IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERT WILBUR and DUSTIN FREDERICK Plaintiffs, vs. ADMIRAL'S COVE BEACH CLUB, a Washington non-profit corporation; and JEAN SALLS, MARIA CHAMBERLAIN, KAREN SHAAK, ROBERT PEETZ, ELSA PALMER, ED DELAHANTY AND DAN JONES, individuals, Defendants.	No. 73725-2 RESPONSE OF ADMIRAL'S COVE BEACH CLUB IN OPPOSITION TO APPELLANT'S RAP 8.3 MOTION
SUE CORLISS Intervenor/Appellant, vs. DUSTIN FREDERICK , ROBERT WILBUR, ADMIRAL'S COVE BEACH CLUB, a Washington non-profit corporation, and its BOARD OF DIRECTORS, Respondents.	

I. INTRODUCTION AND RELIEF REQUESTED

Respondent Admiral's Cove Beach Club ("ACBC") responds to and opposes appellant Corliss's Motion for Injunction Pursuant to RAP 8.3 to Preserve Appeal. ACBC asks this Court to deny the motion because

an injunction is not necessary to preserve the fruits of this appeal and considering the equities a stay is not justified. ACBC should be allowed to continue to fulfill its obligations pursuant to Judge Hancock's May 2015 order.

II. STATEMENT OF FACTS AND PROCEDURE[1]

This case involves a request for declaratory judgment regarding a swimming pool at the Admiral's Cove Beach Club ("ACBC") in Coupeville, Washington. (CP 703, 1209-11, 1214-17) ACBC is a non-profit corporation established in 1969 to administer, advance, and protect the Admiral's Cove subdivision. (CP 697-98) ACBC's affairs are managed by the Board of Directors. (CP 706, 1224, 1226)[2]

In the summer of 2012, the ACBC Board and members discussed the need for a special assessment to repair the pool. (CP 1191) In September 2012, the ACBC Board held three town hall meetings open to

---

[1] Section III "Facts Relevant to Motion" in Corliss's RAP 8.3 Motion contains over two pages of legal argument that reiterates her arguments on appeal. Paragraphs 2 to 9 of the Affidavit [sic] of Susan Corliss contain no facts relevant to the RAP 8.3 Motion; those paragraphs restate Ms. Corliss's arguments on appeal. Paragraphs 2 to 7 of the Affidavit [sic] of Evelyn Novak contain no facts relevant to the RAP 8.3 Motion; those paragraphs simply express Ms. Novak's personal opinions about events that occurred in 2013 and Judge Hancock's May 2015 ruling. The Affidavit [sic] of John Deegan also contains his personal opinions about this case and contains few facts relevant to the RAP 8.3 Motion.

[2] During this litigation, new Board members were elected. (CP 310)

the entire membership to discuss the needed pool repairs. *Id.* The issue was discussed again at the ACBC annual membership meeting in October 2012. (CP 719-20) At that meeting, a motion to study the pool passed ("the October 2012 Motion"). The October 2012 Motion authorized the Maintenance, Long Range Planning and Budget Committees (with the overall objective of having the pool open as soon as possible) to: (1) identify and evaluate options for pool repair and renovations; (2) develop payment options related to task one, and (3) submit findings to the Board and work with the Board as appropriate. (CP 723-24)

Despite the October 2012 motion's objective to have the pool open as soon as funding and construction schedule allowed, the Board sent a ballot to all Active ACBC Members in Good Standing with two options: (1) "refurbish, remodel, and update the pool at a cost of approximately $650,000 or (2) remove the pool at a cost of approximately $200,000." The second option (removal of the pool) passed by a 4% margin. (CP 874, 1193)

This lawsuit was filed in September 2013. (CP 1209-10) The lawsuit sought injunctive and declaratory relief regarding the pool (CP 1209-20), including a declaration that (1) the pool is an integral part of the ACBC, (2) the pool could not be decommissioned under the existing

governing documents, and (3) the May 2013 ballot and vote to decommission the pool were invalid. (CP 1218)

