

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: July 14, 2016)

ONE OFFSHORE ROAD :
CONDOMINIUM ASSOCIATION, INC. :
and ONE OFFSHORE ROAD :
CONDOMINIUM, :
Plaintiffs :

V. :

C.A. No. WC-2012-0182

BREAKWATER VILLAGE :
CONDOMINIUM ASSOCIATION, INC., :
BREAKWATER VILLAGE, INC. and :
PETER CONN, Individually and in his :
Capacity as President of BREAKWATER :
VILLAGE, INC., :
Defendants :

DECISION

K. RODGERS, J. This case arises out of a dispute between two adjacent condominium associations located in the Point Judith area of Narragansett, Rhode Island, over access to an existing sewer line. Breakwater Village Condominium and Plaintiff One Offshore Road Condominium were both created by Defendant Breakwater Village, Inc. (Breakwater) and its President, Defendant Peter Conn (Conn). Breakwater Village Condominium was developed first, as was its association of unit owners, Defendant Breakwater Village Condominium Association, Inc. (BVCA). One Offshore Road Condominium followed several years later, along with its association of unit owners, Plaintiff One Offshore Road Condominium Association, Inc. (One Offshore). One Offshore, joined by Breakwater and Conn, now seek a declaration that certain easement rights exist which entitle One Offshore to tie in to BVCA’s existing sewer lines, as well

as injunctive relief to enjoin BVCA from preventing One Offshore from entering onto the property of BVCA to exercise such rights.

In accordance with Rule 65(a)(2) of the Superior Court Rules of Civil Procedure, a hearing on preliminary injunction was consolidated with the trial on the merits,¹ and the matter was heard without a jury over eight days between October 22, 2013 and February 28, 2014. A lengthy briefing period followed.

Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 9-30-1. For the reasons that follow, judgment shall enter in favor of Plaintiffs, Breakwater, and Conn.

I

Findings of Fact

Having reviewed the evidence presented by both parties, the Court makes the following findings of fact.

A

The Development of Breakwater Village Condominium

Breakwater is a Rhode Island corporation with a principal place of business at 1499 Ocean Road, Narragansett, Rhode Island, and is the developer of property located in Breakwater Village Condominium in the Town of Narragansett (the Town). Conn is a shareholder of Breakwater and currently serves as its President.

In 1991, Breakwater commissioned a survey plan of 59.70 acres of land that it owned, located in the Town at Assessor's Plat M, Lot 167, in the Point Judith area of the Town. The survey plan was prepared by Paul N. Robinson Associates, Inc. and dated April 1, 1991. The 1991 survey plan consisted of five numbered lots designated as Lot 1,

¹ By agreement of the parties and by order of the Court, Plaintiffs' claim for monetary damages was excluded from the trial on the merits.

Lot 2, Lot 3, Lot 4 and Lot 5. Most pertinent to the issues at hand, Lot 1 consisted of 7.14 acres and Lot 2 consisted of 19.99 acres. Lot 2 was designated as “subject to development rights” while Lot 1 was designated as “subject to development rights including the right to be withdrawn.” The survey plan included the further breakdown of Lot 2 into 172 units and proposed roads within the boundaries of Lot 2.

Shortly after the survey plan had been certified, Breakwater became the declarant of the Declaration of Condominium for Breakwater Village Condominium, dated May 7, 1991, and recorded in the Land Evidence Records for the Town on May 8, 1991 (the Breakwater Declaration). BVCA is a Rhode Island non-profit corporation established on June 28, 1991, pursuant to the laws of the State of Rhode Island. Breakwater Village Condominium is located on Lot 2, and BVCA is the association of the owners of the 172 units within Breakwater Village Condominium.

1

Reservation of Rights in the Breakwater Declaration

The Breakwater Declaration reserved certain easement rights to Breakwater, as the declarant, which it is now seeking to enforce. These rights are cross-referenced in several sections within the Breakwater Declaration.

Section 1.2 of the Breakwater Declaration, entitled “Easements and Licenses,” states as follows:

“Easements and Licenses. Included among the easements, rights and appurtenances referred to in Section 1.1 above are the following easements and licenses:

“(a) SUBJECT TO rights reserved by the Declarant to grant at any time and from time to time easements to the Association, appropriate utility and service companies, cable television and governmental agencies and to others for adequate consideration for utilities and service lines.

“(b) SUBJECT TO riparian rights and water rights of others arising from any streams or man-made ponds crossing the Property.

“(c) SUBJECT TO drainage rights of others in the beds of any streams or bodies of water located on the Property.

“(d) SUBJECT TO an easement to The Narragansett Electric Company in Book 30 at Page 128.

“(e) SUBJECT TO utility easements as shown on the Plats and Plans running from Jupiter Street to Avenue D and from Wilderness Drive to Avenue D across Lot 4 of the Withdrawable Real Estate.

“(f) SUBJECT TO a Right of Way in Book 90 at Page 179.

“(g) SUBJECT TO such other easements as are reserved in Article 6 hereof.” Joint Ex. 1, at 1-2.

Article 6, Section 6.1 contains additional easements as referenced in Section 1.2,

as well as the following:

“(b) The Units and Common Elements shall be, and hereby are, made subject to easements in favor of the Declarant, appropriate utility and service companies, cable television companies and governmental agencies or authorities for such utility and service lines and equipment as may be necessary or desirable to serve any portion of the Property. The easements created in this Section 6(b) shall include, without limitation, rights of the Declarant, or the providing utility or service company, or governmental agency or authority to install, lay, maintain, repair, relocate and replace gas lines, pipes and conduits, water mains and pipes, sewer and drain lines, drainage ditches and pump stations, telephone wires and equipment, television equipment and facilities (cable or otherwise), electrical wires, conduits and equipment and ducts and vents over, under, through, along and on the Units and Common Elements.

...

“(k) All easements, rights and restrictions described and mentioned in this Declaration are easements appurtenant, running with the land and the Property, including (by way of illustration but not limitation) the Units and the Common Elements, and (except as expressly may be otherwise provided herein or in the instrument creating the same) shall continue in full force and effect until the termination of this Declaration, as it may be amended from time to time.” Joint Ex. 1, at 8, 11 (emphasis added).

Additionally, Section 6.2 states the following express reservation of easement rights:

“The Declarant reserves the right, at any time and from time to time, to grant to any third party (including, without limitation, any entity affiliated with the Declarant or owned in whole or in part, by the Declarant), any license or easement in, on, over or through the Property, in addition to and not in limitation of those set forth above, which license or easement is determined by the Declarant, in its reasonable judgment, to be necessary for the development or improvement to the Property or any adjacent or contiguous real estate.” Joint Ex. 1, at 12 (emphasis added).

Article 2 of the Breakwater Declaration contains definitions pertinent to the issues in this case. “‘Property’ means the Property described in Section 1.1 above, less such portion of the Withdrawable Real Estate as shall be withdrawn from the Condominium at anytime or from time to time as provided herein.” Joint Ex. 1, at 3. Section 1.1 further identifies the “Property” as referencing collectively all the Real Estate designated in Exhibit A, including Lots 1, 2, 3, 4 and 5, together with all buildings and improvements and subject to all easements, rights and appurtenances thereto. Joint Ex. 1, at 1, and Ex. A. “‘Development Rights’ means those rights which the Declarant has reserved to itself as set forth in Article 16 and elsewhere in this Declaration.” Joint Ex. 1, at 2.

Article 16, entitled “Development Rights and Special Declarant Rights,” in turn provides, in pertinent part:

“Section 16.1 Reservation of Rights. . . . Development Rights and Special Declarant Rights must be exercised within 20 years from the date this Declaration was recorded or such earlier time as the right to do so expires pursuant to the terms hereof or the [Rhode Island Condominium Act, G.L. 1956 §§ 34-36.1-1.01, et seq.], as applicable, or is terminated by the Declarant. . . . All of the Real Estate described on Exhibit D is subject to the Development Rights and Special Declarant Rights reserved in this Section.” Joint Ex. 1, at 29-30.

Exhibit D to the Breakwater Declaration, as referenced in Section 16.1, includes the metes and bounds descriptions of Lot 1, Lot 3, Lot 4, and Lot 5. Joint Ex. 1, at Ex. D.

Finally, Section 16.2 of the Breakwater Declaration and Exhibit K thereto address future improvements to Breakwater Village Condominium and to Lot 1. See Joint Ex. 1, at 30-34 and Ex. K. Section 16.2(e) provides:

“This information is being provided to purchasers of Units in order that they understand that there are improvements to the Condominium which have yet to be completed and that they are purchasing a Unit with the full understanding that improvements will be made after they become Unit Owners. PURCHASERS WILL EXECUTE AT THE TIME OF THE CLOSING OF A UNIT, A DOCUMENT (ATTACHED AS EXHIBIT K) BY WHICH THEY ACKNOWLEDGE THAT THEY HAVE READ THE ABOVE SECTIONS REGARDING FUTURE IMPROVEMENTS AND DEVELOPMENT RIGHTS AND THAT THEY WILL NOT CAUSE ANY OBJECTIONS TO BE MADE WHICH WILL IN ANY WAY HINDER THE DECLARANT FROM CONSTRUCTING ANY IMPROVEMENTS, PURSUANT TO ABOVE SECTIONS 16.1 AND 16.2, AND THAT IF ANY OBJECTION SHALL BE MADE THAT THE UNIT OWNER SHALL BE LIABLE FOR ANY DAMAGES INCURRED BY THE DECLARANT AS A RESULT OF SAID OBJECTION AND THAT THE DECLARANT SHALL BE ENTITLED TO INJUNCTIVE RELIEF DUE TO THE FACT THAT THE DECLARANT WILL BE IRREPARABLY HARMED AND WILL HAVE NO ADEQUATE REMEDY AT LAW.” Joint Ex. 1, at 33-34 (capitalization in original).

