STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Coastal Conservation League, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0089-CC **ORDER GRANTING IN PART AND DENYING IN PART MOTION TO LIFT STAY**
The Belle W. Baruch Foundation, Petitioner, vs. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Respondents.	)	Docket No. 19-ALJ-07-0088-CC

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to separate Requests for Contested Case Hearings filed by Petitioner South Carolina Coastal Conservation League (SCCCL) and Petitioner Belle W. Baruch Foundation (Baruch) challenging the decision of the South Carolina Department of Health and Environmental Control (Department) to issue Permit 2017-01795 (the Permit) to Respondent DeBordieu Colony Community Association (DeBordieu) for beach renourishment and the construction of three groins along a 1.5 mile section of Debidue Island in Georgetown County, South Carolina. By Order dated July 1, 2019, the two cases were consolidated for hearing purposes. Thereafter, DeBordieu filed a Motion to Lift Stay (Motion). Petitioners filed responses in opposition to DeBordieu's Motion. The Court held a hearing on the Motion on August 7, 2019.

BACKGROUND

This consolidated proceeding arises from the Department's decision to issue a Critical Area Permit and Coastal Zone Consistency Certification (CZCC) to DeBordieu, permitting it to perform beach renourishment and groin installation on the beaches of Debidue Island. The Permit authorizes two types of activity to be conducted within the protected critical area. First, the Permit allows DeBordieu to add "up to 650,000 cubic yards of beach-compatible sand" along approximately 1.5 miles (8,000 feet with 500 to 1,000 feet of tapers) of shoreline along Debidue Island. Second, the Permit authorizes DeBordieu to install three permanent sheet-pile-type groins extending from "300 and 400 feet from the back beach/bulkhead to the low tide line." In order to secure these groins, the Permit authorizes armor stone scour aprons along both sides of all three groins at the seaward end of the structures. Each of the groins will require approximately 1,500 tons of stone placed on 5,600 square feet of marine mattresses. The Permit also requires DeBordieu to monitor the erosion surrounding the groins and to mitigate the erosion affecting Baruch's Hobcaw property (Hobcaw), which is the adjoining property south of DeBordieu.

STANDARD OF REVIEW

A stay is automatically imposed when a party files a Request for Contested Case. S.C. Code Ann. § 1-23-600(H)(2) (Supp. 2018) ("A request for a contested case hearing for an agency order stays the order."). The stay must remain in place for ninety days after a contested case is initiated before the Court. § 1-23-600(H)(4)(a). After ninety days, a party may file a motion to lift the automatic stay. *Id.* Before May 2018, the party moving to have the automatic stay lifted had the burden of proof. However, the General Assembly amended the statute in May 2018 to shift the burden of proof to the party bringing the contested case—the petitioner. § 1-23-600(H)(4)(a). Now, the petitioner must meet four requirements to preserve the automatic stay. *Id.* Specifically, the petitioner must prove:

> (i) the likelihood of irreparable harm if the stay is lifted,
>
> (ii) the substantial likelihood that the party requesting the contested case and stay will succeed on the merits of the case,
>
> (iii) the balance of equities weigh in favor of continuing the stay, and
>
> (iv) continuing the stay serves the public interest.

Id. Since the four requirements are conjoined by the word "and" between the third and fourth requirements, the petitioner must prove each of the four requirements. *Bohlen v. Allen*, 228 S.C.

135, 143, 89 S.E.2d 99, 103 (1955) (noting "the word 'and' connotes something in addition to that which has preceded, the elements which are connected necessarily being grammatically [sic] co-ordinance"). If the petitioner fails to prove any of the requirements, "[t]he court *shall* lift the stay." § 1-23-600(H)(4)(a) (emphasis added); *see Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."). Finally, if the stay is lifted, the "action undertaken by the permittee or licensee does not moot and is not otherwise considered an adjudication of the issues raised by the request for a contested case hearing." *Id.* In other words, the outcome of the motion to the lift the stay does not prejudice a party or otherwise affect the ultimate decision of the Court at the merits hearing.