During the course of the lawsuit, several legal issues were presented to Judge Hancock. A temporary injunction was issued in December 2013. (CP 877-878) Later Susan Corliss, appellant, intervened. (CP 614-22)

In May 2015, Judge Hancock issued a final order. Judge Hancock concluded the pool is a recreational facility which the Board has a legal duty and fiduciary obligation to reasonably maintain, repair, and operate and to take action to carry out these duties (including budgeting for continued operation and maintenance); the October 2012 Motion only addressed repair and renovation options, and did not authorize any Board action to decommission the pool; and the general power to dispose of assets in the Articles of Incorporation and Bylaws does not authorize the Board to decommission the pool. (CP 16-18)

Corliss appealed in June 2015. (CP 1-2) No request was made to the superior court or to this Court to stay enforcement of the May 2015 order. All appellate briefs have now been served and filed.

The Board, relying on Judge Hancock's May 2015 order ("Order"), proceeded to act to fulfill its obligation "to maintain, repair and operate the swimming pool and its related facilities in a reasonable

manner." (CP 18) Since the Order, the swimming pool was open from June through Labor Day 2015 with the approval of the Island County and Washington State Health Departments The pool will be open again in 2016 subject to the same approvals. See Declaration of Ed Delahanty in Support of ACBC's Opposition to Appellant's RAP 8.3 Motion ("Delahanty Dec.") ¶¶ 2-4.

The Board has discussed swimming pool renovations and upgrades at numerous open public Board meetings and at the annual Members' meetings. The minutes of each of the Board meetings are posted on the ACBC website shortly after each meeting and accessible to anyone who accesses the website. Corliss was well aware of these discussions and efforts even after her appeal was filed. The Board evaluated renovation strategies and cost, engaged a consultant who evaluated regulatory constraints, contractor bids, other costs and prepared a budget and plan for the project. After the consultant's presentation at the annual Members meeting the Board carefully constructed a pool renovation assessment ballot with support materials for the consideration of the Members in Good Standing. See Delahanty Dec. ¶¶ 5-9.

The ballot provided two assessment propositions: Proposition 1, Pool Renovation and Proposition 2, Heat Pump Option. Members in Good Standing were allowed to vote either Yes or No on each proposition.

The ballot was mailed to all Members in Good Standing in sufficient time for each to return the ballot by March 11, 2016. See Delahanty Dec. ¶¶ 10-11, Exhibit A. Two additional items were mailed with each ballot: a fact sheet labeled "ACBC Pool Renovation Ballot Q & A" and a brochure. See Exhibits B and C to Delahanty Dec. ACBC spent $13,694 for the project consultant's proposal which was an integral part of estimating the project cost and setting the amount for the assessment ballot. See Delahanty Dec. ¶ 7. ACBC spent at least $1,700 to print and and mail the March 2016 ballot, fact sheet, and brochure. See Delahanty Dec. ¶ 13. At no time during this involved and lengthy process did Corliss ask for any kind of stay.

The March 2016 ballot proposition for repair and renovation of the pool passed by a 7% margin. The heat pump option failed. See Delahanty Dec. ¶ 14. In an effort to implement this mandate of the Members in Good Standing to repair and renovate the pool, and to continue to comply with Judge Hancock's ruling and the mandates of the governing documents regarding the obligation to continue to repair, maintain and operate the pool, the Board spent many hours and much effort determining the procedure and logistics of mailing the billings for the authorized assessments. See Delahanty Dec. ¶¶ 2-3, 5, 7-8, 13, 15. ACBC members

will be offered the opportunity to negotiate a range of payment plans to pay the assessment. See Delahanty Dec. ¶ 16.