Exhibit K, entitled “Breakwater Village Condominium Receipt, Acceptance and Waiver,” contains substantially the same language as that capitalized language contained in Section 16.2(e). Joint Ex. 1, at Ex. K. All unit owners and members of BVCA were required to and did execute Exhibit K at the time of closing on such individual units.

B

The Development of One Offshore Road Condominium

In or about 2004, Breakwater sought to develop Lot 1 into another condominium complex pursuant to its reservation of development rights.² Breakwater became the declarant of the Declaration of Condominium of One Offshore Road Condominium, dated December 30, 2004, and recorded in the Land Evidence Records of the Town (One Offshore Declaration). One Offshore is a Rhode Island non-profit corporation established on March 2, 2005, pursuant to the laws of the State of Rhode Island, and it is the association of the owners of the thirty-nine units which comprise Lot 1. The One Offshore Declaration further permitted the maximum number of forty-two units to be created, six units being single-family residences and thirty-six units being campground units. Joint Ex. 4, at 1. The campground units are only permitted to be used from April 1 through November 30 of each year. Joint Ex. 4, at 12.

Like the Breakwater Declaration, the One Offshore Declaration contains reserved rights that are cross-referenced throughout. Included among the “Development Rights and Special Declarant Rights” are “Additional Rights” which state the intention to undertake certain improvements to utilities within the One Offshore Road Condominium; namely, installation of new sewer lines. Joint Ex. 4, at 26-27. Consistent with the intention to undertake such improvements and Section 16.2(b) of the One Offshore Declaration, \$15,000 from the proceeds of the sale of each unit sold was put into escrow

² Between the time that Breakwater Village Condominium and One Offshore Road Condominium were established, the Declarant withdrew Lots 3, 4 and 5 on the Plan and developed those lots for personal use because the property contained the Conn family home and the surrounding land contained wetlands. Lots 3, 4 and 5 are not at issue in this litigation.

at the time of the closing to eventually fund such improvements. Joint Ex. 4, at 27. At the time of trial, Kathy Wilcox (Wilcox), a member of One Offshore and its Treasurer, testified that the account has \$595,000 in it.

Also like the Breakwater Declaration, Article 6.1 of the One Offshore Declaration is entitled “Additional Easements” and provides, in pertinent part:

“(b) The Units and Common Elements shall be, and hereby are, made subject to easements in favor of the Declarant, appropriate utility and service companies, cable television companies and governmental agencies or authorities for such utility and service lines and equipment as may be necessary or desirable to serve any portion of the Property. The easements created in this Section 6(b) shall include, without limitation, rights of the Declarant, or the providing utility or service company, or governmental agency or authority to install, lay, maintain, repair, relocate and replace gas lines, pipes and conduits, water mains and pipes, sewer and drain lines, drainage ditches and pump stations, telephone wires and equipment, television equipment and facilities (cable or otherwise), electrical wires, conduits and equipment and ducts and vents over, under, through, along and on the Units and Common Elements.

...

“(i) All easements, rights and restrictions described and mentioned in this Declaration are easements appurtenant, running with the land and the Property, including (by way of illustration but not limitation) the Units and the Common Elements, and (except as expressly may be otherwise provided herein or in the instrument creating the same) shall continue in full force and effect until the termination of this Declaration, as it may be amended from time to time.” Joint Ex. 4, at 8-9, 10 (emphasis added).

1

The Ninth Amendment to Breakwater Declaration

In conjunction with the One Offshore Declaration, Breakwater filed a Ninth Amendment to the Breakwater Declaration wherein the Declarant Breakwater sought to

establish One Offshore as a single unit within BVCA. Through this Ninth Amendment, Breakwater removed Lot 1 from the “Withdrawable Real Estate” and added one additional unit to BVCA³; it then subdivided this one additional unit to accommodate all the units within One Offshore. Additionally, the Ninth Amendment clarified the rights of One Offshore and BVCA regarding easement access and association fees.

BVCA filed a civil action against Declarant Breakwater and One Offshore seeking a judgment declaring the Ninth Amendment void pursuant to the Rhode Island Condominium Act, codified at §§ 34-36.1-1.01, et seq. (the Act). Another justice of this Court rendered a decision on November 23, 2010, granting BVCA’s Motion for Summary Judgment and declaring the Ninth Amendment to the Breakwater Declaration invalid. Breakwater Vill. Condo. Ass’n v. Breakwater Vill., Inc., No. WC-2008-0017 (R.I. Super. Nov. 23, 2010) (Ninth Amendment Decision). Specifically, that decision determined that Breakwater Village Condominium and One Offshore Road Condominium were and remain separate and autonomous entities by virtue of their enabling Declarations and the provisions of the Act, and that the Breakwater Declaration and One Offshore Declaration do not allow for One Offshore Road Condominium to be inserted into Breakwater Village Condominium as provided in the Ninth Amendment. Id. at *5-6.

³ Prior to the Ninth Amendment, Breakwater had removed one of the 172 units to create a parking lot. Thus, by adding the unit through this Ninth Amendment, the total number of units within the BVCA remained at the permissible 172.

C

The Existing Sewer System Servicing BVCA

Jeffrey Ceasrine (Ceasrine), Town Engineer for the Town since 1987 and licensed professional engineer, had direct supervision over the approval and installation of the existing sewer system located within Breakwater Village Condominium. Not only was Ceasrine familiar with the original low pressure sewer system prepared by the now-deceased Allen Easterbrooks (Easterbrooks) for Breakwater Village Condominium in the 1990's, but also he was familiar with and testified to the present components used in the Breakwater Village Condominium sewer system. As designed, BVCA's sewer system was estimated to handle 300 gallons per household per day, which is roughly two times the average water-consuming flow in the Town. It is a private sewer system maintained by and paid for by members of BVCA which ultimately connects with the Town's sewer lines for treatment through underground piping.

The low-pressure sewer system designed by Easterbrooks required each connecting unit to have a grinder pump. Grinder pumps operate on demand, using a cutting apparatus and then ejecting sewage under pressure. The original sewer system called for each unit within the Breakwater Village Condominium to be serviced by a grinder pump manufactured by Environmental One (E/One). As E/One pumps installed throughout the units in the Breakwater Village Condominium needed to be replaced with time, members of the BVCA sought permission to utilize a different brand of grinder pump known as the Barnes pump. Under Ceasrine's supervision as Town Engineer, the specifications of the Barnes grinder pumps were considered and approved to be used in individual units within the Breakwater Village Condominium. The E/One pump is a

low-pressure pump and the Barnes pump is a progressive cavity pump, but according to Ceasrine, they both provide the same result and it was determined that the use of Barnes pumps among other E/One pumps would not have a deleterious impact on BVCA's existing sewer system.

D

The Existing System at One Offshore Units

Presently, One Offshore Road Condominium is serviced by an existing septic tank and leaching field, and each unit owner's waste is required to be transported by hand to that septic tank. As One Offshore Road Condominium is in close proximity to the Atlantic Ocean, and as soil conditions are also unfavorable, the area is not suitable for a properly designed individual sewage disposal system (ISDS). One Offshore residents are required to pump all human waste and wastewater generated from each residential unit into small capacity tanks located below each individual unit. Sewage from each unit at One Offshore is deposited into forty-gallon holding tanks that are then manually removed from the units for emptying. There are two alternatives by which these holding tanks are emptied: (1) the unit owner uses a blue tank to transfer the waste from the tank and transport it to the larger septic tank located in the common area of One Offshore Road Condominium; or (2) the unit owner hires an individual to collect the waste from each unit weekly who transports it to a so-called "honey wagon," a large storage tank on wheels pulled by a tractor. Even with the latter alternative, which most residents elect to use, the blue bins are still required because some tanks need to be emptied more than once a week.

