

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

SBRMCOA, LLC and SAPPHIRE BEACH	)	
RESORT AND MARINA CONDOMINIUM	)	
OWNERS ASSOCIATION,	)	CASE NO. ST-13-CV-570
	)	
Plaintiffs,	)	ACTION TO PARTIALLY
	)	CONFIRM AND PARTIALLY
v.	)	VACATE OR MODIFY
	)	ARBITRATION AWARD
BEACHSIDE ASSOCIATES, LLC,	)	
	)	
Defendant.	)	
	)	

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: September 1, 2015)

Before the Court is the Motion for Temporary Restraining Order and Preliminary Injunction filed by Plaintiff SBRMCOA, LLC ("SBRMCOA") against Defendant Beachside Associates, LLC ("Beachside"). SBRMCOA and Beachside submitted various memoranda supporting their respective provisions on August 13, and 14, 2015. On August 14, 2015, at 6:01 p.m., the Court entered a temporary restraining order and set this matter for an injunction hearing, which was conducted on August 24, 2015.¹ For the reasons discussed below, SBRMCOA's

¹ At the hearing, SBRMCOA was represented by Maria Tankenson Hodge, Esquire, and Beachside was represented by Neil D. Goldman, Esquire. The Court heard testimony from Craig Cerny, James Grum, Walford Simmonds, and Dean Morehouse. The Court admitted into evidence Plaintiffs' Exhibits 1 and 2, and Defendant's Exhibits 4 through 6, 8 through 13, 21, and 23. Defendant's Exhibits 12 and 13 were admitted only for the limited purpose of establishing that Beachside demanded arbitration, and Plaintiffs initially opposed the demand.

motion will be granted, and an injunction pending appeal will be issued, conditioned on SBRMCOA posting an appropriate bond.

I. FACTUAL AND PROCEDURAL BACKGROUND.

This matter is but one case in the seemingly endless litigation saga surrounding the Sapphire Beach Resort and Marina in St. Thomas, U.S. Virgin Islands. Plaintiff Sapphire Beach Resort and Marina Condominium Association (“Association”) is the association of apartment owners for the Sapphire Beach Resort and Marina Condominium (the “Subject Property”) established pursuant to the Virgin Islands Condominium Act,² and the pertinent declaration of condominium for the Subject Property. SBRMCOA is the agent for the Association, and carries out the duties of the Association under the Condominium Act and the applicable declaration of condominium and bylaws governing the Association. Beachside is the successor-in-interest to the sponsor of the Sapphire Beach Resort and Marina, Bayside Resorts, Inc., and holds the promissory note and mortgage covering the Subject Property, except for that real estate which belongs to the Association and its unit owners.³

This particular case grows out of a dispute between the parties over the cost and procedures for the collection, treatment, and disposal of wastewater for Buildings A through F on the Subject Property. Those buildings belong to the Association, and contain 171 separate residential units. Though not explicitly stated at the hearing, based on the several references during the injunction hearing to “occupancy” rates and levels, it is clear that many, if not all, of the units are rented or leased to tourists visiting St. Thomas.⁴ The matter went to arbitration, and, after the arbitrator issued the final award, SBRMCOA filed a complaint in this Court seeking to vacate and/or modify the final award in part and to confirm it in part. Beachside counterclaimed, seeking the same type of relief. But, of course, Bayside sought confirmation on the portions of the final award for which SBRMCOA desired a vacatur or modification, and a vacatur or modification on the portions for which SBRMCOA requested confirmation.

In the early stages of this litigation, SBRMCOA filed a request for a temporary restraining order and preliminary injunction after Beachside terminated wastewater services to Buildings A through F. The Court issued a temporary restraining order on March 25, 2014, at 2:30 p.m. Thereafter, a hearing was held on the motion for the preliminary injunction on April 7, 2014. Based on the testimony elicited, the exhibits introduced, and the arguments made at the hearing, the Court denied the preliminary injunction and dissolved the temporary restraining order.⁵ This determination was based, in large part, on the fact that SBRMCOA was able to make alternative wastewater disposal arrangements for Buildings B through F, and, it appeared, that Beachside would continue to serve Building A. This arrangement was adopted, at least in practice, by the parties throughout this case until August 10, 2015. Later, after full briefing and oral argument on the merits of the case, this Court entered its Judgment on June 8, 2015, confirming in part and

² See, V.I. CODE ANN. tit. 28, § 901(d).

³ Plaintiffs’ Exhibit 1 delineates the respective parties’ ownership interests in the Subject Property.

⁴ In addition, the March 24, 2014, affidavit of James Grum, filed in connection with an earlier motion, averred that ten percent (10%) of the units are occupied by residents, and the remainder are rented by visitors or temporarily occupied by non-resident owners. Beachside never disputed this factual assertion during these proceedings.

⁵ The written order is dated April 14, 2014.

vacating in part the arbitrator's award which is the basis for this litigation. The Court also remanded the matter to the arbitrator to conclusively determine certain optional procedures contained in the arbitration award. On June 9, 2015, SBRMCOA filed a notice with the Supreme Court of the Virgin Islands appealing the June 8, 2015, Judgment. On July 8, 2015, Beachside also noticed its appeal from the June 8, 2015, Judgment.

According to the present motion, on August 10, 2015, Beachside advised SBRMCOA that it would be terminating wastewater treatment services to Building A on August 15, 2015, if certain monetary demands were not met. The supporting documents further advised that access to a manhole, through which SBRMCOA provided wastewater disposal services to Buildings B through F by the same date, would be ended. In light of the immediacy of the threatened action, and a preliminary consideration of the four factors for injunctive relief, the Court issued the Temporary Restraining Order and, thereafter, conducted the injunction hearing discussed in the opening paragraph of this opinion. After hearing the testimony of the witnesses, reviewing the admitted exhibits, and considering the arguments of counsel, the Court determines the following facts.

At the August 10, 2015, meeting, Beachside advised SBRMCOA that if the latter party did not immediately make payments going forward of Five Thousand Dollars (\$5,000.00) per month, and back payments of Eighty Thousand Dollars (\$80,000.00), wastewater treatment services for Building A would be halted on August 15, 2015. Beachside also indicated that it would eliminate SBRMCOA's access to the manhole through which it was able to provide wastewater disposal services to Buildings B through F.⁶ Around August 12, 2015, Beachside offered to provide wastewater treatment services to all six of the Association's buildings for Sixteen Thousand Dollars (\$16,000.00) per month, which was approximately the cost SBRMCOA and the Association were incurring for the alternate wastewater disposal services for Buildings B through F. However, the Association's board of directors rejected this proposal.

At the time of the parties' meeting, it was contemplated that the severance from the wastewater lines would be accomplished by inserting a ball into the sewage line, and then inflating the same until it clogged the pipe. According to Walford Simmonds, the process would take approximately two (2) minutes to complete. Once the ball was inserted and inflated, the water to Building A would have to be turned off, or, when used, it would very quickly backup and flood the first floor, eventually spilling out onto the grounds. Building A was at least partially occupied at this time. Sealing off the L44 manhole would eliminate SBRMCOA's ability to continue its alternative wastewater disposal arrangements for Buildings B through F. If accomplished, water would have to be turned off to these buildings, or, upon water usage, the lines would backup and wastewater from these structures would eventually spill onto the Subject Property.