The billings for the assessments were originally scheduled to be sent in April but have been delayed and are now expected to be mailed in the near future. Once the invoices are mailed, the process of collecting the assessments will take some time. All funds collected are to be deposited into a special designated account. The Board expects that the majority of the funds will be collected by late fall or early winter 2016. As the funds are collected, the Board contemplates spending only a very small portion of the funds to begin the process of applying for and securing the necessary County and State permits. It is estimated that securing the permits will take approximately four months. Accordingly, the bulk of the funds collected would not begin to be used until early 2017. See Delahanty Dec. ¶¶ 17-20.

It is important to be able to proceed with collecting the assessments without interruption. The assessments must be collected so the Board is ready to fund the detailed planning and drawings, apply for permits, deal with shoreline and environmental issues, and perform the actual renovation before the 2017 swim season. See Delahanty Dec. ¶ 21.

If any part of this process is delayed and ACBC has to wait another year (i.e., until 2018 or later), ACBC will likely incur significant

additional costs. ACBC's consultant for the project had included a 5% cost escalation clause per year based on information obtained from the contractors. Using a projected total cost of $600,000 for the March 2016 member approved pool renovation, a delay until 2018 or later results in a cost increase of at least $30,000 a year. See Delahanty Dec. ¶¶ 22-23.

Appellant Corliss now asks this Court for an injunction preventing the ACBC from implementing Judge Hancock's May 2015 Order. Corliss also asks for an injunction stopping ACBC from collecting the assessments authorized by the March 2016 ballot. ACBC asks this Court to deny the motion.

III. STATEMENT OF ISSUES

1. Should Corliss's RAP 8.3 motion for injunctive relief be denied where a stay is not required to preserve the relief she seeks on appeal because this appeal should be concluded before any significant amount of the March 2016 assessment funds are spent?

2. Should Corliss's RAP 8.3 motion for injunctive relief be denied where the equities weigh in favor of complying with Judge Hancock's order and proceeding with the valid March 2016 assessment?

IV. ARGUMENT

A. THE MARCH 2016 BALLOT AND ASSESSMENT WERE VALID AND APPROPRIATE.

Corliss insinuates the Board was not authorized to act when she argues that "despite the pendency of this case," the Board issued the March 2016 ballot for an assessment. (Motion at p. 5) No stay was requested by Corliss when the appeal was originally filed. Judge Hancock's order mandated the Board comply with its fiduciary obligations to repair, maintain, and operate the pool. The Board was authorized to act accordingly and has done so openly and transparently. The March 2016 ballot and assessment are entirely proper.

RAP 7.2(c) states in part:

> . . . Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3.

Judge Hancock's May 2015 order was not stayed. The March 2016 ballot and assessment proceeded in reliance upon and compliance with Judge Hancock's May 2015 order, and in compliance with ACBC's governing documents

If Corliss wanted to prevent enforcement of the order, she could have done so. An appeal alone does not stay enforcement of the order. The case of *Richland v. Boundary Review Board*, 100 Wn.2d 864, 676

P.2d 425 (1984), demonstrates this point. There, the Franklin County Review Board approved the City of Pasco's application to annex unincorporated property. The City of Richland appealed. Soon after the appeal, Pasco began annexing the property. Richland filed a second suit for declaratory and injunctive relief to stay Pasco's annexation. The second lawsuit was dismissed and Richland appealed. Richland argued the annexation was stayed under RCW 36.93.160. The Supreme Court ruled that statutory stay lasted only during the superior court action. Once a party appealed a decision, the stay ended. The Court stated:

> A party seeking appellate review of a superior court's affirmance or reversal of a boundary review board's decision must seek injunctive relief under [RAP] 8.3 in order to enjoy enforcement of the board's decision.

100 Wn.2d at 873-74.

Similarly, here Corliss appealed but did not seek any injunctive relief. The Board has taken "action premised on the validity" of Judge Hancock's May 2015 Order. The March 2016 ballot and assessment are valid and enforceable and should be allowed to proceed.

Corliss also implies other impropriety by the Board by arguing the March 2016 ballot was sent "after [the Board] disenfranchised many Cove residents, preventing them from voting at all." (Motion at 2) Novak's declaration and the motion refer to "gerrymandering" and denying

members the right to vote. These statements are blatantly false. No members who were entitled to vote were denied the right to vote.

A Member must be in Good Standing to have the right to vote. (CP 705; Bylaws, Article V, Section 1) A Member is in Good Standing if "all current and back dues and/or assessments are paid" (CP 703; Art. III, Section 4), or is current on an approved payment plan. For the May 2013 vote, only Members in Good Standing received ballots. (CP 1193) The same procedure was followed for the March 2016 assessment ballot. See Delahanty Dec. ¶¶ 8-10. No members who were entitled to vote were "disenfranchised."

Mr. Deegan complains that he was denied the right to vote on the March 2016 ballot–because he had not paid his annual dues. By his own admission, Mr. Deegan was not a member in good standing. Therefore, he was not entitled to vote. There was no impropriety in the March 2016 ballot and assessment.

B. A STAY IS NOT REQUIRED TO PRESERVE ANY FRUITS OF CORLISS'S APPEAL.[3]

Corliss brings this motion under RAP 8.3 which states:

---

[3] ACBC maintains the superior court's orders were correct and should be affirmed. The appeal is not, however, frivolous so, for purposes of this RAP 8.3 motion, ACBC does not dispute that the issues on appeal are debatable.

> Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. . . .

The purpose of RAP 8.3 is to permit an appellate court to grant preliminary relief in aid of its appellate jurisdiction and to prevent destruction of the fruits of a successful appeal. *In re Koome,* 82 Wn.2d 816, 818-19, 514 P.2d 520 (1973); *Shamley v. City of Olympia,* 47 Wn.2d 124, 126, 286 P.2d 702 (1955). In *Purser v. Rahm*, 104 Wn.2d 159, 702 P.2d 1196 (1985), the Supreme Court announced the test for a stay pending appeal:

> Whether a stay pending appeal should be granted depends on (1) whether the issue presented by the appeal is debatable, and (2) whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation.

Purser, 104 Wn.2d at 177. A stay is not necessary here.

Corliss argues that a stay is necessary to preserve the fruits of her appeal contending that "[i]f this new Board is able to implement its plan to collect these assessments and repair the pool, this will entirely moot the present appeal." (Motion at 3) She declares that raising the March 2016 assessments, hiring contractors, and completing pool repairs will occur before this Court rules on this appeal. (Corliss Aff., ¶ 14)

A stay is not required because, assuming this Court reverses Judge Hancock's May 2015 Order, the May 2013 vote could be reinstated. As stated above, it will take many months to collect the March 2016 assessments. The funds will be deposited and held in a dedicated account with only a very small portion possibly spent for permits while this appeal is pending.

In *Purser v. Rahm*, the Washington Supreme Court did not issue a stay. There, Medicaid recipients had successfully challenged DSHS's approach for calculating income for Medicaid eligibility. The superior court ruled DSHS's approach violated Washington's community property law. DSHS moved for a stay pending appeal. The motion was denied. DSHS appealed and sought a stay from the appellate court. For the stay, DSHS argued complying with the superior court order would make it out of compliance with Washington's Medicaid plan which had been approved by HHS. If DSHS acts contrary to its plan, the federal government will deny money to DSHS and could subject DSHS to penalties. DSHS had submitted an amendment to the plan but the amended plan had been initially rejected.

The *Purser* court concluded the issue was debatable. Yet, on considering the equities, the court concluded a stay was not necessary because DSHS had an administrative remedy available. The Court stated:

> A preliminary administrative decision should not prevail over a judicial decision based on legal principles. Finally, a stay would be inequitable to persons in respondents' class who are presently denied access to their share of community property. Many of these persons are elderly and are in need of that income.
>
> Considering the merits of the respective positions of the parties and the ability to receive the fruits of a successful appeal, and considering the equities of the situation, we find it appropriate to deny DSHS' motion for a stay.