Although this standard for lifting the automatic stay was recently amended, the prior decision-making process for lifting the automatic stay is not inapplicable since the previous legislation also required consideration of "irreparable harm." *Compare* S.C. Code Ann. § 1-23-600(H) (Supp. 2013) *with* S.C. Code Ann. § 1-23-600(H) (Supp. 2018). Indeed, the same four requirements in the new law have been considered previously in this State's jurisprudence. For example, the current language of the stay is very similar to the language and principles either currently, or formerly, applicable to injunctions within this State. *See Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454–55, 626 S.E.2d 34, 36 (Ct. App. 2005) ("To establish a cause of action for injunction, the plaintiff must show (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." (internal quotation marks and citation omitted)); *Cty. of Richland v. Simpkins*, 348 S.C. 664, 671, 560 S.E.2d 902, 906 (Ct. App. 2002) (holding "the equities of both sides are to be considered, and each case must be decided on its own particular facts" and then "the court of equity must 'balance the equities' between the parties in determining what if any relief to give"). This Court has also addressed the same criteria for lifting the automatic stay in previous decisions regarding the past version of the law.

DISCUSSION

DeBordieu's request that the stay be lifted is not a typical request because it cannot necessarily proceed with its project even if the Court lifts the stay. Specifically, DeBordieu needs to first acquire a permit from the U.S. Army Corps of Engineers (the Corps) before it can

commence the project. DeBordieu argued at the hearing that it was possible the Corps would grant them a permit if this Court lifted the stay.[1] Therefore, it is unclear whether a stay would result in the Corps granting DeBordieu a permit or not. The uncertainty of the Corps permit creates conjecture regarding what the Court is allowing to occur if the stay is lifted. That uncertainty is a consideration in determining whether to lift the stay and allow DeBordieu to proceed. Thus, the Court evaluates this Motion through a unique lens of the uncertainty of the Corps permit.

Irreparable Harm

"Irreparable harm" is not defined in section 1-23-600(H)(4)(a), and it was not previously defined in the old version of the stay either. Where a term is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning. *Lee v. Thermal Eng'g Corp.*, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303 (Ct. App. 2002). According to Black's Law Dictionary, an irreparable injury is "[a]n injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction." Black's Law Dictionary 789-90 (7th ed. 1999). Our case law further instructs that whether harm is irreparable is "not decided by narrow and artificial rules." *Peek*, 367 S.C. at 455, 626 S.E.2d at 36. Rather, what constitutes irreparable harm is a factual determination unique to each case. *See Sisters of Charity Providence Hospitals v. S.C. Dep't of Health & Envtl. Control, et al.*, Docket No. 14-ALJ-07-0332 (S.C. Admin. Law J. Div. November 5, 2014). It has been held that, to be irreparable, the harm must be "neither remote nor speculative, but actual and imminent." *Gracepointe Church v. Jenkins*, 2006 WL 1663798 (D.S.C. June 8, 2006) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)).

Furthermore, the construction of groins is an activity which may be permitted in certain situations. S.C. Code Ann. § 48-39-290(A)(8) (Supp. 2018); Specifically, "[n]ew groins may be allowed . . . on beaches that have high erosion rates with erosion threatening existing development ." § 48-39-290(A)(8). Furthermore, "new groins may be constructed . . . in furtherance of an ongoing beach renourishment effort." *Id.* Therefore, the construction of groins is not, in and of itself, "irreparable harm."

[1] The Court is not aware of an instance in which the Corps of Engineers has approved a project in the middle of litigation before this Court.

Showing irreparable harm is the weakest part of Petitioners' cases. Generally, irreparable harm in the context of a lifting a stay, similar to that in the context of imposing a preliminary injunction, is harm that will occur during the pendency of the action. *Bethesda Softworks, L.L.C. v. Interplay Entm't Corp.*, 452 F. App'x 351, 354 (4th Cir. 2011) ("The traditional office of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits."); *accord Cty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002). Here, Petitioners contend that construction of the three proposed groins as described in the Permit will irreparably harm them in several ways. I find that several of the alleged harms raised by Petitioners do not constitute irreparable harm.

For example, Petitioner Baruch contends that it will be irreparably harmed if construction is allowed prior to discovery in this case because it is at a disadvantage without the facts it would garner from discovery to support its arguments in this Motion. This point was not raised at the hearing. Furthermore, the General Assembly provided for the lifting of a stay without any reference to its effect upon discovery. Therefore, I did not find it this issue is a material consideration.

Next, Petitioner Baruch cites to the affidavit of Dr. Mohamed A. Dabees for the contention that construction of the groins will permanently alter the nearshore sand pathways by allowing extensive erosion to occur prior to the trigger for mitigation currently included in the Permit. Petitioner SCCCL's expert, Dr. Robert Young, appears to agree. However, the evidence did not reflect that the harm asserted by Petitioners would occur during the pendency of this action. Neither of Petitioners' expert witnesses established that the alleged increased erosion on Hobcaw due to the groins will begin immediately. Rather, it appears that for a period of a couple years, Petitioner Baruch's Hobcaw tract (just south of the project) would likely receive an influx of sand before the erosive effect of the groin installation would be felt on downdrift beaches. This litigation will be concluded well before the erosive effects will begin to appear. Therefore, lifting the stay and allowing the renourishment and groin installation to go forward will cause no irreparable harm to Petitioners in the form of erosion during the pendency of this action.

Furthermore, SCCCL provided affidavits from several of its members who live in DeBordieu Colony who attested that they would be deprived of their use and enjoyment of the

beach during the renourishment and construction of the groins. The affidavits also evidence concerns that after construction the groins would lessen the aesthetic value of the beach, increase the danger of swimming and recreating on the beach, and overall lessen the affiants' use and enjoyment of the beach. SCCCL argues that the loss of use and enjoyment during construction is a loss that cannot be recouped through money or regained by the removal of the groins—it is a permanent loss of time to enjoy the beach.

While it is potentially true that SCCCL's members will lose the ability to use and enjoy at least part of the beach during the renourishment and construction, the Court does not find this to be an irreparable harm because of its temporary nature. There was no indication that the entire beach or access to it would be blocked during construction. Additionally, the harm is reparable because the beach will be restored for the same types of use an enjoyment, albeit in an altered condition with the groins. Similarly, the aesthetic and recreational concerns after the installation of the groins would not be irreparable because, if this Court decides against DeBordieu at the merits hearing, the groins would be removed, and the beach restored to its original condition.

Additionally, some of SCCCL's affiants' concerns were largely conclusory assertions without any supporting detail or assertions for which the was no expertise offered in support. For example, Mr. Lacy opined the groins would create dangerous rip currents, which may be true, but would require expert testimony that was not provided. Similarly, Ms. Altman opines that constructing the groins will not stop erosion even though she provides no basis for rendering opinion testimony of that sort. And Mr. Ford raises concerns about DeBordieu's liability for accidents and other damages caused by the groins for which he asserts that himself and other persons who live at DeBordieu Colony would bear the financial risk. Mr. Ford does not appear to hold a position with DeBordieu Colony that would make him qualified to speak on this subject. Statements such as these do not comply with Rule 702, SCRE, and must be disregarded by the Court in the exercise of its gatekeeping function. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010) (holding that court must exercise gatekeeping function); *see also Risher v. S.C. Dept. of Health & Envtl. Control*, 393 S.C. 198, 205, 712 S.E.2d 428, 432 (2011) (holding that a putative expert must "have acquired by reason of study or experience or both such knowledge and skill in a profession or science" that he is more qualified than the finder of fact "to form an opinion on the particular subject of his testimony") (quotations omitted)).

Nevertheless, DeBordieu's ability to adequately remove the groins should they receive an adverse ruling is a concern for this Court, especially considering the absence of a Corps permit and the restricted timeframes within which DeBordieu must work. The evidence at the hearing showed DeBordieu provided a commitment of at least $250,000 for groin removal. DeBordieu Colony also has a reserve fund of approximately $3.2 million and a beach preservation fund of approximately $3.6 million. While the $250K commitment would be available for removal of the groins, there was no guarantee that DeBordieu's other funds would be available for groin removal.

The cost of removing three groins, which the parties disagree about, would appear to cost at least $750K. Specifically, removal of the groins would require Respondent to un-install millions of pounds of rock and mats associated with the three groin structures. This would involve the labor of deconstructing three groins without any permanent impact to the area and transporting rocks and materials away from the area. Baruch's expert, Dr. Dabees, averred that

> the cost and time required to remove the structures (including preparation of technical specifications, bid preparation and consideration, mobilization of crews and equipment, and then implementation of a removal plan) will be significant impediments to prompt and complete removal of the structures, resulting in a prolonged removal process. This removal process will further compound the irreparable harm to and impacts of the proposed groins on the Petitioner.

In the report prepared by Coastal Science & Engineering for DeBordieu, the estimated total cost of the groins is $3.5 million or approximately $1.2 million per groin. Dr. Debees further averred that "the estimated cost of removal of the structures and stone components allowed by the Permit would be similar to [same order of magnitude] the initial construction costs." Based upon Dr. Debees estimation of the cost of removal, which is essentially equivalent to the cost of installation, $250,000 is clearly not enough to cover the cost of removal of three completed groins.