Later, and also during the course of the hearing, another manhole, situated between Buildings B and C, was suggested by Beachside as a suitable alternative for servicing Buildings B

⁶ The manhole at issue is shown as a circled "S" above "L44" just to the right of the center of Plaintiffs' Exhibit 1. This manhole is located on Beachside's property.

through F.⁷ However, James Grum testified that this second manhole has a smaller capacity than the L44 manhole, and would require clearing approximately twice as often. Walford Simmonds agreed that the second manhole would have to be pumped out approximately twice as often as the L44 manhole. James Grum also testified that during the transporting of wastewater to the Waste Management Authority facility where SBRMCOA now takes the sewage for Buildings B through F, the second manhole would likely reach capacity and begin to overflow. The parties do not dispute that the Subject Property is immediately adjacent to Sapphire Beach a/k/a St. John Bay and Red Bay, and therefore, in the first tier of the Virgin Islands coastal zone.⁸ Relying primarily on concerns about environmental harm, SBRMCOA argues that maintaining the status quo, with it servicing Buildings B through F and Beachside servicing Building A, during the appeal before the Supreme Court is warranted. Beachside, while opposing SBRMCOA's request, does not present any arguments with respect to the environmental issues raised above.

Beachside owns a wastewater treatment facility on the Subject Property which is intended to provide services for Buildings A through F, as well as Sapphire House, laundry and restrooms, and to other facilities thereon.⁹ In anticipation of arbitration proceedings, the parties entered into an agreement, dated September 25, 2008, but not executed by Plaintiffs until January 22, 2009.¹⁰ As part of that contract, Plaintiffs agreed to pay, and Beachside agreed to accept, payment of Five Thousand Dollars (\$5,000.00) per month in exchange for the provision of wastewater treatment services to Buildings A through F until the "...entry of judgment on an award in the arbitration proceeding...."¹¹ SBRMCOA made these payments through April of 2014, when it was forced to begin the alternative wastewater disposal procedures for Buildings B through F. From May of 2014 to present, SBRMCOA has not made any payments to Beachside for the wastewater treatment services provided for Building A. Also, Beachside points out that SBRMCOA and the Association have not made any payments toward the liquidated sum awarded in the final arbitration award and confirmed by this Court. According to Beachside, maintaining the status quo results in an "involuntary servitude" upon it which allows Plaintiffs to receive wastewater treatment services for free, and at Beachside's expense. Beachside further argues that SBRMCOA's present request seeks a mandatory injunction which should only very rarely be judicially approved. SBRMCOA counters that until the sum awarded by the arbitrator and confirmed by the Superior Court, is affirmed by the Supreme Court, there is no enforceable judgment debt which it must pay at this time.

⁷ This second manhole is shown on Plaintiff's Exhibit 1 as a circled "S" about an inch above and just to the right of the manhole described in footnote 6. This manhole is located on the Association's property.

⁸ See, 12 V.I.C. §§ 902(r), 908.

⁹ Defendant's Exhibit 5. Despite its name, Sapphire House is not a part of the Association, and SBRMCOA has no responsibility for that structure.

¹⁰ Plaintiffs' Exhibit 2.

¹¹ Plaintiffs' Exhibit 2 at p. 3, section 2(b).

II. LEGAL DISCUSSION.

a. This Court has Jurisdiction to Entertain SBRMCOA's Motion While the Appeal is Pending Before the Supreme Court.

Before addressing the merits of SBRMCOA's motion, the Court must be satisfied that it has jurisdiction to address the merits of the matter.¹² SBRMCOA briefly touches on the issue of jurisdiction, and cited two cases for the proposition that this Court may consider and grant the requested relief. In its responses, Beachside does not address the issue of jurisdiction at all. Although the parties agree that jurisdiction exists, they may not stipulate to such jurisdiction, and the Court must be satisfied that it has the authority to adjudicate this motion.¹³ In the August 14, 2015, Temporary Restraining Order, this Court relied on cases construing Rule 62(c) of the Federal Rules of Civil Procedure, and incorporated the same pursuant to Superior Court Rule 7. This was in error because "...the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Local Rules of the District Court should represent rules of last resort rather than first resort, and should be invoked only when a thorough review of applicable Virgin Islands statutes, Superior Court rules, and precedents from this Court reveals the absence of any other [applicable] procedure."¹⁴

As a general rule, once an appeal from a final order of the Superior Court has been filed with the Supreme Court, this tribunal no longer has jurisdiction over the subject case.¹⁵ However, there are some exceptions to the general rule. Rule 8(b) of the Virgin Islands Supreme Court Rules provides, in part, "Requests...for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal in a civil case must ordinarily be made in the first instance to the Superior Court." This language is patterned after Rule 8(a)(1)(C) of the Federal Rules of Appellate Procedure, and, therefore, federal courts' interpretations of that provision are helpful in analyzing the local rule.¹⁶

Notably, the authority for federal appellate courts to stay or enjoin a trial court judgment pending appeal is not found in the statute conferring appellate jurisdiction, but pursuant to the federal all writs statute and their inherent judicial authority.¹⁷ But, the federal all writs act does not expressly provide for injunctive relief. To the contrary, the statutory jurisdiction of the Supreme Court of the Virgin Islands expressly includes the authority to issue all writs necessary to meet its duties and injunctions in aid of its appellate jurisdiction.¹⁸ Thus, the Supreme Court's explicit authority to issue a stay or injunction pending appeal is more expansive than that of federal appellate courts. In addition, the Supreme Court may provide the procedures to regulate the

¹² E.g., *People v. Miller*, 53 V.I. 162, 167 (V.I. Super. Ct. 2010) (citing *New Mexico v. Gutierrez*, 409 F. Supp. 2d 1346, 1347 (D.N.M. 2006)).

¹³ See, e.g., *Ottley v. Estate of Bell*, 61 V.I. 480, 488 n. 4 (V.I. 2014) (citations omitted).

¹⁴ *Vanterpool v. Gov't of the V.I.*, S. Ct. Civil No. 2013-0072, 2015 V.I. Supreme LEXIS 23 at * 16 (V.I. Aug. 10, 2015) (quoting *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014)) (insertion in original).

¹⁵ *Walters v. Walters*, 60 V.I. 770, 782 (V.I. 2014); *In re Rogers*, 56 V.I. 325, 342 (V.I. 2012).

¹⁶ E.g., *H & H Avionics, Inc. v. V.I. Port Auth.*, 52 V.I. 458, 461-62 (V.I. 2009).

¹⁷ FED. R. APP. P. 8 Advisory Committee Notes.

¹⁸ 4 V.I.C. § 32(b).

appeals pending before it,¹⁹ and it has directed that motions for injunctions pending appeal must first be filed with the Superior Court. Therefore, this Court has jurisdiction to adjudicate SBRMCOA's motion. However, such jurisdiction is sustained by title 4, sections 32(b) and (f)(2) of the Virgin Islands Code, and Rule 8(b) of the Supreme Court Rules, and not by virtue of Superior Court Rule 7 and Rule 62 of the Federal Rules of Civil Procedure.

b. The Legal Standard to be Applied on a Motion for an Injunction pending Appeal.

On a motion for an injunction pending appeal, the Superior Court's "...rules respecting time periods, practices, and procedures apply."²⁰ Therefore, this Court will consider the same factors applicable to a motion for an injunction.²¹ Specifically, the trial court looks at: 1) the threat of irreparable harm if the injunction is denied, 2) the probability success on the merits, 3) the balance of the harm between the parties if the motion is granted or denied, and 4) the public interest.²² Our Supreme Court recently stated,

"...the moving party still has the burden of making some showing on all four injunction factors. But in considering whether to grant or deny the preliminary injunction, the Superior Court must evaluate the moving party's showing on all four factors under a sliding-scale standard. In conducting this sliding-scale analysis, the Superior Court must make findings on each of the four factors and determine whether — when the factors are considered together and weighed against one another — the moving party has made 'a clear showing that [it] is entitled to [injunctive] relief.'"²³

Applying this revised sliding-scale test to the facts elicited at the hearing, the Court determines that an injunction pending appeal is appropriate.