104 Wn. 2d at 178.

Similarly here, the March 2016 ballot and assessment taken in compliance with a legally valid judicial determination should be allowed to stand. Implementing and collecting the assessments will take several months. Only a very small portion of the funds collected from the March 2016 assessments will possibly be spent on permits while this appeal is pending. Therefore, the fruits of the appeal will not be destroyed.

Moreover, a balance of the equities weighs in favor of ACBC and against Corliss. ACBC spent time, effort, and funds to issue the March 2016 ballot. Corliss knew, or should have known, about this process through the Board meeting minutes and general community knowledge. Yet, Corliss took no action until after the March 2016 vote was announced. Under well established principles of equity, Corliss has not done equity.

The Washington Supreme Court has stated:

> From ancient times, " '[t]he first maxim in equity' has been that one 'who seeks equity must do equity.' " *People's Sav. Bank v. Bufford,* 90 Wash. 204, 208, 155 P. 1068 (1916) (italics omitted). Of similarly ancient provenance is the requirement that those " 'who come[ ] into equity must come with clean hands.' " *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 949, 640 P.2d 1051 (1982).

Columbia Cmty. Bank v. Newman Park, LLC, 177 Wn.2d 566, 581, 304 P.3d 472 (2013).

The equities balance against Corliss. ACBC has already incurred costs to prepare and issue the March 2016 ballot. ACBC remains confident this Court will affirm Judge Hancock's ruling. Nevertheless, in the unlikely event that Corliss prevails on appeal, the funds spent and the time and effort expended on the March 2016 ballot will have been wasted. This result could have been avoided if Corliss merely sought a stay ten months ago when she filed this appeal. The RAP 8.3 motion should be denied.

C. IF A STAY IS GRANTED, THE STAY SHOULD BE CONDITIONED ON A BOND.

Should this Court conclude a stay is appropriate, any stay should be conditioned on a bond. RAP 8.3(a) states an "appellate court will ordinarily condition the order on furnishing a bond or other security." "If the harm occasioned by the appellate delay can be met by a bond, supersedeas should always be granted." *Boeing Co. v. Sierracin Corp.,* 43

Wn. App. 288, 292, 716 P.2d 956 (1986), *citing State ex rel. Pioneer Mining & Ditch Co. v. Superior Court*, 108 Wash. 183, 186, 183 P. 74 (1919). If a stay is granted, a bond or other security is required to protect ACBC from harm.

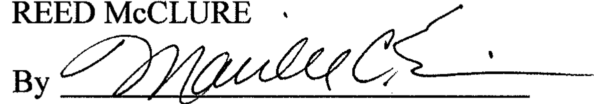
If any part of the March 2016 assessment process is delayed and ACBC has to wait another year (i.e., until 2018 or later), ACBC will likely incur significant additional costs. ACBC has obtained a project proposal from a pool contractor. As mentioned earlier, ACBC's consultant for the project included a 5% per year cost escalation over the estimates obtained from pool contractors. Using a projected total cost of $600,000 for the March 2016 member approved pool renovation, a delay until 2018 or later results in a cost increase of at least $30,000 a year. <u>See</u> Delahanty Dec. ¶¶ 22-23. Therefore, any stay should be conditioned on posting a bond in the minimum amount of $30,000.

V. CONCLUSION

ACBC asks this Court to deny the motion because an injunction is not necessary to preserve the fruits of this appeal and, considering the equities, a stay is not justified. If the motion is granted and a stay is allowed, Corliss should be required to post a bond in the minimum amount of $30,000.

DATED this 29th day of April, 2016.

REED McCLURE

By 

Christopher Nye WSBA # 29690
Marilee C. Erickson WSBA #16144
Attorneys for Respondent ACBC

1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

068514.081211 622276.docx