Wallace Berard (Berard), a member of One Offshore and maintenance employee, testified that he is the individual who operates the honey wagon. Using a two-inch heavy duty hose, he transfers waste from the individual holding tanks beneath the residential units to the honey wagon, doing the same as he makes his way to each participating unit around the condominium complex until he gets to the larger septic tank where he again makes the transfer using the two-inch hose. Berard stated that there were significant problems associated with the honey wagon because there have been many spills, including major spills, at One Offshore Road Condominium; he testified that spills occurred almost monthly. Spills sometimes occur when hoses break, causing sludge to spray out onto the ground. Berard testified that when he cleans up spills, he has to attempt to clean it up with water from a nearby unit as much as he can, followed by bleach and water and spraying other chemicals because of the environmental hazard associated with sewage. Despite his efforts, he testified that the smell of any spill is awful. Moreover, he stated that even if no spill occurs, the odor from emptying the tanks by hand and travelling around the condominium complex is powerful and offensive. A video demonstrating Berard's maintenance duties and use of the honey wagon was narrated by One Offshore member Greg Duchesne (Duchesne), who also testified, and was introduced into evidence.

E

The Proposed Sewer System Improvements

Due to the antiquated and unsanitary procedures currently used for sewage disposal at One Offshore, Plaintiffs, Breakwater, and Conn have attempted to improve the sewer system as was contemplated and provided for in the One Offshore Declaration.

See Joint Ex. 4, at 26-27. In or about 2007, legal counsel Donald Packer, Esq. (Packer), a witness at trial, began the approval process to add thirty-nine residential units to the Town's wastewater treatment system. As required, the request was presented to and reviewed by the Town's Sewer Advisory Committee in the summer of 2007. At that time, a specific engineering plan had not been developed as it is commonplace to await approval from the Town before incurring the expense of developing plans that may never come to fruition.

Several sessions between the Sewer Advisory Committee and the Town Council took place in which questions and concerns were raised and addressed, including the possible means by which the maximum number of forty-two units would ultimately tie into the Town's wastewater system. By July 2008, the Town Council approved a waiver of the sewer policy to allow the addition of forty-two One Offshore units to be added to the Town's wastewater system, with a stipulation that required written permission from BVCA after it lodged objections to potential tie-in plans being discussed. The issue then became how to move the wastewater from the individual One Offshore units to the Town's system.

In July 2008, Commonwealth Engineers & Consultants, Inc. (Commonwealth) developed several plans for One Offshore to connect to the Town's wastewater system: (1) the so-called "Egan line" that required 4300' of piping to connect to a private sewer line before reaching the Town's sewer lines; (2) a four-inch main pipe to run approximately one mile up Ocean Road that would require other residences along the path to also connect to that main pipe; (3) a sewer line running parallel to the existing sewer lines within the Breakwater Village Condominium and thereafter connecting to the

Town's sewer lines without actually connecting to BVCA's sewer lines; and (4) a connection into BVCA's sewer system and thereafter proceeding to the Town's sewer lines. Packer, Ceasrine, Steven Clarke (Clarke) and Joshua Rosen (Rosen), principal of and project engineer at Commonwealth, respectively, each testified about these options.

The Egan line alternative proved to be unsuitable because it lacked the capacity to add thirty-nine residential units. The Ocean Road alternative was cost prohibitive, costing approximately \$810,000 for offsite costs alone, in addition to the costs within One Offshore's property. Inasmuch as BVCA had objected to a parallel sewer line running under its property, One Offshore elected to pursue the less costly route of entering approximately sixty feet onto the Common Elements of the Breakwater Village Condominium and connecting directly to BVCA's sewer system. BVCA steadfastly refused to allow One Offshore to make such a connection and One Offshore filed the instant lawsuit.

In addition to its argument that the Breakwater Declaration did not reserve to Breakwater or Conn any easement right to a sewer line connection, BVCA maintains that the proposed sewer tie-in from One Offshore to BVCA is not technologically feasible and would significantly impair BVCA's sewer system. It is this latter argument that was the subject of much of the testimony before this Court.

1

The Mix of E/One Pumps and Barnes Pumps Within the BVCA Sewer System

The dispute between the parties as to technological feasibility centered largely on whether the existing pumps in BVCA's system could withstand the addition of sewage flow from forty-two units at One Offshore. The primary concern raised by BVCA was

that its sewer system was originally designed and constructed using semi-positive displacement pumps manufactured by E/One, but that at some time after it was first constructed, several unit owners at BVCA obtained approval from the Town to replace some E/One pumps with centrifugal pumps manufactured by Barnes. Due to the fact that BVCA's original system was designed based on the use of E/One pumps, there was significant disagreement between the parties regarding whether the existing system had the capacity to accept up to forty-two additional E/One pumps at One Offshore.

BVCA presented one expert, Robert Angilly (Angilly), a licensed professional engineer in the State of Rhode Island. Angilly testified that he was first contacted by counsel for BVCA on October 1, 2013, a mere three weeks prior to the date that this matter was scheduled for trial. The ensuing piecemeal disclosure by BVCA and/or its counsel of relevant information to Angilly created ever-developing and seemingly never-ending opinions by BVCA's one expert. Nonetheless, Angilly understood that he was contacted for the purpose of providing an expert opinion which would support the conclusion that the proposed tie-in of One Offshore's sewer system to that of BVCA should be denied.

Angilly reviewed the Easterbrooks plan for the BVCA sewer system and met with BVCA's counsel and its President, Dale O'Hara (O'Hara). Initially, Angilly did not obtain any documents or information at that time regarding the One Offshore sewer connection in order to analyze the proposal to tie-in that very system to BVCA's sewer system.

Over a week later and less than two weeks before trial, Angilly received additional engineering documents from BVCA's counsel, including several large

drawings prepared by Commonwealth for a sewer system and a force main from One Offshore. A few days thereafter, Angilly learned that a number of E/One pumps at BVCA had been replaced by Barnes pumps, although he did not know exactly how many Barnes pumps there were or where they were located. At that time, O'Hara was unable to provide any more specific information about how many Barnes pumps had replaced E/One pumps within the Breakwater Village Condominium, but indicated that he thought the mix of pumps was "about fifty-fifty." Tr. 21:3-4, 42:20-21, 44:14-19, Oct. 24, 2013. Relying upon Easterbrooks' system design, Angilly determined that there were 178 total pumps installed at BVCA, and a fifty-fifty split meant that there were eighty-nine Barnes pumps in BVCA's sewer system. Tr. 21:4-7, Oct. 24, 2013.

Six days before the scheduled trial, Angilly received more documents from BVCA's counsel, including information relative to an application to CRMC and a report from F. R. Mahoney, the exclusive regional distributor of E/One devices, which report provided the manufacturer's estimate of capacity of BVCA's sewer system for the proposed One Offshore system. See Pls.' Ex. 6. The F. R. Mahoney report contained charts produced from software that E/One makes available to the engineering community at no cost on its website to assist in the design of sewer systems using its products. Id. Angilly testified that prior to seeing that F. R. Mahoney report, he had never used the particular sewer design software program or any programs similar in nature to the E/One sewer design software. Tr. 29:1-7, Oct. 24, 2013. Angilly testified that the report contained the following advisory statement: "This analysis is only valid with the use of progressive cavity type grinder pumps as manufactured by Environment One." Tr. 34:1-9, Oct. 24, 2013; Pls.' Ex. 6, at 17. From that statement alone, Angilly concluded that

“you really shouldn’t mix types of pumps” in sewer systems. Tr. 34:10-16, Oct. 24, 2013. Angilly never consulted with F. R. Mahoney representatives, representatives of the manufacturer of the Barnes pumps, or any other professionals in reaching this conclusion.

On October 18, 2013, Angilly was deposed. At that time, based upon his understanding that eighty-nine Barnes pumps were located within BVCA’s sewer system, he opined that the addition of forty-two units from One Offshore would have no effect on the operation of BVCA’s sewer system. He further testified in his deposition that “it’s not going to fail at Breakwater Village. It’s going to fail at One Offshore.” Angilly Dep. 27, Oct. 18, 2013; see also Tr. 91:14-92:1, Dec. 11, 2013. Again, Angilly never consulted with F. R. Mahoney representatives, representatives of the manufacturer of the Barnes pumps, or any other professionals in reaching this conclusion, nor did he offer any calculations or other support for reaching that conclusion.

On October 21, 2013, Angilly learned that there were actually only forty Barnes pumps in BVCA’s system. In discussing the significance of the two different pumps during his direct examination on October 24, 2013, Angilly stated that the E/One pumps pump fluid at a rate of eleven gallons per minute, while Barnes pumps pump fluid at a rate of forty-six gallons per minute. He explained that the effects on the sewer system from the differing pump rates “causes the pressure to increase with every single pump that you add.” Tr. 49:16-17, Oct. 24, 2013. Furthermore, another design characteristic of the Barnes pumps that was different than the E/One pumps was that Barnes pumps will “shut off” when pressure in the system exceeds the shut-off pressure. Tr. 51:24-52:3, Oct. 24, 2013; see also Tr. 131:11-13, Dec. 11, 2013. From these factual premises and without consulting F. R. Mahoney representatives, representatives of the manufacturer of

the Barnes pumps, or any other professionals, Angilly concluded that the system at BVCA is functioning satisfactorily in its existing condition, but, if forty-two units were added from One Offshore, then twenty-six pumps within Breakwater Village Condominium will “fail.” Tr. 52:4, Oct. 24, 2013. He defined “fail” to mean that “[t]hey stop delivering; sewage backs up into the house.” Id. at 52:7. He also stated that the failure of twenty-six pumps within Breakwater Village Condominium would not affect the other pumps that had not failed. Angilly stated that his expert opinion was made to a reasonable degree of engineering certainty.