1. The Irreparable Harm Factor Favors the Issuance of an Injunction.

At the June 4, 2015, dispositional hearing the Court noted that SBRMCOA is not the association of unit owners, but the agent for the Association. The harm which may inure to its principal may not necessarily follow to the agent. However, the facts presented demonstrate a likelihood of irreparable harm to both the Association and SBRMCOA if the threatened actions of Beachside are not enjoined.

If Beachside is allowed to terminate access to the wastewater lines and manhole L44, there will be no wastewater treatment or disposal services available for Buildings A through F at the Subject Property. The testimony of James Grum and Craig Cerny show that access to manhole

¹⁹ 4 V.I.C. § 32(f)(2).

²⁰ V.I. S.Ct. R. 8(b).

²¹ See, *Yusef v. Hamed*, 59 V.I. 841, 847 n. 3 (V.I. 2013) (citations omitted) (The Supreme Court noted that the preliminary injunction factors apply to a motion to stay pending appeal.).

²² E.g., *Dennie v. Abramson Enters., Inc.*, 124 F. Supp. 2d 928, 930 (D.V.I. App. Div. 2000).

²³ *3RC & Co. v. Boynes Trucking Sys., Inc.*, S. Ct. Civil No. 2015-0016, 2015 V.I. Supreme LEXIS 22 at * 17-18 (V.I. July 23, 2015).

L44 is necessary for SBRMCOA's alternate plan for disposal of wastewater for Buildings B through F at the Subject Property. Also, if allowed to construct the lift required to service Building A if Beachside cuts off service, which is subject to on-going permitting processes before the Coastal Zone Commission, access to manhole L44 will be required by SBRMCOA. The testimony provided by Craig Cerny, James Grum, and Walford Simmonds also noted if access to the wastewater lines and manhole L44 are severed, wastewater for the affected buildings will back up, flood these residential structures, and eventually spill onto the grounds of the Subject Property. This includes property belonging to the Association, the care of which is committed to SBRMCOA.

This release of wastewater effluent will expose the residents to diseases such as dysentery and cholera. If allowed into the surrounding sea, it will encourage the growth of algae which negatively affects corals. These threatened environmental and health concerns sustain the contention that irreparable harm to the Association is present.²⁴ To the extent that SBRMCOA may be rendered unable to meet its obligations to the Association, its principal, there is irreparable harm. Further, irreparable harm exists because a spill of effluent would subject SBRMCOA, as well as the Association, and Beachside for that matter, to governmental sanctions under Virgin Islands environmental and health laws.²⁵ Further, the type of alterations required to address Building A wastewater disposal, according to Mr. Cerny, cannot be completed without the requisite permits. Although SBRMCOA has been pursuing the permits from the Department of Planning and Natural Resources, Beachside has interposed objections to some of these efforts, which delays the permitting process.

The alternatives presented by Beachside do not negate the existence of irreparable harm to SBRMCOA. While Beachside argues that it would provide the services in exchange for SBRMCOA and the Association making certain payments, the testimony and demeanor of Dean Morehouse counsel that irreparable harm remains despite these offers. Beachside's offers have varied in the payment amount - one of \$5,000 per month and another of \$16,000.00 per month. Moreover, Beachside raised the issue of a potential termination of services in January of 2015, but waited until August, 2015, to pursue this course of action. And, then, Beachside provided only five (5) days' notice to SBRMCOA to make its election, despite being aware that the CZM process SBRMCOA was pursuing to address its wastewater disposal issues was on-going and will take time to complete. Importantly, Dean Morehouse testified at the injunction hearing and declined to promise not to terminate access to manhole L44 pending appeal in the absence of a court order prohibiting such severance. His demeanor towards SBRMCOA and the Association indicated an inclination to punish them for not paying past due amounts. While the Court understands the frustration Beachside may have for not being compensated for past due services provided, pursuing an avenue of self-help which will expose Plaintiffs to administrative sanctions, injure the health of residents and tourists, and cause environmental damage cannot be condoned. Given Beachside's

²⁴ See, *Ohio Valley Envtl. Coalition, Inc. v. U.S. Army Corps of Eng'rs*, 890 F. Supp. 2d 688, 693 (S.D. W.Va. 2012) (citations omitted); *Sierra Club v. Clinton*, 689 F. Supp. 2d 1123, 1145 (D. Minn. 2010) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.") (quoting *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545 (1987)); *County of Wright v. Litfin*, 386 N.W.2d 757, 759 (Minn. 1986).

