

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FILED _____ ENTERED _____
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MAR 11 2016

AT GREENBELT
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND

BY

DEPUTY

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs

v.

Civil No. **PJM 04-3679**

WASHINGTON SUBURBAN SANITARY
COMMISSION,

Defendant

v.

ELLEN C. DIMOND, *et al.*,

Movants

TEMPORARY RESTRAINING ORDER

Upon consideration of Movants' (Ellen Dimond's and Laraine Lomberg's) Motion to Enforce Judgment, Motion for Temporary Restraining Order, and Motion for Other Relief (ECF No. 40), the written Opposition of Defendant Washington Suburban Sanitary Commission (WSSC), and an extended telephone conference held on the record on Thursday, March 10, 2016, with counsel for Movants, Plaintiff United States, Intervenor-Plaintiff Maryland Department of the Environment, and Defendant WSSC, the Court finds that the request for a Temporary Restraining Order is just and proper, and that Movant's Motion for Temporary Restraining Order (ECF No. 40) will be **GRANTED**. Final disposition of Movant's Motion to Enforce Judgment and Motion for Other Relief (ECF No. 40) is **DEFERRED** pending further order of the Court.

I.

The Court is satisfied that Movants have given written or oral notice to all principal adverse parties.

II.

The Court finds, based on the pleadings and exhibits before it, as well as the representations made by counsel during the extended telephone conference on the record with counsel for Movants, WSSC, the United States, and the Maryland Department of the Environment, that there is a likelihood that Movants will prevail on their requested relief (i.e., as contiguous property owners, entitlement to notice and the opportunity for a hearing concerning the WSSC rehabilitation project) and that Movants will suffer irreparable harm (i.e., suffer likely harm to their real property) if a temporary restraining order is not issued. *Winter v. Natural Resources Defense Counsel*, 555 U.S. 7, 20 (2008); *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (2011); *see also AIDS Healthcare Foundation v. Prince George's Cty.*, Civ. A. GJH-14-3029, 2014 WL 4810343, at *3 (D. Md. Sept. 26, 2014) (noting that the standards for issuing a temporary restraining order are the same as that of issuing a preliminary injunction). Moreover, the balance of equities tips in the Movant's favor, and the public interest will be served by respecting Movants' rights as property owners. *Winter*, 555 U.S. at 20; *Dewhurst*, 649 F.3d at 290.

The Court further concludes, however, that a Maryland court is the more appropriate venue for Movants to litigate what are essentially their Maryland law-based claims. This Temporary Restraining Order is therefore entered so that Movants may promptly and expeditiously seek relief in an appropriate state court.

III.

The original parties in this matter—the United States, the State of Maryland, WSSC, and various intervenor-plaintiff citizen groups—entered into a Consent Decree, signed by the Court on December 7, 2005. The Consent Decree was modified by the parties on January 19, 2006 and signed by the Court that day.¹ Pursuant to the Consent Decree, WSSC must undertake efforts to eliminate any unpermitted spill, release, or discharge of a pollutant from the collection and conveyance system owned by WSSC and located in the Washington Suburban Sanitary District and designed to store and/or convey sewage to a wastewater treatment plant. The Consent Decree also mandates that WSSC undertake these efforts in compliance with all applicable federal and State laws, regulations, and permits. *See* Consent Decree, Art. XIX, ¶ 65; *see also* Consent Decree, Art. XVII ¶ 62.

Today is Friday, March 11, 2016. Beginning on Monday, March 14, 2016—three (3) days from today—WSSC proposes to bring in its trucks and other heavy equipment to rehabilitate, remedy, or repair a WSSC facility in Montgomery County, located in the Quince Orchard Valley Neighborhood Park (Quince Park) in the city of Gaithersburg, Maryland. Quince Park is irregular in shape, and includes a narrow strip of land which intersects with a local public residential street known as Suffolk Terrace. *See* Movant's Mot. Enforce Consent Decree, Mot. TRO, Mot. Other Relief (Mot. TRO), Ex. A, ECF No. 40-3. This strip of land is approximately 40 feet wide and 144 feet long. Movants' private property abuts this land strip. The WSSC proposes to use this strip of land as an access route to perform its anticipated rehabilitation work.

Movants, who are owners of property contiguous to the strip of land over which the trucks and heavy equipment will traverse, have stated on affidavit that they have not received

¹ On December 1, 2015, the parties entered into a Second Amended Consent Decree, but, at the joint request of the parties, this Second Amended Consent Decree has not been signed by the Court as an Order.

any official notice informing them of the specific nature of the work that is to be done in Quince Park, nor have they been afforded an opportunity to participate in a hearing with respect to the rehabilitation project. *See* Mot. TRO, Ex. B (Dimond Aff.) ¶¶ 54-55; Mot. TRO, Ex. C (Lomberg Aff.) ¶¶ 7-8. Movants assert that this failure of notice and an opportunity for a hearing violates Maryland law, specifically the Annotated Code of Maryland, Environmental Article §§ 5-204(b) and 5-906(b). Movants further submit that such failure also violates the express terms of the Consent Decree.