Angilly’s direct examination concluded on December 11, 2013, at which time he was subject to cross-examination and then redirect examination which extended until December 12, 2013. In the interim, Angilly’s opinions continued to evolve. Angilly explained that he reached his conclusion by using the E/One sewer design software, which was designed to analyze only those systems that used E/One pumps. In order to account for the Barnes pumps within the system, Angilly determined, based on the higher flow rate of Barnes pumps, that each Barnes pump was equal to there being four E/One pumps in the system. He then explained that he took the 172 pumps said to be located within BVCA’s sewer system, subtracted forty for the Barnes pumps, “[g]etting down to 132” and then multiplied the forty Barnes pumps by four (160) reaching the functional equivalent of 292 pumps presently operating and existing within the Breakwater Village Condominium. Tr. 74:11-12, Dec. 11, 2013.

Angilly explained as follows, based on the research provided on the E/One pumps:

“if you have 20 pumps, then you can assume that three of them will be on simultaneously. Simultaneous operations

are what govern the flow through the pipe. So if we bring additional simultaneous operations into our fixed pipes, we're going to increase the velocity and we're going to increase the velocity head, and therefore, we're going to increase the pressure." Id. at 82:3-10.

Thus, Angilly testified that when he ran the E/One sewer design software, accounting for the Barnes pumps and additional units at One Offshore, the outcome was that pressure in some of the branches of the system would exceed the "shut off" pressure of the Barnes pumps, causing them to fail. Tr. 23:6-24:1, Dec. 11, 2013. Within those branches of the sewer system where pressure exceeded the "shut off" level, Angilly counted twenty-six pumps. Id. at 86:1-18. Angilly stated that he could identify "which of the 26 [pumps] would need to be replaced." Id. at 23:11-13.

Ultimately, Angilly admitted that a pump which he says "fails," id. at 16:7-8, does not mean that the pump is "broken forever." Id. at 25:9-10. He explained that when a Barnes pump stopped because it reached its "shut off" pressure, once the pressure decreases it would again begin to move fluid through the system. Id. at 25:13-17, 27:23-29:25. Angilly never explained why he believed the twenty-six "failed" pumps would need to be replaced. Id. at 23:8-9.

In contrast to Angilly's testimony, One Offshore, Breakwater and Conn presented several experts to demonstrate that BVCA's sewer system would be unharmed by a tie-in of the One Offshore sewer system, namely Ceasrine, Clarke, Rosen, and Henry Albro (Albro), a long-time employee of F. R. Mahoney.

Clarke explained that his firm often worked with a sales associate from F. R. Mahoney and that the manufacturer's representatives were typically brought in on a project "[p]retty early on." Tr. 236:20, Dec. 12, 2013. Clarke had worked with Albro on

several projects because Albro was an experienced associate who assisted engineering firms in designing sewer systems that used E/One products. In fact, Clarke testified that he “always ha[s] the manufacturer do the design of the system for [him].” Id. at 237:5-6. He elaborated on that process: “As far as the sewer system goes, we give him the layout of how we’d like to go and he comes up with an actual design for that layout, and many, many, many times he actually comes back with comments on the layout and design suggestions on the layout.” Id. at 239:20-24.

Clarke testified that in coming up with their proposed design for One Offshore, the Town gave input as to what type of system and connection to the Town’s sewer they would prefer. Between his firm, Albro and the Town’s engineers, it was determined that a low-pressure sewer system that tied into the existing BVCA system would be the best option, and in coming up with such a proposal, the design necessarily had to include a determination that such a tie-in would have no negative impacts for either One Offshore, BVCA or the Town’s sewer systems. Clarke testified that he knew that BVCA obtained Town approval in 1996 to install Barnes pumps in some of the units, based on the design of the existing piping system. He knew that both Barnes’ website and E/One’s website include information and sell kits through which Barnes’ pumps can be retrofit for E/One pumps and vice versa.

Finally, Clarke testified that, as a licensed professional engineer, he has a professional duty to insure that the health, safety and welfare of the public in the State of Rhode Island is protected whenever he certifies any work under his professional engineer stamp, thus requiring that he review each and every plan to ensure it meets professional standards. He testified that he was willing to put his professional engineer stamp on the

plans for One Offshore's proposed tie-in to BVCA's sewer system without any hesitation or reservation because the systems would function properly.

Albro also testified on behalf of One Offshore, Breakwater and Conn, as the sales associate of F. R. Mahoney who had been intimately involved in the design and evaluation of the One Offshore sewer system proposal. As an employee of F. R. Mahoney, Albro worked as an "application engineer," which he described as a term used in the industry for a supporting role. Albro has extensive experience with the design program that E/One provides to engineers free of charge on its website. Albro is trained to use E/One's software program, analyze, and recommend designs for low-pressure sewer systems. Tr. 4:23-5:7, 9:2-10:10, Jan. 30, 2014. Albro explained the various methods in which he evaluated the effect of the proposed addition of forty-two units to the BVCA system. Albro explained that after he learned that there was a mix of Barnes and E/One pumps, he ran several trials, including doing mathematical calculations by hand and inputting different parameters into the E/One program to determine the limits of the system when operating with and without the additional forty-two units. Albro explained in detail how he utilized performance curves for both the Barnes pumps and the E/One pumps provided by their respective manufacturers to best approximate an average flow rate in each of the branches of the BVCA sewer system. By approximating a flow rate at different pressures, Albro determined that he could plug the averages into the programs, effectively analogizing the Barnes pumps to the E/One pumps to allow the E/One program to produce reliable results indicating that the addition of the forty-two E/One pumps from One Offshore would not negatively impact the functionality of BVCA's sewer system.

II

Presentation of Witnesses

Lay witnesses and association members were presented from both One Offshore and BVCA. Wilcox, Berard and Duchesne offered testimony on behalf of One Offshore. BVCA President O'Hara and past President David Maurice (Maurice) offered testimony on behalf of BVCA. While credible in their own right, their respective testimony was of limited use to the Court, save for the graphic and helpful video and testimony concerning the day-to-day removal of waste from One Offshore units. The testimony of Berard in particular was powerful, and the video entered as an exhibit corroborated his testimony and shed light on the unsanitary conditions within One Offshore Road Condominium.

Legal counsel for Breakwater also testified. Packer, Robert Donnelly, Esq., (Donnelly) and James Reilly, Esq. (Reilly), all distinguished and knowledgeable practitioners in land use matters, each testified to their professional involvement in the efforts of Breakwater and Conn to bring a sewer system to One Offshore Road Condominium as well as the development of both condominium complexes, including the drafting of all condominium documents. Also credible in their own right, the issues presented in this case neither rise nor fall on the testimony of these witnesses.

Angilly, Ceasrine, Clarke, Albro and Rosen testified before this Court as expert witnesses.

Although BVCA argues that it need not prove that the proposed tie-in is not feasible, this Court would be remiss if it did not reflect upon the evolving expert opinions

that were offered by Angilly.⁴ This Court found the testimony of Angilly to be less than persuasive. Angilly demonstrated the least familiarity with the proposed One Offshore sewer system and the existing BVCA sewer system than any of the expert witnesses who testified. Regarding Angilly's qualifications for testifying as an expert, Angilly was asked what experience he had over the years with regard to systems similar in nature to the sewage system at BVCA. Angilly testified that he had "designed several Environment One pump systems, some of those for single houses, some of those dealt with two to four houses." Tr. 8:1-3, Oct. 24, 2013. He then stated that the methodology that engineers use "for two to three or four houses is exactly the same as you're going to end up using when you design a system for 42 or 172 or 178 or more units." *Id.* at 8:4-7. Later, Angilly admitted that none of his current practice is in the area of low-pressure sewers and that it had been six or seven years since he was last involved in anything to do with a pressure sewage system. Instead, 60% to 80% of his current work is as "an engineer that performs [] home inspections." Tr. 104:13-105:3, Dec. 11, 2013. Furthermore, and of greater concern, Angilly admitted that his analysis of the system was pursuant to information he had received on E/One pumps some twenty years ago, that he had never seen nor worked with any sewer design software prior to utilizing the software available by E/One, and that he had no information about capacities of current pumps manufactured by E/One or whether they had changed since he last received a catalog. Finally, he stated that he had never used a Barnes pump in any design he has prepared, and he never consulted with any other professionals concerning his opinions.

⁴ Indeed, for the amount of time spent on Angilly's examination over three separate days, it is telling that BVCA's only reference in almost fifty pages of briefing is that BVCA had no duty to prove infeasibility. *See* BVCA's Reply Brief, at 8.

Despite his lack of present information regarding the pumps at issue in this case, Angilly stated that he did not do any independent research to determine whether or not different types of pumps, particularly progressive cavity pumps and centrifugal pumps, could be combined in a low-pressure sewer system. He did not contact anyone at F. R. Mahoney to inquire whether they had ever dealt with a system that mixed pumps, nor did he contact any product specialists at Barnes or any of their distributors.