²⁵ See, *Fibermark N. Am., Inc. v. Jackson*, Civil Action No. 07-839, 2007 U.S. Dist. LEXIS 22206 at * 30-31 (D.N.J. Mar. 28, 2007).

attitude towards SBRMCOA and the Association, its moving target of payment amounts it seeks to provide wastewater treatment services, and its history of willingness to terminate wastewater services for Buildings A through F, the Court concludes that an injunctive order is required to ensure continuing wastewater services to these buildings pending appeal.

2. SBRMCOA's Likelihood of Success on the Merits is not Strong.

SBRMCOA contends that it has the requisite likelihood of success on the merits because the arbitration award was incomplete, and, therefore, unenforceable. Beachside counters that SBRMCOA has not asserted a claim for relief, and, therefore cannot succeed on the merits. SBRMCOA now essentially raises the same arguments presented to this Court prior to the entry of judgment, and maintains that this Court erred. Thus, the movant has made only a slight showing of success on the merits of the appeal before the Supreme Court.²⁶ Nevertheless, while SBRMCOA does not make a compelling demonstration of its likelihood of success on the merits, an injunction is still warranted under the circumstances.

3. The balancing of the hardships favors granting an injunction pending appeal.

With respect to the third factor, the rationale which supported the issuance of the March 25, 2014, Temporary Restraining Order is equally applicable to the present motion. As noted on page 3 of that Order,

“[I]f immediate relief is not granted, harm will inure to the various members of the Association who are individual property owners. Without the ability to flush toilets and drain bathing water, their properties will be rendered uninhabitable. The interference with real property rights is an appropriate basis for injunctive relief.”

In addition, as noted above, if injunctive relief is not issued, and the water to the buildings is not turned off, the resulting spills of wastewater expose the Association and SBRMCOA to civil and criminal penalties and proceedings under Virgin Islands law.²⁷

To the contrary, Beachside repeatedly asserts that it will suffer harm because SBRMCOA and the Association have not begun to pay the amount awarded by the arbitrator and confirmed by

²⁶ In this case, the success on the merits prong is not as important as in most cases because of what was properly before this Court, and is now on appeal, and what was not. The claim the parties placed before the arbitrator centered on dollar amounts due for past wastewater services and repairs to the treatment facility. The injunctive relief now sought revolves around the present and future relationship between, and responsibilities of, the parties with respect to the wastewater treatment plant on the Subject Property. For reasons unknown to the Court, this issue was not selected for arbitration by the parties, it was never before that officer or this Court, and, therefore, it is not before the Supreme Court for adjudication in the pending appeal. Thus, neither party can succeed on the merits of that issue. But, the circumstances presented involve matters which implicate significant legislative policies, impacts on the environment and public health, and effects on the interests of third parties and the public. Applying the sliding-scale approach approved by the Supreme Court, this is the unusual case where “...the moving party [may] obtain an injunction even where the probability of success on the merits is low if the court determines that the moving party's likelihood of irreparable harm is great and the nonmoving party's likelihood of irreparable harm is very low.” *3RC & Co.*, 2015 V.I. Supreme LEXIS 22 at * 5-6 (citing *Yusef v. Hamed*, 59 V.I. 841, 847 n. 3 (V.I. 2013)).

²⁷ *E.g.*, 12 V.I.C. §§ 190, 913(b), (c); 19 V.I.C. §§ 1562(c), 1563(23); 29 V.I.C. §§ 312(e), (g).

this Court. Beachside also asserts that it has incurred, and will continue to incur, additional costs going forward by having to continue to operate its wastewater treatment facility and provide services to Building A. However, this harm to Beachside is a matter which it, by its very arguments, concedes can be addressed with monetary damages. This is not the type of harm that warrants great consideration on a request for injunctive relief.²⁸ Moreover, at the hearing, Beachside acknowledged that it will continue to operate the wastewater facility to provide services to connected properties which are not part of the Association. Also, based on its own testimony, there is no additional facility-operating cost to Beachside to provide services to Building A, and it will not realize any savings if it that building is disconnected.

Beachside also contends that the relief sought by SBRMCOA is in the nature of a mandatory injunction, and should not be granted because the movant has not met its requisite “heavy burden.”²⁹ A mandatory injunction is defined as “[a]n injunction that orders an affirmative act or mandates a specified course of conduct.”³⁰ Although the injunction pending appeal would require Beachside to continue to provide services to Building A, this is nothing more than a continuation of what Beachside has done for over a year. Also, based on the testimony of Walford Simmonds, the treatment facility actually operates more effectively when it has additional inputs of effluent to process. The more efficient plant operation will allow Beachside to better meet its obligations to the non-Association entities it also services. Thus, the injunction would assist rather than harm Beachside. As noted above, Beachside will not incur any additional cost by continuing to service Building A. The Court finds that this factor weighs very heavily in favor of granting injunctive relief to SBRMCOA pending appeal.

4. The Public Interest is Served by Issuing an Injunction Pending Appeal.

The fourth factor, the impact on the public interest, weighs heavily in favor of granting injunctive relief pending appeal. Again, relying on a justification found on page 3 of the March 25, 2014, Temporary Restraining Order,

“Finally, the public interest is best served by issuing a TRO in this instance. The immediate cessation of wastewater treatment services to Plaintiff and its members may impact the Sapphire Beach area and surrounding waters, and prevent the members from residing in, or renting or otherwise using, their properties due to health concerns. The Legislature has established that these items are critically important public policy matters.”³¹

²⁸ See, *3RC & Co.*, 2015 V.I. Supreme LEXIS 22 at * 22 (“When the moving party’s loss is a matter of simple mathematic calculation, it fails to establish irreparable injury for preliminary injunction purposes.”) (citation, quotation marks, and insert marks omitted).

²⁹ *Trinity Indus. v. Chicago Bridge & Iron Co.*, 735 F.3d 131, 139 (3d Cir. 2013).

³⁰ *Samuel v. V.I. Joint Bd. of Elections*, Civil No. 2012-0094, 2013 U.S. Dist. LEXIS 3689 at * 16 (D.V.I. Jan. 6, 2013) (quoting BLACK’S LAW DICTIONARY (9th ed. 2009)).

³¹ See, 12 V.I.C. § 181 (describing the public policy on water pollution control); 12 V.I.C. §§ 903(b), 906 (conservation policies in the coastal zone areas); 29 V.I.C. § 301(a)(1) (requiring that all residences be connected to an appropriate sewage system); 29 V.I.C. § 494 (describing the public policy on the management of wastewater and solid waste).

It is of note that Beachside does not discuss the public interest factor in its opposition papers, and did not address this issue at the hearing. Thus, it has waived any contention that the public interest will not be served by the grant of this injunction. Importantly, the impending violations of the legislative policies covering wastewater treatment and disposal, and coastal zone conservation are a clear demonstration that the public interest factor plainly favors the issuance of injunctive relief. A leading treatise collects cases for the proposition that "...when the acts sought to be enjoined have been declared unlawful or clearly are against the public interest, [the movant] need show neither irreparable injury, nor a balance of hardship in his favor, nor a likelihood of success on the merits."³² Moreover, territorial statutes expressly provide SBRMCOA with authority to pursue injunctive relief for the harms implicated by Beachside's threatened actions.³³ These provisions place the public interest factor in a priority position on the sliding-scale injunction balancing test,³⁴ and impel the conclusion that an injunction pending appeal is appropriate in this case.

5. A Moderate Bond is Appropriate in this Case.

At the injunction hearing, there was no dispute that an injunction must be accompanied by an appropriate bond. Both sides also appear to agree that the bond should be a sum per month over the anticipated period of the appeal. But, the amount of the bond is hotly contested. In the written papers, Beachside sought a bond of \$200,000.00, representing \$5,000.00 per month from May 14, 2014, until completion of the appeal. However, at the hearing, Beachside posited that a bond of \$18,000.00 per month, which actually exceeds the monthly amount which it proposed to SBRMCOA to service all six of the Association's buildings, was appropriate. SBRMCOA counters that the appropriate bond is \$833.33 per month, which is one-sixth of the \$5,000.00 per month which SBRMCOA agreed to pay to Beachside in their agreement dated September 25, 2008, for service to all six of the Association's buildings.

The Court concludes that it should use the lower figure for this injunction for several reasons. First, it is rational because it is based on the sum the parties agreed was the fee for the six buildings, but applied to the sole structure still being serviced by Beachside. Second, SBRMCOA already is paying separately for the wastewater disposal service for the Association's other five buildings. Using a bond figure that effectively requires it to pay twice for wastewater treatment and disposal services is not justifiable under the circumstances presented. Third, the Court notes that, had this request been made pursuant to the Virgin Islands Coastal Zone Management Act, no bond would be required at all.³⁵ The Court also notes that the Supreme Court

³² 11A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.4 (3d ed. 2013).

³³ 12 V.I.C. § 190(a) ("The Commissioner, or any resident of the United States Virgin Islands, is authorized to commence a civil action or may intervene in a civil action for appropriate relief, including a permanent or temporary injunction, for any violation or threatened violation for which the Commissioner is authorized to issue a compliance order under section 188 of this chapter."); 12 V.I.C. § 913(b)(1) ("Any person may maintain an action for declaratory and equitable relief to restrain any violation of this chapter. On a prima facie showing of a violation of this chapter, preliminary equitable relief shall be issued to restrain any further violation hereof.")

³⁴ 11A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.4 (3d ed. 2013) (Noting that the other three factors are of lessened importance than the public interest "...when a statute expressly authorizes interlocutory injunctive relief.")

³⁵ 12 V.I.C. § 913(b)(1) ("No bond shall be required for an action under this subsection.").

has issued guidelines under which it intends to resolve fifty percent (50%) of its appeals within twelve (12) months, and ninety percent (90%) of them within eighteen (18) months.³⁶ The Court will use the longer time frame because the Supreme Court is addressing jurisdictional issues, in addition to the merits of the pending appeal. Taking all factors together, the Court will require SBRMCOA to post the sum of Fifteen Thousand Dollars (\$15,000.00) for this injunction bond,³⁷ which must be posted in this Court within ten (10) days of the entry of this opinion and accompanying order.

III. CONCLUSION.

Upon weighing the four factors on a sliding-scale basis, the Court concludes that SBRMCOA has shown only a slight chance of success on the merits. However, its showing on the irreparable harm factor is solid. Given the legislative policies at issue and the testimony presented at the injunction hearing, the balance-of-the-harm and public interest elements very compellingly favor issuance of the injunctive relief sought by SBRMCOA. Finally, this injunction is appropriately premised upon the timely posting of a measured bond. Therefore, SBRMCOA's motion will be granted, and an injunction pending appeal will issue in an Order of even date.

Dated: September 1, 2015


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella George
Acting Clerk of the Court

By:


Donna D. Donovan
Court Clerk Supervisor 9.1.2015

³⁶ *In re: Adoption of Time Standards*, Promulgation No. 2011-0005, Order (V.I. Dec. 28, 2011).
³⁷ \$833.33 x 18 months actually totals \$14,999.94. The Court rounds this figure to \$15,000.00.