

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N., L.B., and minor child B.K.L.N.,	:	
J.A.R., E.G.M., and minor child J.G.,	:	
M.N., P.M., and minor child H.M.N.,	:	
M.C., G.S.C., and minor children	:	
G.R.S.C. and N.B.T. M.E.L., E.O.E.,	:	Docket No. 268 M.D. 2020
and minor child J.O.E.,	:	
	:	
	:	
Petitioners,	:	
	:	
v.	:	
	:	
PENNSYLVANIA DEPARTMENT	:	
OF HUMAN SERVICES	:	
	:	
Respondent.	:	

ORDER

AND NOW, this _____ day of _____, 2020, upon consideration of the Application for Leave to Intervene (the “Application”) of The County of Berks to be included as Respondents, and any response thereto, it is hereby **ORDERED** that the Application is **GRANTED**.

By the Court:

J.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

C.N., L.B., and minor child B.K.L.N.;	:	
J.A.R., E.G.M., and minor child J.G.;	:	
M.N., P.M., and minor child H.M.N.;	:	
G.C., J.J.S.J., and minor child M.S.J.;	:	
M.C., G.S.C., and minor children	:	Docket No. 268 M.D. 2020
G.R.S.C. and N.B.T.; M.E.L., E.O.E.,	:	
and minor child J.O.E.,	:	
	:	
<i>Petitioners,</i>	:	
	:	
v.	:	
	:	
PENNSYLVANIA DEPARTMENT	:	
OF HUMAN SERVICES,	:	
	:	
<i>Respondent.</i>	:	

APPLICATION FOR LEAVE TO INTERVENE

Pursuant to Pa. R.A.P. 1531(b) and Pa. R.Civ.P. 2327(3) and (4), Proposed Intervenor, The County of Berks (“Berks County” or “the County”), by and through its undersigned counsel, MacMain, Connell & Leinhauser, LLC., hereby seeks leave to intervene as party respondents in this original jurisdiction matter, and in support thereof avers as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On April 23, 2020, Petitioners, C.N., L.B., et al, (collectively, “Petitioners”) initiated this litigation by filing their Emergency Petition for Issuance of a Writ of Mandamus (the “Petition”) and Application for Special

Relief in the Nature of an Application for Peremptory Judgment in Mandamus (the “Application”).

2. Petitioners in the instant matter assert that they are families currently residing in the Berks County Residential Center (“BCRC”) in civil immigration detention who have brought an action against the Department of Human Services (“DHS”) in connection with the ongoing 2019 Novel Coronavirus (“COVID-19”) pandemic.

3. Petitioners discuss as part of the Petition, the matter of *J.S.C., et al. v. DHS* (678 MD 2019); a matter involving wholly separate petitioners (“J.S.C. and J.A.M.”) bringing action against DHS as a result of its issuance of a Certificate of Compliance issued to the BCRC and related stipulations, specifically the February 3, 2017 Stipulation and Order, see, *The County of Berks v. Dallas, et al*, 8 MD 2017. and the January 22, 2018 Order, see, *The County of Berks v. Miller, et al*, 13 MD 2018 (collectively, “Stipulations”).

A. History of the BCRC and its Relationship with DHS

4. In 2001, the County of Berks signed an Inter-Governmental Service Agreement (“IGSA”) with the United States Department of Homeland Security-Immigrations and Customs Enforcement (hereinafter “ICE”) to operate the BCRC, a family immigration program.

5. The BCRC provides an avenue for the residents, undocumented illegal immigrants seeking asylum, to maintain family unity while ICE enforces Federal immigration laws. It is one (1) of only three (3) such facilities in the entire country.

6. From 2001 through 2015, DHS performed yearly inspections of the BCRC. DHS renewed the license of the BCRC, providing a Certificate of Compliance in accordance with the regulations of 55 Pa. Code 3800. DHS had never previously revoked, or otherwise called into question BCRC's Certificate of Compliance.

7. In 2013, the County sought to move the location of the BCRC, which was located at 1261 County Welfare Road, Leesport, Berks County, Pennsylvania to 1040 Berks Road, Leesport, Berks County, Pennsylvania. Therefore, DHS required the County to apply for a new Certificate of Compliance for the BCRC.