Angilly's ultimate conclusion at trial, that the connection of One Offshore's sewer system would be detrimental to BVCA's system, was very different from the opinion he presented at his deposition several months earlier. On October 18, 2013, Angilly gave testimony at a deposition in which he opined that, based on the presence of eighty-nine Barnes pumps at BVCA (rather than the true number of forty), the addition of forty-two units from One Offshore would not have a detrimental affect on BVCA, but that the E/One pumps in One Offshore's sewer system would not be able to operate properly. He admitted later at trial that he had come to that conclusion, and presented his expert opinion, despite not having conducted any calculations or run any tests on either system. He further agreed that before he did any of his analysis, he already firmly believed that there should not be a connection between the two systems. Tr. 158:8-11, Dec. 11, 2013.

Angilly repeatedly stated that he stood by his opinion that the connection should not be made through BVCA's sewer system because the additional forty-two units from One Offshore would cause twenty-six pumps in BVCA to fail. However, each time he was questioned on his meaning of the term "fail," he agreed that the Barnes pumps would merely stop pumping temporarily, but that they would begin to operate normally when the pressure in the system was reduced. He never offered an explanation of how and why

he concluded that twenty-six pumps within BVCA's system would have to be replaced. His reliance on one Barnes pump being the functional equivalent of four E/One pumps was wholly unsupported.

By contrast, this Court found Albro's testimony to be quite detailed, technical and helpful. Albro has been employed as a sales associate with F. R. Mahoney since 2000, and in that time, he has assisted engineers design and install low-pressure sewer systems that contain a total number of units numbering in the thousands. Prior to working for F. R. Mahoney, Albro installed his first low-pressure sewer system in 1985. He stated that since he began his employment at F. R. Mahoney, he has used the E/One program to assist in designing low-pressure sewer systems from a few times a week to daily. Albro's explanation of his process for determining whether the addition of forty-two units, after discovering that there were forty Barnes pumps in place at BVCA, demonstrated a methodical and intelligent process of integrating the characteristics of each pump into the presently existing system.

Albro remained coherent and helpful on cross-examination in explaining the different characteristics and processes of the E/One pumps and the Barnes pumps, and did not appear to contradict any prior testimony. Albro's testimony stood in stark contrast from that of Angilly, who repeatedly contradicted his prior testimony and opinions.

Cearine, Clarke and Rosen also provided credible and helpful testimony to the Court. Cearine offers institutional knowledge of the Town's engineering projects, having served as Town Engineer since 1987 and at times as Town Manager. Cearine holds a neutral position as between One Offshore and BVCA, but inevitably he is

responsible for maintaining the health, safety and welfare of the Town when considering issues presented to the Town's Engineering Department. By approving the proposed tie-in connection, Ceasrine placed both his professional reputation and his professional credentials on the line by concluding that BVCA's existing sewer system is capable of safely operating with the addition of forty-two units from One Offshore.

Clarke likewise places both his professional reputation and his professional credentials as a licensed professional engineer on the line each and every time he certifies plans, including the plans for the tie-in to BVCA's system. In placing his professional engineer stamp on sewer plans, he ensures that he and/or his subordinates work closely with the municipal authorities and with F. R. Mahoney associates early on in a project. The same held true in this instance. Clarke presented as a very competent engineer and a credible witness.

Similarly, Rosen credibly testified that there would be no adverse impact on BVCA's existing sewer system with the addition of forty-two units from One Offshore. Rosen worked as a team with Clarke and now-retired Anthony Winorski (Winorski) to craft the engineering plan to connect a new One Offshore sewer system to BVCA's existing sewer system. He described the 60' easement onto BVCA's property to make that connection, the use of 2" plastic pipes, the necessary excavation needed, and the process of removing and replacing asphalt to accomplish this. He also confirmed the cost estimates of the Ocean Road proposal to be in excess of \$811,000 for off-site improvements alone, with the obligation to permit other property owners along that half-mile route on Ocean Road to be able to connect to the sewer system. By contrast, the total cost associated with One Offshore's proposed tie-in to BVCA's system would be

roughly \$490,000. Rosen was knowledgeable and consistent in his testimony, and presented as a credible witness.

III

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that, “[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon.” Super. R. Civ. P. 52(a). In a non-jury trial, “[t]he trial justice sits as a trier of fact as well as of law.” Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). “Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.” Id. (quoting Hood, 478 A.2d at 184). It is well established that “assigning credibility to witnesses presented at trial is the function of the trial justice, who has the advantage of seeing and hearing the witnesses testify in court.” McBurney v. Roszkowski, 875 A.2d 428, 436 (R.I. 2005) (citations omitted). The trial justice may also “draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.” DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006) (quoting Walton v. Baird, 433 A.2d 963, 964 (R.I. 1981)).

Furthermore, “[w]hen rendering a decision in a non-jury trial, a trial justice ‘need not engage in extensive analysis and discussion of all the evidence. Even brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case.’” Parella, 899 A.2d at 1239 (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998) (citation omitted)). The trial justice need not “categorically

accept or reject each piece of evidence in his [or her] decision for [the Supreme] Court to uphold it because implicit in the trial justices [sic] decision are sufficient findings of fact to support his [or her] rulings.’” Notarantonio v. Notarantonio, 941 A.2d 138, 147 (R.I. 2008) (quoting Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 102 (R.I. 2006)).

IV

Analysis

One Offshore argues that it is entitled to a declaratory judgment that it has the right to go onto the Common Elements of BVCA and connect its sewer system to BVCA’s existing sewer system because there is an express easement in the Breakwater Declaration. Alternatively, One Offshore argues that an implied easement by grant was created when the two condominium associations were judicially severed in the Ninth Amendment Decision. Finally, One Offshore seeks a permanent injunction to prevent BVCA from interfering with its right to connect their sewer line through the Common Elements of BVCA’s property.

BVCA makes several arguments why One Offshore is not entitled to either declaratory judgment or injunctive relief. As an initial matter, BVCA argues for the first time in its post-trial brief that One Offshore failed to join indispensable parties by not joining each of the individual unit owners at BVCA. Next, BVCA argues that One Offshore does not have an easement to connect their sewer system through BVCA’s Common Elements because the express easements provided for in the Breakwater Declaration must only be used for making improvements within BVCA. BVCA additionally argues that the development rights set forth in the Breakwater Declaration failed to include a time limit, as required by the Act, and that the Act sets a twenty-year

time limit on the use of declaration rights. In regard to One Offshore's requested injunctive relief, BVCA argues that the moving parties failed to demonstrate a lack of alternative remedy at law or to prove imminent irreparable harm. Finally, BVCA argues that Plaintiffs failed to meet their burden that the sewer tie-in is technologically feasible.

A

Indispensable Parties

BVCA argues that One Offshore's failure to join as indispensable parties the individual lot owners is grounds for dismissal of this lawsuit because unit owners may have to shoulder the cost of any monetary damages that may be awarded by this Court. One Offshore responds that BVCA did not raise this argument in a timely manner.

Section 9-30-11 provides that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." The Rhode Island Supreme Court has determined that this provision is mandatory and that "[o]rdinarily 'failure to join all persons who have an interest that would be affected by the declaration' is fatal." Burns v. Moorland Farm Condo. Ass'n, 86 A.3d 354, 358 (R.I. 2014) (quoting Abbatematteo v. State, 694 A.2d 738, 740 (R.I. 1997) (quoting Thompson v. Town Council of Westerly, 487 A.2d 498, 499 (R.I. 1985))). However, Rule 12 of the Rhode Island Superior Court Rules of Civil Procedure specifically addresses "indispensable parties" and describes when and how such a defense must be filed. The Rule states as follows:

“(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is

required, except that the following defenses may at the option of the pleader be made by motion:

...

“(7) failure to join an indispensable party.

“A motion making any of these defenses shall be made before pleading if a further pleading is permitted.” Super. R. Civ. P. 12.

Rule 12 additionally explains which defenses will be waived if not properly asserted:

“(h) Waiver of Defenses. A party waives all defenses and objections which the party does not present either by motion as hereinbefore provided or, if the party has made no motion, in the party’s answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.” *Id.* (emphasis added).

The Supreme Court, in Burns, identified several prior cases in which the Court had dismissed an action for failure to join an indispensable party. See Burns, 86 A.3d at 358-59 (citing Abbatematteo, 694 A.2d at 740) (in an action against Employees’ Retirement System of Rhode Island for declaration that retirement system’s payment of more generous benefits to some retirees was unconstitutional, the failure to join those retirees allegedly receiving more generous benefits constituted dismissal for failure to join indispensable parties); In re City of Warwick, 97 R.I. 294, 296-97, 197 A.2d 287, 288 (1964) (Mayor sought declaration regarding whether the municipal charter or general statutes controlled the selection of members of certain municipal boards, but his failure to

join all members of the board “deprive[d] the decree appealed from of any binding effect as to [them] ... and could in the future lead to needless litigation if the rights declared [in that case] were attempted to be enforced against them.”); Sullivan v. Chafee, 703 A.2d 748, 749–50, 754 (R.I. 1997) (failure to join entire nine-member council in a declaratory judgment action over the annual budget was “fatal to their declaratory-judgment action”).

In Burns, certain members of a condominium association sued the association and the individual members of the management committee for issuing four special assessments on all members of the association to pay for repairs that only benefited owners in one of the three phases of the development. 86 A.3d at 356. The plaintiffs sought a declaration that the assessments were illegal and they were entitled to reimbursement of any amounts paid towards the assessments, and requested that the court order the defendants to reassess the assessments to the individual unit owners whose properties were benefited. Id. at 356-57. The trial court did not rule on the defendants’ assertion that the individual unit owners who benefited from the repairs were indispensable parties, instead finding for the plaintiffs and ordering the defendants to reassess the costs and allocate the costs to those benefited individual unit owners. Id. at 357. On appeal, the Supreme Court found that the individual unit owners who were “ordered to bear an additional burden even though they were not part of the case” were indispensable parties within the meaning of § 9-30-11. Id. at 359. The Court said it “c[ould] not fathom how those unit owners do not ‘have or claim any interest which would be affected by the declaration.’” Id. (quoting § 9-30-11).

As between these parties, this is not the first time that the question of indispensable parties has surfaced. In the Ninth Amendment Decision, Breakwater

argued that the individual members of One Offshore were indispensable parties to that litigation, which the court rejected. While not binding on this Court, it is noteworthy that the very issue of unit owners being indispensable parties is nothing new to these litigants.

Notwithstanding, BVCA failed to raise the defense of failure to join an indispensable party until after the completion of the entire trial which spanned several months. This matter was filed in March of 2012 and was scheduled for trial to begin on October 22, 2013. Prior to the commencement of trial on October 22, 2013, Plaintiffs were permitted to file an amended complaint, in response to which BVCA filed an amended answer. BVCA, at that time, still had not asserted the defense of failure to join an indispensable party. The trial began on October 22, 2013 and concluded on February 28, 2014. It was not until April 29, 2014 when BVCA filed its post-trial memorandum in which it raised this defense for the first time. See Vaillancourt v. Motta, 986 A.2d 985, 988 (R.I. 2009) (Rhode Island Supreme Court declined to address issue of failure to join indispensable parties when the defendants raised the issue for the first time in a motion to reconsider after appealing the trial justice's grant of a motion for summary judgment.).

While Super. R. Civ. P. 12 grants parties a generous amount of time to raise such a defense, including up to and during the trial, to allow such a defense to be raised several months after the trial is concluded would impermissibly stretch the plain language of the Rule. Therefore, this Court holds that BVCA did not raise the defense of failure to join an indispensable party within the time permitted by the Rhode Island Superior Court Rules of Civil Procedure and it has therefore waived that defense.

B

Express Easement

One Offshore, Breakwater and Conn argue that they are entitled to a declaration that they have the right to connect One Offshore's proposed sewer system to the existing sewer system at BVCA pursuant to an express easement contained in the Breakwater Declaration. BVCA argues that the Act requires that the easement rights contained in the Breakwater Declaration may only be used for improvements within the Breakwater Village Condominium, and not improvements to One Offshore Road Condominium.

“In litigation over asserted rights to an easement, the party claiming the easement has a heightened burden of proof of clear and convincing evidence because of the policy considerations against placing undue burdens upon property.” Wellington Condo. Ass'n v. Wellington Cove Condo. Ass'n, 68 A.3d 594, 599 (R.I. 2013). “[W]hen construing an instrument that purportedly creates an easement, it is th[e] Court's ‘duty [] to effectuate the intent of the parties.’” Id. at 600 (quoting Hilley v. Lawrence, 972 A.2d 643, 649 (R.I. 2009) (quoting Carpenter v. Hanslin, 900 A.2d 1136, 1147 (R.I. 2006))). “Nevertheless, ‘[w]hen the written terms of an agreement are clear and unambiguous, they can be interpreted and applied to the undisputed facts as a matter of law.’” Id. (quoting Hilley, 972 A.2d at 649 (quoting Carpenter, 900 A.2d at 1147)).

The Act provides mandatory definitions that must be employed in the interpretation of the statute and by any condominiums established pursuant to the Act. None of the parties dispute that both condominiums are bound by the requirements in the Act. The creation of easement rights in a condominium declaration are permitted by the Act, pursuant to the following language:

“Subject to the provisions of the declaration, a declarant has an easement through the common elements as may be reasonably necessary for the purpose of discharging a declarant’s obligations or exercising special declarant rights, whether arising under this chapter or reserved in the declaration.” Sec. 34-36.1-2.16.

Those words describe the minimal easement rights guaranteed to every declarant. As explained in the Commissioners’ Comment 1 to that subsection,

“the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant’s rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant’s construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the ‘reasonably necessary’ test contained in this section to consider limitations on the declarant’s easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.” Id. at Commissioners’ Comment 1 (emphasis added.).

To determine whether certain easement rights exist, it is necessary to look to the Breakwater Declaration to determine whether additional rights were reserved. Section 1.2 of the Breakwater Declaration, titled “Easements and Licenses,” states as follows:

“[i]ncluded among the easements, rights and appurtenances referred to in Section 1.1 above are the following easements and licenses:

“(a) SUBJECT TO rights reserved by the Declarant to grant at any time and from time to time easements to the Association, appropriate utility and service companies, cable television and governmental agencies and to others for adequate consideration for utilities and service lines.

...

“(g) SUBJECT TO such other easements as are reserved in Article 6 hereof.” (Joint Ex. 1, at 1-2.)

Article 6, Section 6.1 contains the additional easements referenced above, which include, in pertinent part, the following:

“(b) The Units and Common Elements shall be, and hereby are, made subject to easements in favor of the Declarant, appropriate utility and service companies, cable television companies and governmental agencies or authorities for such utility and service lines and equipment as may be necessary or desirable to serve any portion of the Property. The easements created in this Section 6(b) shall include, without limitation, rights of the Declarant, or the providing utility or service company, or governmental agency or authority to install, lay, maintain, repair, relocate and replace gas lines, pipes and conduits, water mains and pipes, **sewer and drain lines, drainage ditches and pump stations, telephone wires and equipment**, . . . over, under, through, along and on the Units and Common Elements.

...

“(k) All easements, rights and restrictions described and mentioned in this Declaration are easements appurtenant, running with the land and the Property, including (by way of illustration but not limitation) the Units and the Common Elements, and (except as expressly may be otherwise provided herein or in the instrument creating the same) shall continue in full force and effect until the termination of this Declaration, as it may be amended from time to time.” *Id.* at 8, 11 (emphasis added).

Section 6.2 additionally states the following express reservation of easement rights:

“The Declarant reserves the right, at any time and from time to time, to grant to any third party (including, without limitation, any entity affiliated with the Declarant or owned in whole or in part, by the Declarant), any license or easement in, on, over or through the Property, in addition to and not in limitation of those set forth above, which license or easement is determined by the Declarant, in its reasonable judgment, to be necessary for the development or improvement to the Property **or any adjacent or contiguous real estate.**” *Id.* at 12 (emphasis added).

By this language, Breakwater reserved particular easement rights to itself specifically for the purpose of, inter alia, constructing “sewer and drain lines.” Along

with that reserved right, Breakwater specified that such easement could be granted to third parties as it might determine “in its reasonable judgment, to be necessary for the development or improvement to the Property or any adjacent or contiguous real estate,” to wit, Lot 1. Breakwater specifically reserved the right to use such easement to develop the “Property,” and also “adjacent property.” Furthermore, Breakwater clearly described its intentions to develop Lot 1 as provided for in Article 16.2. Thus, the easement language in the Breakwater Declaration provides clear and convincing evidence that Breakwater has reserved the easement right to install, lay, maintain, repair, relocate and replace sewer and drain lines under the Common Elements, and that it may grant to any third party this very easement as it may determine with reasonable judgment to be necessary for the improvement of adjacent One Offshore.

BVCA argues that such easement rights may only be used for the benefit of Breakwater Village Condominium. In support thereof, BVCA directs this Court’s attention to § 34-36.1-1.03(26), which defines “Special declarant rights” as “rights reserved for the benefit of a declarant to: ... (iv) To use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium.” BVCA’s reliance upon that definition is misplaced. As the Commissioners’ Comment 1 explains, “[t]he rights granted by this section may be enlarged by a specific reservation in the declaration.” Sec. 34-36.1-2.16 (Commissioners’ Comment 1). The clear and convincing evidence before this Court, as demonstrated by Section 6.2 of the Breakwater Declaration, reveals that Breakwater did indeed enlarge those special declarant rights to grant the same easement rights to a third

party when determined to be necessary for the improvement of any adjacent or contiguous real estate.

Not only does the documentary evidence provide clear and convincing evidence that Breakwater expressly reserved easement rights that entitle One Offshore to the relief it seeks, but also the testimony and evidence before the Court clearly and convincingly demonstrates that Breakwater exercised reasonable judgment in determining that the proposed tie-in and exercise of such easement rights under BVCA's Common Elements is necessary for the improvement of adjacent Lot 1. Three alternative plans were vetted and, this Court concludes, each were reasonably determined to be unsuitable. Moreover, it is undisputed that the present waste system at One Offshore Road Condominium is archaic, foul smelling, unpleasant, unsanitary, and environmentally hazardous.

This Court concludes that the moving parties have clearly and convincingly demonstrated that a valid easement exists by which Breakwater has reserved the easement right to install, lay, maintain, repair, relocate and replace sewer and drain lines under the Common Elements of BVCA for the improvement of One Offshore, and that such easement may be granted to One Offshore or any other third party as it was properly and reasonably determined to be necessary for the improvement of adjacent One Offshore.

C

Implied Easement

One Offshore alternatively argues that it has the right to utilize its easement to benefit a third-party, One Offshore Road Condominium, pursuant to an implied easement

by grant that arose at the time the two condominium associations were severed by the Ninth Amendment Decision.⁵

“An implied easement is predicated upon the theory that when a person conveys property, he or she includes or intends to include in the conveyance whatever is necessary for the use and the enjoyment of the land retained.” Hilley, 972 A.2d at 650. “[T]he standard for an easement by grant requires that the party claiming an easement show by clear and convincing evidence that the claimed easement was (1) apparent, (2) permanent, and (3) reasonably necessary for the enjoyment of the claimant’s parcel prior to severance.” Wellington, 68 A.3d at 603 (citing Catalano v. Woodward, 617 A.2d 1363, 1367 (R.I. 1992); Vaillancourt v. Motta, 986 A.2d 985, 987–88 (R.I. 2009); Hilley, 972 A.2d at 650; Ondis v. City of Woonsocket ex rel. Treasurer Touzin, 934 A.2d 799, 803, 805 (R.I. 2007)). “[T]he test of necessity is whether the easement is reasonably necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made.” Vaillancourt, 986 A.2d at 987-88.

Plaintiffs argue that such an implied easement arose out of the judicial severance of Breakwater’s commonly owned property. Rhode Island’s jurisprudence on implied easements contains no requirement for the severance to be accomplished by sale by the common owner. Rather, judicial severance has long been a recognized power of the superior courts in Rhode Island. See Dickinson v. Killheffer, 497 A.2d 307, 314 (R.I. 1985) (affirming Superior Court’s judgment to partition property); see also 59A Am. Jur.

⁵Having found that an express easement exists which entitles the moving parties to declaratory judgment in their favor, it is unnecessary to address this alternative. Nevertheless, this Court addresses the same for the sake of completeness.

2d Partition § 59 (“Property may be partitioned through judicial partition, which means partition through the medium of a judicial proceeding.”).

On or about November 23, 2010, the Ninth Amendment Decision was issued and stated as follows:

“if One Offshore were allowed to be inserted into BVCA, BVCA owners would have an ownership interest in all of the common elements of its real estate, which—as proposed by Breakwater—would include One Offshore. Doing so would violate the plain terms of the Act, as persons who are not individual unit owners of One Offshore with an ownership interest in the undivided real estate of One Offshore (namely the BVCA owners) would own the common elements of One Offshore, in violation of the Act’s requirement that those common elements be owned ‘solely’ by the individual unit owners of One Offshore. Therefore, the Ninth Amendment, which attempts to insert One Offshore into BVCA without an agreed upon merger or creation of a master association by the unit owners of both condominiums, contradicts the Act, rendering the Ninth Amendment invalid.” Breakwater Vill. Condo. Ass’n, No. WC-2008-0017 at 10.

As a result of that judicial declaration, One Offshore and BVCA are separate and distinct condominium associations. Thus, when Declarant Breakwater attempted to improperly “merge” the two condominium associations, it actually achieved the opposite result of severing the entities. The issue for this Court is to determine if an implied easement by grant arose as a result of that severance.

To make such a determination, this Court must look to the intent of Breakwater to create an easement benefiting the dominant estate (One Offshore) and burdening the servient estate (BVCA). As evidence of Breakwater’s intention to create an easement favoring One Offshore, Plaintiffs point to the language of the Breakwater Declaration, which specifically includes an easement right “to install, lay, maintain, repair, relocate

and replace ... sewer and drain lines, drainage ditches and pump stations, ... over, under, through, along and on the Units and Common Elements.” (Joint Ex. 1, at 8.) Plaintiffs additionally presented Exhibit K to the Breakwater Declaration, the Breakwater Village Condominium Receipt, Acceptance and Waiver, which required purchasers to acknowledge “the proposed improvements and the rights reserved to the declarant to ... develop that certain parcel designated as Lot 1 of the withdrawable real estate ...” Id. at Exhibit K.

Plaintiffs provided the testimony of Donnelly to demonstrate that the purpose of having purchasers of units at BVCA sign the waiver was to ensure that they had notice of Breakwater’s intent to develop the property at One Offshore and, in doing so, to exercise its easement and declaratory rights to connect utilities through BVCA. Additionally, Plaintiffs demonstrated Breakwater’s intention to connect a sewer system from One Offshore to the existing system at BVCA with the testimony of Wilcox. Wilcox testified that from the time that One Offshore’s units were first sold, each buyer placed \$15,000 into an escrow account for the purpose of the installation of sewers. Finally, Rosen testified that if One Offshore was required to connect their sewer system to the nearest alternative connection point, it would cost the unit owners and association an additional \$811,455.98. Tr. 31:9-24, Oct. 23, 2013.

This Court finds that the evidence presented by Plaintiffs demonstrates that at the time of severance, in 2010, it was clearly the intention of Breakwater to utilize its easement rights to allow One Offshore to connect its proposed sewer system through the existing system at BVCA. As far back as 2005, Breakwater demonstrated an intention to install a sewer system at One Offshore, and, as far back as 1991, Breakwater

demonstrated that it had the intention to develop Lot 1, and specifically reserved the right to connect sewer pipes and pumps through the Common Elements and Units at BVCA. If Breakwater had any other intentions at the time of judicial severance, it would not have attempted to insert One Offshore as a unit of BVCA, and it likely would have required purchasers of units at One Offshore to contribute a much larger sum of money into the escrow account. Therefore, Plaintiffs met their burden of proving that Breakwater intended such easement rights to extend to One Offshore at the time the property was severed.

Finally, this Court must determine whether such a use of Breakwater's easement rights was reasonably necessary. Wilcox and Duchesne both testified that the sewage from each unit at One Offshore goes into forty-gallon holding tanks that are manually removed from the units. Duchesne presented to the Court a video that he prepared and narrated showing the method by which sewage is collected. Additionally, Berard stated that there were significant problems associated with the "honey wagon" because there have been many spills over the years at One Offshore and that they were lucky to go an entire month without a spill. Berard testified that when he cleans up spills, he has to attempt to clean it up with water from a nearby house as much as he can, followed by using bleach and water and spraying other chemicals for sanitary reasons. Defendant BVCA's expert witness even admitted that the practice of removing sewage waste by hand was "unacceptable," "unhealthy," and "unsafe." Tr. 102:18-22, Dec. 11, 2013.

Plaintiffs additionally presented testimony as to why the connection through BVCA's existing sewer was reasonably necessary. Rosen testified that Commonwealth provided One Offshore with a cost estimate of the different proposed connections,

calculated initially in 2008. Rosen testified that the unit costs for products, labor and construction were generated from Rhode Island Department of Transportation's weighted average unit prices based on an average of contractor bids by year. Commonwealth then determined that, at the time Rosen testified to these estimates, prices had increased by 5% since 2008. Pursuant to those calculations, Rosen testified that the cost of constructing the sewer system at One Offshore, together with the cost of extending a connection through BVCA, would be approximately \$623,000. He then stated that using the next closest municipal sewer connection, by extending the connection over one-half mile under Ocean Drive, the additional cost to One Offshore would be approximately \$811,000 over the BVCA tie-in proposal.

Considering the fact that One Offshore currently has \$595,000 in an escrow account set aside for this sewer project, it would be burdensome for the residents of One Offshore to come up with the additional funds needed to connect their sewer system through the Ocean Drive connection. Additionally, this Court is particularly mindful of the great need that the residents of One Offshore have of a modern and sanitary waste disposal system. With those facts in mind, this Court finds that Plaintiffs met their burden of proving by clear and convincing evidence that the sewer connection through BVCA is reasonably necessary.

D

Exercise of Development Rights and Special Declarant Rights

BVCA relies on various provisions within the Breakwater Declaration and the Act in arguing that Breakwater is beyond the permissible twenty years provided in the Breakwater Declaration to now exercise its development rights to permit this proposed

tie-in, and that actions taken to date to exercise such development rights do not comport with the statutory mandate of executing and recording an amendment to the Breakwater Declaration. See generally BVCA's Post-Trial Memo, at 18-22. BVCA's arguments are premised upon the exercise of development rights and/or special declarant rights, rather than easement rights, and therefore BVCA's reliance thereon is misplaced.

Plaintiffs, Breakwater and Conn have sought to declare the easement rights over and under the Common Elements of Breakwater Village Condominium; they have not sought to exercise development rights that would be governed by Article 16 of the Breakwater Declaration and the Act. The General Assembly has defined "Development rights" as:

"any right or combination of rights reserved by a declarant in the declaration to:

"(A) Add real estate to a condominium;

"(B) Create units, common elements, or limited common elements within a condominium;

"(C) Subdivide units or convert units into common elements, or

"(D) Withdraw real estate from a condominium." Sec. 34-36.1-1.03(11).

"Special declarant rights" are also defined in the Act as follows:

"[R]ights reserved for the benefit of a declarant to:

...

"(iv) To use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium, (§ 34-36.1-2.16)." Sec. 34-36.1-1.03(26).

The Act further requires that:

"The declaration for a condominium must contain:

...

"(8) A description of any development rights and other special declarant rights . . . reserved by the declarant,

together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised.” Sec. 34-36.1-2.05(8).

As required by the Act, the Breakwater Declaration includes Article 16, entitled “Development Rights and Special Declarant Rights.” Joint Ex. 1, at 29-34. These rights are comprehensive and detailed. In accordance with § 34-36.1-1.03(11), the Breakwater Declaration describes the development rights to include the right to add real estate; create units, common elements or limited common elements; subdivide or convert units into common elements; and withdraw real estate. Joint Ex. 1, at 29-30. In accordance with § 34-36.1-1.03(26), the Breakwater Declaration further provides for the right to complete the improvements shown on the plans; maintain models and sales offices; make the condominium part of a larger association or subject to a master association. Joint Ex. 1, at 29-30. As it relates to easements, that same section in the Breakwater Declaration reserves to Breakwater the right “to exercise the easements as set forth in Articles 1.3 and 6 hereof.” Joint Ex. 1, at 29 (underlining in original).

Thereafter, under “Additional Rights” and “Beach Rights and Access,” the Breakwater Declaration painstakingly identifies the possible development rights that Breakwater has reserved and could exercise. See Joint Ex. 1, at 30-34. The possible developments identified included improvements to BVCA’s existing utilities, including their own sewer lines, the potential uses of Lot 1 that was intended to be developed, development of airspace, and beach access should Lot 1 be withdrawn. See Joint Ex. 1, at 30-34. As Donnelly testified, this information was to put all BVCA members and potential members on notice of the potential development and improvements within Breakwater Village Condominium and Lot 1.

The Breakwater Declaration provides, “Development Rights and Special Declarant Rights must be exercised within 20 years from the date this Declaration was recorded or such earlier time as the right to do so expires pursuant to the terms hereof or the Act, as applicable, or is terminated by the Declarant.” Joint Ex. 1, at 30.

Were the relief that Breakwater, Conn and One Offshore are seeking involve development rights or special declarant rights, BVCA may be correct in asserting that such action is barred after twenty years. Moreover, if the same were true, then BVCA would be correct that there was no amendment to the Breakwater Declaration executed and recorded (and not judicially determined to be void as was the Ninth Amendment) which effectuated the exercise of such rights. However, the easement rights reserved to Breakwater and third parties are not restricted to a twenty-year period. To the contrary, as discussed supra Section IV(B), Breakwater properly enlarged and identified the easement rights reserved that may be exercised “at any time and from time to time,” which are “easements appurtenant, running with the land and the Property,” and which may “be necessary for the development or improvement to . . . any adjacent or contiguous real estate.” Joint Ex. 1, at 11-12. To restrict easements to a twenty-year period to be exercised in the first instance would wholly undermine the express reservation of those easement rights and would elevate an easement to a “development right” or “special declarant right” that is not required by the Act nor contemplated by the Breakwater Declaration.

For these reasons, this Court rejects BVCA’s contention that the relief requested is barred as not having been exercised within twenty years of the recording of the Breakwater Declaration.

E

Injunctive Relief

One Offshore requests that this Court issue a permanent injunction to prevent BVCA from continuing to interfere with their right to connect their proposed sewer system with the existing sewer system at BVCA. BVCA argues that One Offshore is not entitled to injunctive relief because they have not proven that they lack an adequate remedy at law or that they are threatened with immediate irreparable harm. BVCA additionally asserts that there is no likelihood that moving parties will succeed on the merits.

“A party seeking injunctive relief ‘must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.’” Nye v. Brousseau, 992 A.2d 1002, 1010 (R.I. 2010) (quoting Nat’l Lumber & Bldg. Materials Co. v. Langevin, 798 A.2d 429, 434 (R.I. 2002)). “Irreparable injury must be either ‘presently threatened’ or ‘imminent’; injuries that are prospective only and might never occur cannot form the basis of a permanent injunction.” Id. “A party seeking an injunction must also demonstrate likely success on the merits and show that the public-interest equities weigh in favor of the injunction.” Nat’l Lumber & Bldg. Materials Co., 798 A.2d at 434.

As an initial matter, this Court has already determined that One Offshore will succeed on the merits; therefore, a consideration of that element is no longer necessary.

BVCA claims that One Offshore has argued merely that the harm it faces is that it might have to spend the extra money to tie their sewer system into a connection farther away. In essence, BVCA claims that One Offshore is only faced with monetary damages

if it has to connect its sewer system through Ocean Drive, and that the law provides remedies for monetary loss by allowing One Offshore to sue for damages. One Offshore responds that the harm it faces is not only irreparable, but is presently suffered. The harm claimed by One Offshore is caused by the state of their current wastewater removal system and the inability of Breakwater to exercise valid and express easement rights. For as long as One Offshore is prevented from constructing a sewer system, the residents must continue to live with the archaic, unacceptable, and unhealthy system of having their waste removed by hand and the harsh chemical treatments that come with regular sewage spills that occur throughout One Offshore Road Condominium.

This Court holds that Plaintiffs adequately demonstrated that they are presently faced with an irreparable harm for which there is no adequate remedy at law. While it is true that One Offshore could sue for breach of contract and damages⁶ if this Court decided that it is not entitled to a declaratory judgment and injunctive relief, such a decision would necessarily prolong the time-frame in which the residents of One Offshore could begin constructing a necessary modern sewer system to which they are entitled by virtue of the easement rights discussed supra. During that time, the residents would have to continue to endure their present unsanitary conditions. The fact that there are technological but more expensive alternatives does not prove that such alternatives would provide an adequate remedy for the current and ongoing harm facing the residents of One Offshore.

Finally, the Court considers the balance of the equities. Each of the parties' expert witnesses testified that when they design sewer systems, they are required to

⁶ Indeed, the damages already sought by Plaintiffs in this action remain severed from the issues resolved herein. See fn.1, supra.

consider the effect of the system to the public health and safety. Ceasrine, Clarke, and Albro each specifically testified that they believed the design of the proposed One Offshore sewer system with a connection through the BVCA system would not impair the health and safety of either the public or the residents at either condo association. This Court accepts those representations and rejects the proposition espoused by BVCA's expert Angilly that the residents of BVCA would be harmed if One Offshore were allowed to tie in to BVCA's existing sewer system. The balance of the equities clearly favors One Offshore. Accordingly, One Offshore is entitled to the injunctive relief sought.

V

Conclusion

For all the foregoing reasons, this Court declares that a valid easement, both express and implied, exists by which Breakwater has reserved the easement right to install, lay, maintain, repair, relocate and replace sewer and drain lines under the Common Elements of BVCA for the improvement of One Offshore, and that such easement has been reasonably determined to be necessary for the improvement of adjacent One Offshore. Breakwater, then, may grant to One Offshore or any other third party those easement rights.⁷ Accordingly, declaratory judgment shall enter in favor of the moving parties, One Offshore, Breakwater and Conn, permitting One Offshore to tie in to BVCA's existing sewer system.

⁷ As valid easement rights exist, this Court concludes sua sponte that the stipulation issued by the Town Council in 2008 requiring written permission from BVCA in order to add forty-two One Offshore units to the Town's wastewater system is void. This Court does not offer any other conclusions relative to the remaining terms of the waiver.

Additionally, having succeeded on the merits of its claim, One Offshore is entitled to a permanent injunction to prevent Defendant BVCA from continuing to interfere with its right to connect its proposed sewer system with the existing sewer system at BVCA.

Counsel for One Offshore shall prepare an order consistent with this Decision. Judgment shall be reserved until Plaintiffs' requested damages are adjudicated or Rule 54(b) certification is sought and granted.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **One Offshore Road Condominium Association, Inc. and One Offshore Road Condominium v. Breakwater Village Condominium Association, Inc., Breakwater Village, Inc. and Peter Conn, Individually and in his Capacity as President of Breakwater Village, Inc.**

CASE NO: **WC-2012-0182**

COURT: **Washington County Superior Court**

DATE DECISION FILED: **July 14, 2016**

JUSTICE/MAGISTRATE: **Rodgers, J.**

ATTORNEYS:

For Plaintiff: **Robert D. Goldberg, Esq.**

For Defendant: **Christopher J. Zangari, Esq.
James A. Donnelly, Esq.
Carol A. Zangari, Esq.**