The Court finds that Movants are likely to prevail with respect to their right to receive official notice and obtain a hearing under state law. The Annotated Code of Maryland, Environmental Article § 5-204 sets forth notice and hearing procedures that persons or entities filing applications for water supply, sewage, or refuse disposal systems authorizations must follow. These include service of notice of applications for waterway projects on all current owners of property contiguous to the parcel upon which the proposed activity will occur, either personally or by certified mail, and publication of the proposed activity by the Maryland Department of the Environment through “public notice.” *See* Md. Code Ann., Envir. § 5-204(b)(3), (b)(5). Further, upon receipt of a timely request satisfying certain requirements, the Maryland Department of the Environment is required to hold a public informational hearing. *See* Md. Code Ann., Envir. § 5-204(c); *see also* Md. Code Ann., Envir. § 5-906. Since Movants have stated on affidavit that these notice procedures were not followed and that they were not afforded an opportunity for an official hearing, and since neither Defendant WSSC nor the Maryland Department of the Environment have averred to the contrary, the Court concludes that Movants are likely to succeed in demonstrating that WSSC did not comply with Maryland law.

As for the matter of irreparable harm, Movants submit that the failure to receive adequate notice and an opportunity to be heard has impeded their ability to voice their concerns about the effects that the rehabilitation project might have on their property, including, for example, to protest or seek to minimize the cutting of trees and physical damage to their contiguous land. *Dimond Aff.* ¶ 53; *Lomberg Aff.* ¶ 5. Since WSSC's rehabilitation project is set to begin on Monday, March 14, 2016, three (3) days from today, the Court concludes that they will suffer irreparable harm.

The Court further finds that the balance of equities tips in Movants' favor. The likelihood of success on the claim of right to notice and to seek a hearing is high. Unless Movants are entitled to be heard in an appropriate forum, WSSC's trucks and heavy equipment will begin to roll, trees on or adjacent to the property may be cut, and the supportive structures of their respective properties may be damaged. Moreover, Movants must have an opportunity to demonstrate that reasonable access routes exist as alternatives to the strip of land between their properties. On the other hand, the harm to Defendant WSSC appears at most to be monetary. True, delay in the commencement of the repair work may result in unanticipated costs, for example, of the services that have been contracted to perform the work. But this particular work, as the Court has been advised by counsel, has already been postponed for several months and a further postponement—in all probability not to exceed sixty (60) days—should not significantly prejudice WSSC. Indeed, Movants' input into the proposed work may well result in an overall more salutary outcome.

The public interest, the final factor in a temporary restraining order analysis, is often the most elusive of the four factors. No great swath of the community will be adversely affected by a reasonably short delay in the commencement of the WSSC rehabilitation project. In the

meantime, the rights of private landowners to receive official notice and to be heard before government construction projects affecting their land go forward has clear due process implications, even in the absence of a statute expressly guaranteeing this rights. *See Legend Night Club v. Miller*, 637 F.3d 291, 303 (4th Cir. 2011) (“[U]pholding constitutional rights is in the public interest.”). Here there is such a statute. The public interest will be served by the issuance of a Temporary Restraining Order in this case.

That being said, this Court believes that federal court is ultimately not the appropriate venue for Movants to litigate the adequacy of their state-based claim of the right to receive notice or the right to a state hearing. A Maryland state court would provide for a more appropriate forum for review of these claims. *See* Md. Code Ann., Envir. §§ 1-605, 1-606 (providing a procedure under Maryland law for judicial review Maryland Department of the Environment permit decisions). For this reason, the Court issues this Temporary Restraining Order with the understanding that Movants will within seven (7) days pursue the merits of their claims in an appropriate state court.

IV.


Accordingly, it is, this 11th day of March, 2016, at 1:00 p.m.,

ORDERED

1. Defendant WSSC is hereby **ENJOINED** from commencing any construction of the public sewer infrastructure in the Quince Orchard Valley Neighborhood Park for a period of fourteen (14) days; this period will expire on March 25, 2016 at 1:00 p.m. and is extendable for an additional fourteen (14) days only for good cause shown.
2. Movants **SHALL**, within seven (7) calendar days, file suit in the appropriate state court seeking to vindicate their apparent rights under Maryland law to receive formal notice

and the opportunity for a hearing with regard to WSSC's planned sewer rehabilitation activity in the Quince Orchard Valley Neighborhood Park, which is contiguous to Movants' respective properties.

3. Movants **SHALL** seek an expedited vindication of their rights with the appropriate state court.
4. Movants **SHALL** post a \$2,500.00 cash bond (which may be a cashier's check) as security by no later than the close of business on Monday, March 14, 2016. The posting of this bond is not intended to in any way relieve Movants from full liability should it be determined that this Temporary Restraining Order was wrongfully issued.
5. Movants **SHALL** promptly serve a copy of this Order, the Motion for Temporary Restraining Order, and any state court filings upon all parties; the Court suggests, in the interests of expediting the state proceeding, that counsel for the interested parties, to the extent permitted by law, accept service of process with respect to any state-based filing.



/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE