

1 **SENT ON OCTOBER 1, 2013 FOR FILING IN ISLAND COUNTY SUPERIOR COURT**

2 **The Honorable Alan R. Hancock**
3 **Date of Motion: October 7, 2013**
4 **Nature of Motion: Temporary Restraining Order**

5
6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF ISLAND**

8 **ROBERT WILBUR and DUSTIN**
9 **FREDERICK,**

10 **Plaintiffs,**

11 **v.**

12 **ADMIRAL'S COVE BEACH CLUB, a**
13 **Washington non-profit corporation; and JEAN**
14 **SALLS, MARIA CHAMBERLAIN, KAREN**
15 **SHAAK, ROBERT PEETZ, ELSA PALMER,**
16 **ED DELAHANTY AND DAN JONES,**
17 **individuals,**

18 **Defendants.**

NO. 13-2-00741-4

DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER

19 **I. INTRODUCTION**

20 In June 2013, a majority of the members in good standing of Admiral's Cove Beach
21 Club's ("ACBC") voted to remove a pool on ACBC property. Plaintiffs filed this lawsuit and
22 the motion for TRO in an effort to prevent ACBC and the Board from enforcing this vote, as
23 required by the Bylaws. Thus, the TRO prohibits ACBC and the Board from fulfilling its
24 obligations under the Bylaws to implement the vote of its members. For the reasons that follow,
25 Defendants respectfully request that the TRO be lifted and that Defendants be permitted to move
forward with its obligations under the Bylaws, pursuant to the vote of the ACBC membership.

DEFENDANTS' RESPONSE TO PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING
ORDER

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- 1 -

Betts
Patterson
Mines
One Convention Place
Suite 1400
701 Pike Street
Seattle, Washington 98101-3927
(206) 292-9988

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II. FACTS

ACBC was incorporated in 1969. (Declaration of Karen Shaak (“Shaak Decl.”), ¶ 3) ACBC is a non-profit corporation whose members are primarily the owners of the property in Admiral’s Cove development, Division 1 through 7. (*Id.* at ¶ 4.) ACBC is governed by the Articles of Incorporation and the Bylaws. (*Id.* at ¶ 5; Shaak Decl., **Exhibit A.**) ACBC’s pool opened in 1969 and, after years of piecemeal maintenance, has fallen into a state of disrepair. (*Id.* at ¶ 6.) Due to the age of the pool and a lack of available financial resources, repairs to the pool have been done on an as-needed basis. (*Id.* at 7.) Over the past several years, ACBC’s various Boards and pool committees have been making every effort to open the pool each summer by fixing the bare minimum necessary to keep the pool running. (*Id.* at 8.) During the summer of 2012, the pool had reached such a dire state that repairs were only able to keep it open for one month. (*Id.* at ¶ 9.) In the fall of 2012, it became clear to the Board and the members of ACBC that piecemeal repairs would no longer be sufficient to open the pool in 2013. (*Id.* at ¶ 10.)

In August 2012, the Board discussed whether ACBC must decide to either save the pool or close it forever. (*Id.* at 11.) Beginning in August 2012, the Board began a series of community presentations regarding the needs of the pool. (*Id.* at 12.) At the October 27, 2012 Annual Meeting, a quorum of members in good standing passed a unanimous motion, with one friendly amendment, to form a committee which would investigate the cost of a pool refurbishment, investigate payment options for refurbishment related to assessment costs and dues, and submit the findings to the Board and work with the Board as appropriate. (*Id.* at 13.) Over the course of the next several months, the committee complied with this directive and

1 eventually recommended that an assessment be made at \$650,000 to \$675,000. (*Id.* at 14.) The
2 recommendation was made to the Board at the April 13, 2013 membership meeting and the
3 Board indicated that a ballot would be sent to the members. (*Id.* at 15.)

4 The Board mailed out a ballot to 490 members in good standing asking them to vote to
5 refurbish the pool for \$650,000 or to remove the pool for \$200,000. (*Id.* at 16.) On June 28,
6 2013, the ballots were counted. (*Id.* at 17.) On June 29, 2013, it was announced to the
7 membership that 166 members in good standing voted to remove the pool and 153 members in
8 good standing voted to refurbish it. (*Id.* at 18.) In fact, six of the seven Board Members,
9 including President Jean Salls, and Secretary Karen Shaak voted to refurbish the pool. (*Id.* at 19.)
10 On or about August 13, 2014, the Board mailed assessments to all members for the removal of
11 the pool. (*Id.* at 20.) According to the Bylaws, the payments on the assessments were due thirty
12 days following the date the assessments were mailed. (*Id.* at 21.) Despite the assessment's
13 compliance with the Bylaws, Plaintiffs have failed to pay this assessment. (*Id.* at 22.)