On the other hand, DeBordieu's expert, Dr. Kana, strongly disagreed with the cost of removal propounded by Dr. Debees. He averred that the cost of removing one groin would be approximately $250,000 because the cost of removal would not need to include the cost of purchasing the material. Dr. Kana further opined that probably only the groin immediately adjacent to Hobcaw would need to be removed, and it would take approximately a month to remove a groin. It is unclear to the Court why DeBordieu has not estimated the total cost of removal of all three groins, especially considering there is a possibility that if the stay is lifted, DeBordieu could complete construction of all three groins before this Court issues its decision

after the merits hearing. Regardless, it is clear that $250,000 will not cover the removal of three groins even by Dr. Kana's estimate.

The purpose of DeBordieu posting a bond is to insure that any harm resulting from DeBordieu's actions can be rectified. *See Keith v. Day*, 60 N.C. App. 559, 561, 299 S.E.2d 296, 297 (1983). Recognizing the difficulty of remediating environmental injury, it is especially important that DeBordieu be in a position to fully fund the complete removal of the groins and restoration of the beach should they receive an adverse decision. *See S.C. Dep't of Wildlife & Marine Res. v. Marsh*, 866 F.2d 97, 100 (4th Cir. 1989). Here, Baruch has provided an affidavit of an expert who avers that the cost of removal will be similar to the cost of the construction, which would put the cost of removal near $3.5 million. DeBordieu's expert averred that the removal of one groin would cost $250,000, from which we can infer that the removal of three groins would require $750,000. DeBordieu's evidence of a $250,000 commitment does not meet either expert's estimation of the cost of removal.

Therefore, although there was some evidence that DeBordieu maintains a reserve of money that could pay for the cost of removing all three groins, that reserve money has not been allocated toward removal of the groins and, in fact, it is set aside for beach preservation which presumably would be allocated towards the construction of the project. Accordingly, I find there is insufficient evidence of the necessary funds to guarantee the costs of removal. And, if there is insufficient money to remove the groins and thereby remediate the harm, the resulting harm from the installation of the groins would be irreparable.[2]

Therefore, I find Petitioner have met their burden to show irreparable harm.

Substantial Likelihood of Success on the Merits

When determining what constitutes a "substantial likelihood of success on the merits" it is helpful to refer to this State's injunction jurisprudence, which also addresses the likelihood of success on the merits. Our courts have held that "[i]n evaluating whether a plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of

[2] DeBordieu argues Petitioners will have an adequate remedy by statute for removal of the groins pursuant to section 48-39-290(A)(8)(e). However, this statute governs removal after adverse effects from the groin installation have occurred. Here, the issue is the removal of groins pursuant to a loss at trial before any adverse effect occurs.

entitlement to relief." *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 367, 709 S.E.2d 639, 642 (2011). The Court of Appeals echoed this principle in *Peek v. Spartanburg Regional Healthcare System* when it held "[t]he determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made." 367 S.C. at 456, 626 S.E.2d at 37. Accordingly, I find Petitioners do not have to establish their case on the merits, but rather make a prima facie showing that they are entitled to relief.

Here, Petitioners have cited several issues that are worthy of consideration by this court. For instance, both Petitioners' experts submitted affidavits in which they opine the background erosion rate submitted by DeBordieu for Hobcaw is inappropriately inflated and incorrect. DeBordieu has submitted evidence that the background erosion rate is 8.1 cy/ft/yr. This rate is important because it establishes the trigger point for mitigation to take place after the groins are constructed. If the groins cause erosion at Hobcaw to exceed the purported background erosion rate of 8.1 cy/ft/yr, then DeBordieu will be required to engage in mitigation effort pursuant to the Permit.

Baruch's expert, Dr. Dabees attests the background erosion rate is inaccurate because it is based on outdated data and it is "much higher than existing background erosion rate." Specifically, he opines that DeBordieu's calculated rate "conflates historic erosion by including large historical morphologic changes, beach nourishment events and recent change into one linear rate." Further, he opines "the trigger is based upon an unusually high trigger number that does not bear a direct relationship to what is going to occur on the Baruch's beach without the construction of the groins." Dr. Debees concludes that the inflated background erosion rate "minimizes [DeBordieu's] responsibilities to mitigate for down coast erosion due to the groins after construction of the groins." Dr. Debees also notes that "none of the criteria to be used for mitigation quantifies actual loss of upland property along the downcoast beach at Baruch," but rather relies on "volumetric change," which "sidesteps potential groins related erosion at specific locations on the Baruch beachfront by combining gains and losses over a large area that also includes sand transported offshore due to the groins." Overall, Dr. Debees expresses a concern that DeBordieu's argument that it will prevent adverse effects to Hobcaw through mediation is meaningless if the mitigation trigger is based upon an inflated background erosion rate.

