. & S. L. 1997, ch. 41. The Act to clarify that legislation is P. & S. L. 2001, ch. 8, also referred to as L.D 500. *See Town of Frye Island v. State* 2008 ME 27 ¶¶ 4, 6.

[3] Although MSAD 6 named the "Inhabitants of the Town of Frye Island" as the defendant, this does not give the Town standing to assert rights that are personal to its residents. The Law Court has described naming a town by its inhabitants as a "hoary practice" and has ruled that where "Inhabitants of a Town" are named, this refers to the municipal body corporate. *Boothbay Harbor v. Russell,* 410 A.2d 554, 557 n.3 (1980).

Special Legislation clause of the Maine Constitution, in which Frye Island claims that the Secession Act as amended improperly exempts one municipality from generally applicable law.

The Town cites a number of U.S. Supreme Court decisions that it contends supports its right to assert the claims in count III, but all are distinguishable.[4] The Town also cites to the Home Rule provision of the Maine Constitution and notes that the Emergency Legislation clause of the Maine Constitution specifically bars emergency legislation from infringing the home rule rights of municipalities. Me. Const. Art. 4, Part 3, § 16(1). The problem with this argument is that, regardless of its other alleged infirmities, the Secession Act as amended does not intrude on any Home Rule rights that the Town may have.

Accordingly MSAD 6's motion to dismiss count III of the Town's counterclaims is granted with the exception of the claim set forth in paragraph 62(C) of the counterclaims.[5]

Motion to Intervene

As noted above, the motion to intervene is a vehicle to raise constitutional claims that the Town is unable to raise on its own behalf.

At the outset, except for those claims which the Town does not have any right to raise, the motion to intervene under Rule 24(a) (Intervention of Right) is denied because that rule expressly does not allow intervention when a proposed intervenor's interest "is adequately represented by

[4] In a number of those cases, municipalities or municipal agencies were joined by individual plaintiffs who had an unquestioned right to assert the claims. As a result, there was no occasion to address the rights of the municipalities. In the remaining cases the municipal plaintiffs were either contesting state interference with municipal regulations or were being directed by state legislation to take action which they contended was unconstitutional. Neither of the latter two situations are presented in this case.

[5] Little need be said about the Town's argument that MSAD 6 has waived its right to challenge Count III by answering the complaint and not raising failure to state a claim as an affirmative defense. Failure to state a claim is not an affirmative defense and can be raised at any time. M.R.Civ.P. 12(h)(2).

existing parties." The court cannot discern any conceivable reason why the Town, represented the same counsel (Pierce Atwood) that represents the proposed intervenors, cannot adequately represent the interests of the proposed intervenors.

With respect to the constitutional claims asserted in count III of the counterclaim, MSAD 6 argues that – in light of the dismissal of all but one of those claims – allowing the motion to intervene would interject issues into the case that would not otherwise be present. As a result, MSAD 6 argues that intervention under Rule 24(a) is not appropriate because, regardless of the outcome of this action, the proposed intervenors could bring an action on their own behalf and the disposition of this action would not as a practical matter "impair or impede [the proposed intervenors'] ability to protect [their] interest" within the meaning of Rule 24(a).

Similarly, MSAD 6 points out that under Rule 24(b) (Permissive Intervention) the claim or defense of the proposed intervenors requires a common question of law or fact. Once again, if the proposed intervenors are brought into the action to pursue claims that have been dismissed, they would not be litigating issues that have common questions of law or fact with the issues otherwise raised by the case. The proposed intervenors could assert such claims in an independent action, and while that appears to be inconvenient, the Law Court has ruled that inconvenience is not an adequate ground to support intervention. *Brown v. Zoning Board of Appeals,* 391 A.2d 348, 349 (Me. 1978).

The above objections, while technical in nature, appear to have merit. There is a metaphysical problem with allowing the proposed intervenors to intervene in order to litigate claims that have been dismissed.

Accordingly, the court will grant the motion for permissive intervention as to all of the issues except the counterclaims raised by the Town in count III that have been dismissed above.

This is subject to the condition that, on those issues where intervention has been allowed, the intervenors and the Town shall file joint briefs unless granted leave to file separately.

To litigate the claims in count III that have been dismissed, the Intervenors need to file an independent action along with a motion to consolidate that action with this case. If they do so, the court anticipates that it will grant that motion and direct that the existing scheduling order in this case will control both of the consolidated actions.

Rule 24(d)

Rule 24(d) provides for notification of the Attorney General in any case in which the constitutionality of a statute affecting the public interest is called into question. On their claim that the Secession Law as amended violates the especial legislation clause of the Maine Constitution, the Town has raised a constitutional issue. Moreover, if and when the Intervenors file an action to raise the claims in count III that have been dismissed, they also will be raising constitutional issues.

Accordingly, the Town and the Intervenors shall notify the Attorney General of the constitutional issues raised and shall send the Attorney General's Office copies of any pleadings raising those issues so that the State can intervene to the extent called for by Rule 24(d) if the State chooses to do so.,

The entry shall be:

1. Plaintiff MSAD No. 6's motion to dismiss count III of the Town of Frye Island's counterclaims is granted with the exception of the Town's claim under the special legislation clause of the Maine Constitution.

2. The motion of proposed intervenors Gleysteen et al. for intervention of right is denied.

3. The motion of proposed intervenors Gleysteen et al. for permissive intervention is granted except as to the claims in count III of the Town's counterclaims that have been dismissed.

On the claims on which intervention has been allowed, Intervenors and the Town shall file joint briefs unless granted leave to file separately.

4. The motion of proposed intervenors Gleysteen et al. for permissive intervention as to the claims in count III of the Town's counterclaims that have been dismissed is denied without prejudice to the proposed intervenors' right to file an independent action and to move to consolidate that action with this case.

5. Pursuant to Rule 24(d) Town shall notify the Attorney General of the constitutional issue it has raised under the special legislation clause. If and when the Intervenors commence a separate action to raise constitutional challenges to the Secession Act as amended, they shall; also notify the Attorney general pursuant to Rule 24(d).

6. The clerk shall incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: June 26, 2018

Thomas D. Warren
Justice, Superior Court