15 III. ARGUMENT

16 A. Legal Standard

17 The standard for the issuance of a temporary restraining order or a preliminary injunction
18 is well-settled and has been set forth by the Supreme Court of Washington in *Kucera v. Wash.*
19 *Dept. of Transportation*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). In *Kucera*, the Court stated
20 that “injunctive relief will not be granted where there is a plain, complete, speedy, and adequate
21 remedy at law.” The *Kucera* court further stated that:
22

23 One who seeks relief by temporary or permanent injunction must show (1) that he
24 has a clear legal or equitable right, (2) that he has a well-grounded fear of
25 immediate invasion of that right, and (3) that the acts complained of are either
resulting in or will result in actual and substantial injury to him.

1 Id. (quoting *Tyler Pipe Indus., Inc. v. Dept. of Revenue*, 140 Wn. 2d 785, 792, 638 P.2d 1213
2 (1982)). In addition, “[s]ince injunctions are addressed to the equitable powers of the court, the
3 listed criteria must be examined in light of equity including balancing the relative interests of the
4 parties and, if appropriate, the interests of the public.” *Id.* The Court stated that “[i]f a party
5 seeking a preliminary injunction fails to establish any one of these requirements, the requested
6 relief must be denied.” *Id.* at 210.

8 **B. The TRO Should be Lifted to Permit the Board to Implement the Vote of the**
9 **Majority of ACBC’s Members in Good Standing**

10 A majority of ACBC’s members in good standing who responded to the ballot to remove
11 or refurbish the pool voted to remove the pool. The vote was conducted in accordance with
12 ACBC’s governing documents and with a motion passed at the October 27, 2012 annual
13 meeting. The vote was close—with 166 members voting to remove the pool and 153 voting to
14 refurbish the pool. In fact, six of the seven Board Members voted to refurbish the pool,
15 including the President and the Secretary. However, because the Board is tasked with
16 implementing a valid vote of the members in good standing, it was obligated to listen to its
17 members and move forward with the removal of the pool. To do so, the Board imposed an
18 assessment on or about August 13, 2013 to remove the pool. The TRO was issued only after the
19 imposition of the assessment.
20

21 ACBC and its Board are neither pro-pool nor anti-pool. Rather, ACBC and its Board
22 merely seek to implement the wishes expressed by a majority of the members. Implementing the
23 vote to remove the pool is the only way to respect the voting process and, more importantly,
24 ensure that the Board conforms to the obligations set forth in ACBC’s governing documents. It
25

1 is this neutral respect for the process used to reach this point that compels Defendants to oppose
2 the TRO. When considering an injunction, the Washington Supreme Court in Kucera stated that
3 the requirements “must be examined in light of equity including balancing the relative interests
4 of the parties and, if appropriate, the interests of the public.” *Kucera* , 140 Wn.2d at 210.
5 Plaintiffs assert that their interests in the pool would be infringed if the removal was to go
6 forward. However, Plaintiffs ignore the fact that 166 members in good standing at ACBC have
7 an equally strong interest in having their votes respected.

8 It is understandable that the losing side to this vote is unhappy with the result and is
9 seeking to prevent the removal of the pool from going forward. However, like the six members
10 of the Board who voted keep the pool, Plaintiffs lost the vote. Residence in a common
11 community, and membership in a private organization such as ACBC, requires people to
12 sometimes accept decisions with which they may disagree. Therefore, Plaintiffs must recognize
13 that their rights to the pool are outweighed by the majority of members who voted to remove the
14 pool. Consequently, Defendants respectfully request that the Court lift the TRO and permit the
15 Board to move forward with the removal of the pool, because that is what the majority of the
16 members in good standing voted for.

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19 **C. The TRO Does Not Prevent Members Who Are Not in Good Standing from not**
20 **Being Listed on the Ballot for New Board Member Election at the Forthcoming**
21 **Annual Meeting**

22 Defendants do not oppose the express language of the TRO as it relates to the election of
23 new Board Members. Paragraph four of the TRO prohibits the Defendants:

24 From taking any action individually or collectively, as a Board of Directors to:

- 25 4.1 deny or refuse to accept a nomination for Director of any member of the
corporation who is in good standing as defined by the Bylaws of the Admiral's
Cove Beach Club;

1 4.2 prevent a member of the corporation in good standing from running for
2 election to the ACBC Board of Director's at any meeting of the membership
held for such purpose.

3 (Temporary Restraining Order and Order to Show Cause ¶ 4). The TRO also prohibits

4 Defendants:

5 From imposing or levying a special assessment of any type against each lot or
6 any individual lot within the plat of Admiral's Cove, the purpose of which is to
7 pay for any part of the costs of decommissioning, filling, damaging, inactivating,
8 covering, demolishing or in any manner grading, removing, destroying or
otherwise rendering unusable, the swimming pool and related facilities owned by
the Admiral's Cove Beach Club.

9 *Id.* ¶ 2.

10 The Admiral's Cove Bylaws state that:

11 A member shall be in good standing if all current and back dues and/or
12 assessments are paid, including payment plan approved by the Board where
13 payments have been made, or are being as agreed. A member in good standing
14 during the previous year shall be considered in good standing in the current year
15 until such time as the current dues and/or assessments are assigned and due. Dues
and/or assessments shall normally be due thirty (30) days after mailing.

16 (Bylaws, Article III, Sec. 4). The Bylaws further state that all candidates selected to be included
17 on a ballot for the Board of Directors qualify as members in good standing. (Bylaws, Article
18 XII, Sec. 6.)

19 The special assessment for the removal of the pool was sent to all members on or about
20 August 13, 2013. However, the TRO was signed on September 11, 2013. Therefore, the special
21 assessment for the removal of the pool was imposed before the TRO was in effect. Dues and/or
22 assessments are due thirty (30) days after mailing. (*See* Bylaws, Article XIV, Sec. 4.)

23 Therefore, the special assessment is now past due. Nothing in the TRO prevents the Board from
24 collecting or enforcing previously-imposed assessments. The TRO only prohibits the imposing
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1 or levying of assessments going forward. Further, nothing in the TRO prevents the Board from
2 considering previously-imposed assessments when determining good standing. Therefore, any
3 member who has not paid the assessment sent on or about August 13, 2013 is not in good
4 standing. Such an application of the requirements for good standing is consistent with both the
5 TRO and the Bylaws. Therefore, only members who paid all assessments which were levied
6 before the entry of the TRO will be in good standing and eligible to be on the ballot for next
7 year's Board. Because the TRO only prohibits the imposition or levying of assessments going
8 forward and makes no mention of the enforcement or collection of previously-imposed
9 assessments, Defendants do not read the TRO as conflicting with the Board's interpretation of
10 the Bylaws.
11

12 In addition, to the extent Plaintiffs assert that the August 13, 2013 assessment was
13 improper and that they need not pay the assessment to be in good standing, case law suggests
14 otherwise. In *Panther Lake Homeowner's Assoc. v. Juergensen*, 76 Wn. App. 586 (1995), the
15 appellate court held that a disagreement stemming from a special assessment did not justify
16 withholding payment of that special assessment. In concluding that withholding an assessment is
17 not permitted, the court stated "[l]ot Owners' remedies are limited to making their wishes known
18 to the Association, casting their votes, and seeking declaratory relief if the Association acts
19 beyond its authority. Lot Owners are not permitted to compound the Association's problems by
20 unilaterally withholding assessments for capital improvements." *Id.* at 591.
21

22 While *Panther Lake* addressed a homeowner's association and not a non-profit
23 corporation such as ACBC, the holding is persuasive. Similar to a homeowner's association, the
24 parties here live in a shared community with governing documents and a Board elected to
25 implement those documents. Like in a homeowner's association, when one becomes a member

of ACBC, he or she agrees to be bound by the Bylaws and the other governing documents.

1 While an individual may not agree with the decisions arrived at by the majority of the residents
2 or members, a refusal to pay dues is not the appropriate remedy. This is especially true when
3 good standing is measured by someone's payment of their dues and all assessments and when
4 only members in good standing may run for the Board.
5

6 The August 13, 2013 special assessment was properly imposed and there is no valid
7 basis to oppose it. The members were notified that voting to remove the pool would cost
8 \$200,000, and a majority of the members in good standing so voted. However, even if Plaintiffs
9 oppose the special assessment, as they clearly do, they are not justified in withholding payment.
10 They may make their opinions known to the Board and vote against the assessment, which they
11 have done. They may also file for declaratory relief, which they have done. Even though
12 Plaintiffs have taken advantage of these avenues to assert their displeasure with the assessment,
13 Plaintiffs must still pay the assessment in order to be considered a member in good standing and
14 be eligible for Board elections. This conclusion is consistent with the Bylaws, *Panther Lake*, and
15 the TRO.
16

17 III. CONCLUSION

18 For the reasons set forth above, Defendants oppose Plaintiffs' TRO and any attempt by
19 Plaintiffs to further restrain ACBC or its Board from implementing the moving forward with the
20 wishes of a majority of the members in good standing of ACBC.
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DATED this 30th day of December, 2013.

BETTS, PATTERSON & MINES, P.S.

By _____
Joseph D. Hampton, WSBA #15297
Vasudev N. Addanki, WSBA #41055
Attorneys for Defendants

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