8. The County voluntarily relinquished their then existing Certificate of Compliance for the former location and re-applied for a new Certificate of Compliance to operate at the new location. DHS granted the Certificate of Compliance in February of 2013.

9. After moving to the new location, DHS continued to perform yearly inspections of the BCRC. DHS has never revoked BCRC's Certificate of Compliance.

10. In June of 2014, the County requested a modification to its Certificate of Compliance to increase its capacity from 96 residents to 192. The County also advised DHS that it sought to renovate the 4th floor of the Center.

11. DHS advised officials at the County and the BCRC of the process that it must follow in order to accomplish the modification to increase capacity.

12. As a result of the request and direction given by DHS, the County began a yearlong extensive construction project to renovate the fourth floor of the BCRC to accommodate additional families.

13. When the renovation was completed, the County submitted an application for a new Certificate of Compliance as directed by DHS.

14. In March of 2015, the County then requested that DHS approve the capacity increase of the BCRC, based on the expansion of the facility.

15. By letter dated October 22, 2015, DHS advised the County that their request to increase the capacity of the facility was “postponed.”

16. On November 9, 2015, the County submitted the application for renewal of the BCRC’s Certificate of Compliance for 2016-2017, as it has done every year since 2001.

17. On November 9, 2015, DHS granted the County's renewal application and issued to BCRC a Certificate of Compliance to operate for 2016-2017.

18. On November 17, 2015, DHS issued a letter to the County stating that the 2016-2017 Certificate of Compliance to the BCRC was issued in error and is thereby "rescinded."¹

19. On January 27, 2016, DHS, by letter, advised the County that (a) they were refusing to renew the 2016 Certificate of Compliance of the BCRC; (b) that they were revoking the 2016 Certificate of Compliance of the BCRC; and (c) that they were denying the County's request to increase the capacity of the BCRC.

20. Thereafter on February 4, 2016, the County filed an appeal to the Bureau of Hearings and Appeals of the "revocation" and "rescission" of the 2016 Certificate of Compliance and denial of the capacity increase.

21. On November 7, 2016, a hearing was held on the appeal of the revocation of the 2016-2017 Certification of Compliance before the Bureau of Hearings and Appeals. ("BHA").

¹ The letter was a nullity in that there is no means by which DHS can simply "rescind" a Certificate of Compliance that was issued.

22. On April 20, 2017, Administrative Law Judge David Dudley entered an Order sustaining the BCRC's appeal and ordering DHS to rescind its revocation of the 2016-2017 Certificate of Compliance.

23. DHS filed a Motion for Reconsideration of that decision on May 24, 2017 which the County opposed.

24. On January 30, 2018, Cathy Utz, Deputy Secretary of DHS granted the Motion for Reconsideration and remanded the appeal back to Judge Dudley for reconsideration.

25. On April 9, 2019 a Petition to Intervene in the underlying licensing action, was purportedly filed on behalf of "Individuals Currently and Formerly Detained at the Berks County Residential Center."

26. The BHA denied the Petition to Intervene and a Petition for Review was filed on behalf of the proposed Intervenors.

27. By Order dated January 21, 2020 the Commonwealth Court of Pennsylvania granted the Petition for Review and directed that the BHA allow intervention for the limited purpose to allow the intervenors to introduce evidence related to the operation of the BCRC under 55 Pa. Code Ch. 3800.

28. In July of 2018, the parties re-briefed the issues and submitted same to Judge Dudley for his Reconsideration.

29. The Reconsideration remains pending.

30. The BCRC, for the duration of 2019 and while DHS' Motion for Reconsideration of the decision of the Bureau of Hearings and Appeals remains pending, has continued to operate pursuant to the stipulation between the parties in *The County of Berks v. Dallas, et al*, 8 MD 2017.

31. Judge Dudley's decision on remand with regard to the revocation of the 2016-2017 license is still pending.

32. The BCRC continues to operate under the 2016-2017 Certificate of Compliance during the pendency of that appeal.²

33. On February 10, 2020, the matter *J.S.C., et al. v. DHS* (678 MD 2019) was originated, with the petitioners objecting to the Stipulations, contending DHS is without legal authority to enter into the Stipulations.

34. Berks County has a stake in the outcome of the *J.S.C., et al. v. DHS* (678 MD 2019) matter because the petitioners object to the Stipulations and filed

² Each year from 2016 through the present, the BCRC has applied for Certification of Compliance with DHS, and upon non-receipt of an approval or denial of the application by DHS, has filed a Complaint in Mandamus each year against DHS. By agreement and Stipulations of the parties, the various mandamus actions remain open, pending the resolution of the underlying Certification matter with Judge Dudley. The Stipulations have the effect of allowing BCRC to continue operations as if fully licensed. See, Application for Leave to Intervene on behalf of the County of Berks, filed March 24, 2020 on *J.S.C., et al. v. Pa. Dept. of Human Services et al*, No. 678 MD 2019 (Pa. Cmwlt. 2019).

an Application for Leave to Intervene in the Commonwealth Court on March 24, 2020.

35. Berks County's Application for Leave to Intervene is currently pending with the Commonwealth Court on *J.S.C., et al. v. DHS* (678 MD 2019).

B. Factual Basis Surrounding BCRC's Interest in the Instant Matter

36. Petitioners' Petition and Application introduce uncertainty and risks to Berks County's operation of the BCRC and, if successful, will cause direct harm to BCRC's operations.

37. Petitioners' Petition and Application further introduce uncertainty, directly interfere with Berks County's property interest in the ISGA and Berks County's operations, including its sixty-one (61) employees that will be negatively impacted if Petitioners succeed.

38. Petitioners' Petition and Application are inextricably linked with Berks County's direct interests in and operations of the BCRC.

39. Petitioners seek a Writ of Mandamus compelling DHS to issue an Emergency Removal Order pursuant to Pa. Code § 20.37 requiring the removal of Petitioners from BCRC.

40. If Petitioners succeed in their requests for relief, it will leave a void in the necessary and critical services that the County provides through the BCRC and

its programming, namely, providing a location where family units can remain united while they go through immigration proceedings.

41. Berks County has a direct, immediate, and substantial interest in this litigation because its interests in the Stipulations, its operations, and IGSA will not be adequately represented by DHS, whose interests are not wholly aligned with the County as evidenced by the past four years of litigation between the parties.

42. On April 24, 2020, the Court issued an Order requiring Respondent DHS to file Answers to the Petition and Application by Tuesday, April 28, 2020 at 3:00 p.m.

II. PENNSYLVANIA LAW GOVERNING INTERVENTION

43. Pennsylvania Rule of Appellate Procedure 1531(b) allows a person not named as a respondent in an original jurisdiction Petition for Review to seek leave to intervene by filing an application with the Court.

44. Pursuant to Pennsylvania Rules of Appellate Procedure 106 and 1517, original jurisdiction petitions for review are governed by the Pennsylvania Rules of Civil Procedure, unless the Rules of Appellate Procedure expressly provide otherwise.

45. Pennsylvania Rule of Civil Procedure 2327 provides, in relevant part:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if ...

(3) such person could have joined as an original party in the action or could have been joined therein;
or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

46. The County of Berks seeks to intervene pursuant to Pa. R.Civ.P. 2327(3) because they could have been joined as an original party to this action.

47. The County also seeks to intervene as a Respondent pursuant to Pa. R.Civ.P. 2327(4) to protect its specific, substantial and legally enforceable interests in its license, the Stipulations, the ISGA, and its continued operations.

III. LEGAL ARGUMENT

A. The County of Berks May Intervene in this Matter Pursuant to Pa.R.Civ.P. 2327(3) Because They Could Have Been Joined as Respondents

48. Pennsylvania Rule of Civil Procedure 2327(3) provides that a party shall be permitted to intervene when “such person could have joined as an original party in the action or could have been joined therein.”

49. The Rule is not contingent upon whether the proposed intervenor has standing, a legally enforceable interest, or any other criteria other than a demonstration that the party could have been joined as an original party.

50. Further, “[t]he corollary rule on intervention is found at Rule No. 2329, which sets forth the reasons for denying intervention.” *Allegheny Reprod.*

Health Ctr. v. Pa. Dep't of Human Servs., 2020 Pa. Commw. LEXIS 104, *10
(Commw. Ct. Jan. 28, 2020).

51. Pennsylvania Rule of Civil Procedure 2329 provides, in relevant part:

Upon the filing of the petition and after hearing, ... the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if

(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

(3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R.Civ.P. 2329 (emphasis supplied).

52. It is well-settled that “a grant of intervention is mandatory where the intervenor satisfies one of the four bases set forth in Rule No. 2327 unless there exists a basis for refusal under Rule No. 2329.” *Allegheny Reprod. Health*, at *11-12 (emphasis supplied), citing, *Larock v. Sugarloaf Township Zoning Hearing Board*, 740 A.2d 308, 313 (Pa. Cmwlth, 1999) (Holding, that “the effect of Rule

2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present”).

53. For standing to exist in an action seeking a declaratory judgment “the underlying controversy must be real and concrete, such that the party initiating the legal action has, in fact, been ‘aggrieved.’” *Pa. Indep. Oil & Gas Ass’n v. Commonwealth*, 135 A.3d 1118, 1129 (Pa. Commw. Ct. 2015), citing, *Pittsburgh Palisades Park, LLC. v. Commonwealth*, 888 A.2d 655-659 (Pa. 2005).

54. It is settled that “[a] party is aggrieved for purposes of establishing standing when the party has a ‘substantial, direct and immediate interest’ in the outcome of litigation.” *Pa, Ind. Oil & Gas Ass’n*, at 1129, citing, *Johnson v. American Standard*, 8 A.3d 318, 329 (Pa. 2010) (quoting, *Fumo v. City of Philadelphia*, 972 A.2d 487, 496 (Pa. 2009)).

55. Further, personal standing pursuant to Rule 2329(1) “requires a party to have a direct, immediate, and substantial interest in order to initiate litigation.” *Allegheny Reprod. Health*, at *13, citing, *William Penn Parking Garage, Inc. v. city of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975).

56. The County is an original party in three (3) actions, going back four (4) years involving its license and the Stipulations which are premised upon the exact same legal questions in Commonwealth Court matter *J.S.C., et al v. DHS*

(678 MD 2019). The County also has a pending Application for Leave to Intervene in this “related” matter.

57. If Petitioners are successful in their litigation it will undoubtedly affect the County’s ability to continue operations at the BCRC and will interfere with the ISGA and the critical services that the County provides to the Federal Government.

58. It thus follows that Petitioners could have named BCRC in the instant Petition and Application.

59. Accordingly, the County “could have been joined” as respondents and should therefore be permitted to intervene pursuant to Pa. R.Civ.P. 2327(3).

B. The County May Intervene in this Matter Pursuant to Pa. R.Civ.P. 2327(4) Because They Have a Legally Enforceable Interest in Protecting Their Business Operations, Their License and in the ISGA

60. Pennsylvania Rule of Civil Procedure authorizes intervention where determination of an action “may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.” Pa.R.Civ.P. 2327(4); see *Chadwick v. Caufield*, 834 A.2d 562, 570-571 (Pa. Super 2003) (holding intervention proper under Rule 2327(4) where potential reversal of a denial of petition for *habeas corpus* would result in a greatly diminished marital estate of the petitioner such that petitioner had an interest in ensuring the continued enforcement of a finding of contempt).

61. The County seeks to intervene to protect its legally enforceable interests in its license, operability, and the ISGA which may be adversely affected by Petitioner's requested relief as described herein.

62. Because Petitioners are seeking declaratory and injunctive relief that will materially and negatively impact the County, whose operations at the BCRC would be wholly upended, including the potential loss of 61 jobs, the County should be permitted to intervene in this action.

63. The County's right to intervene is clear and beyond doubt. The Petition and Application pose a substantial, direct, and immediate burden on the County.

C. THERE IS NO BASIS TO REFUSE BERKS COUNTY'S APPLICATION

64. Pennsylvania Rule of Civil Procedure 2329 provides that an application for intervention may be refused where: (1) the petitioner's claim or defense "is not in subordination to and in recognition of the propriety of the action"; (2) the petitioner's interest is already adequately represented"; or (3) "the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties."

65. None of the factors delineated in Pa. R.Civ.P. 2329 apply to the County.

66. First, their defenses and claims are in subordination to, and in recognition of the, the propriety of the action.

67. Second, Berks County's interests are not and will not be adequately represented by any of the existing parties, and in fact, are in conflict with the interests of the existing parties. Berks County has a vital interest in the outcome of this litigation independent of that of DHS. The fundamental core of the underlying License Appeal is a dispute between DHS and Berks County involving the license to operate the BCRC, and as such it is clear that Berks County's interests vary in large part from that of DHS.

68. Third, Berks County has not unduly delayed in filing this Application, before the pleadings are closed and before any Final Order of the Court.

69. Finally, Berks County's intervention will not unduly delay, embarrass, or prejudice the trial or adjudication of the parties' rights.

70. Where Berks County may intervene pursuant to Rules 2327(3) and (4) and where no reason to deny this Application is present pursuant to Rule 2329, intervention is mandatory.

IV. CONCLUSION


71. For the reasons set forth above, Berks County has a clear right to intervene in this matter.

72. Berks County requests a hearing on this Application, if deemed necessary by this Honorable Court.

WHEREFORE, The County of Berks respectfully requests this Honorable Court grant its Application for Leave to Intervene, approving its intervention and full party status in this action.

**MacMAIN, CONNELL &
LEINHAUSER, LLC**

Dated: April 27, 2020


By: 

Matthew J. Connell, Esquire
PA Attorney I.D. No. 80246
433 W. Market Street, Suite 200
West Chester, PA 19382
Attorney for Intervenor,
The County of Berks

VERIFICATION

I, Diane Edwards, Executive Director of the Berks County Residential Center, hereby certify that the facts in the foregoing *Application for Leave to Intervene* are true and correct to the best of my knowledge and belief. I make this statement subject to the penalties of 18 Pa. C.S. §4904 relating to unsworn falsification to authorities.

Date: 4/27/2020

By: 
Diane Edwards
Executive Director
Berks County Residential Center


CERTIFICATE OF COMPLIANCE

I, Matthew J. Connell, Esquire, certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts*, which require filing of confidential information and documents differently than non-confidential information and documents.

**MacMAIN, CONNELL &
LEINHAUSER, LLC**

Dated: April 27, 2020

By: _____


Matthew J. Connell, Esquire
PA Attorney I.D. No. 80246
433 W. Market Street, Suite 200
West Chester, PA 19382
*Attorney for Intervenor, Berks County
Residential Center*

CERTIFICATE OF SERVICE

I, Matthew J. Connell, Esquire, hereby certify that on this 27th day of April, 2020, a copy of the foregoing *Application for Leave to Intervene* was served upon the following via eService:

Karen L. Hoffman, Esquire
Syrena Law
128 Chestnut Street, Suite 301a
Philadelphia, PA 19106

David C. Bennion, Esquire
Free Migration Project
150 Cecil B. Moor Avenue, Suite 203
Philadelphia, PA 19112

Bridget Cambria, Esquire
Jacquelyn Kline, Esquire
ALDEA-The People's Justice Center
532 Walnut Street
Reading, PA 19601

Carol A. Donohoe, Esquire
Post Office Box 12912
Reading, PA 19612

Edward G. Cherry, Esquire
Matthew J. McLees, Esquire
Kenneth J. Serafin, Esquire
Megan Rubenstein, Esquire
Office of General Counsel
Department of Human Services
3rd Floor West, Health and Welfare Building
625 Forster Street
Harrisburg, PA 17112

**MacMAIN, CONNELL &
LEINHAUSER, LLC**

By: _____


Matthew J. Connell, Esquire
PA Attorney I.D. No. 80246
433 W. Market Street, Suite 200
West Chester, PA 19382
*Attorney for Intervenor, Berks County
Residential Center*