SCCCL's expert, Dr. Rob Young, also finds DeBordieu's estimated background erosion rate of 8.1cy/ft/yr at Hobcaw to be "inappropriately high" because it was based on "a period of time when the island was changing planiform shape in response to inlet migration." Dr. Young asserts that the inlet affecting the movement of sand at Hobcaw has moved south and that the use of "profile volume loss as a mitigation trigger, rather than shoreline change or land loss, does not adequately address the potential harm caused to downdrift property." As a result of the inappropriately high background erosion rate, he opines that damage to Hobcaw will go unmitigated.

In contrast, DeBordieu argues Petitioners have presented no credible evidence that the erosion rate is not high or approximately 8.1cy/ft/yr. DeBordieu's background erosion rate is supported by the affidavit of its expert, Dr. Kana. DeBordieu argues its estimate is consistent with the Department's historic erosion rate for the area. Nevertheless, the issue is again whether Petitioners have made a prima facie showing that they are entitled to relief. Overall, Petitioners have presented a prima facie case that the background erosion rate of 8.1cy/ft/yr at Hobcaw may not adequately protect Hobcaw from adverse effects from the groins if this rate is, indeed, inappropriately high.

Petitioners also contend the Department failed to adequately establish the two statutory conditions precedent for constructing groins: (1) a high erosion rate and (2) that erosion is threatening existing development or public parks. § 48-39-290(A)(8). Petitioner Baruch argues the Department's conclusion that the average erosion rate of 4.2 cy/ft/yr for 1940-2000 at DeBordieu is "high" and was made without comparing this rate to other beaches in the area or in South Carolina to give the number import relative to others. Petitioner SCCCL also attacks the Department's finding of a "high" erosion rate, asserting that over the past fourteen years, with two renourishments, the erosion rate at DeBordieu is positive 1.4cy/ft/yr. SCCCL also notes that the erosion rate calculated during the corresponding time of Hurricane Hugo (1989-1996), a catastrophic event, was 3.18 cy/ft/yr, which is less than the purported current background rate at DeBordieu. Overall, Petitioners complain the Department classified the background erosion rate at DeBordieu as "high" without any relative data points to show what is "low" and without adequately taking into account the renourishments, the addition of the bulkhead, and other events that have affected the rate over the years.

DeBordieu, for its part, argues Petitioners are "quibbling" with the erosion rates and its estimates are well-supported and consistent with the Department's historic erosion records. DeBordieu notes Petitioners have not put forward their own erosion rates to counter those submitted by DeBordieu and merely argue the rates are incorrect.

Whether or not the erosion rate is "high" at DeBordieu is a question of fact to be presented at trial for this Court's determination. And, because it is a necessary component to granting the Permit for a groin, a finding that the erosion rate at DeBordieu is not high would affect the merits of this case. At this stage in the case, Petitioners have presented adequate evidence to establish a prima facie case that what number or rate qualifies as "high" under the statute is unclear and the rate submitted by DeBordieu may not be correct. Therefore, on this issue, Petitioners have presented a prima facie case of success on the merits.

Balance of the Equities

I find that the balancing of the equities favors maintaining the automatic stay based on the unique factual circumstances of this case. DeBordieu contends that placing the sand and groins on the beach will enhance the beach for its users, better protect it from any storm events, and help decrease the frequency and intensity of future renourishments. It further argues that the project will not cause any immediate harm to Hobcaw. This appears to be correct regarding the sand installed upon the beaches and regarding the groins, if installed as permitted.

However, if Petitioners' allegations are correct, the time frame in which Petitioners are assured from harm is uncertain. That uncertainty is further exacerbated by the unknown timeframe for the Corps to grant the permit and the regulatory time constraints for constructing the project. Laws protecting turtle nesting require construction to take place between November 1st and April 30th. DeBordieu explained at the hearing that it intends to start construction this November (2019) if it receives a Corps permit by then. This case is scheduled to be heard in mid-February 2020. Therefore, when the permit is granted by the Corps is a dynamic and important factor in considering whether to lift the stay in this case. For instance, if the permit is not granted until January, then the groin construction may be only at its initial stages when the case is heard. Consequently, if this Court were to determine DeBordieu should not be granted the critical area permit and CZCC, then allowing the project to proceed in this case could result in partially constructed groins that would need to be removed prior to April 30th. However, if removal by

April 30th is not possible, partially constructed groins would remain on the beach for approximately six months, the effects of which are unclear to this Court because no evidence has been presented regarding this particular scenario.

Dr. Kana estimates that it will take six months to complete the project. Therefore, although lifting now could result in the completion of the project by April 2020, that assumption is based upon the Corps permitting the project before November 2019. If that does not occur, the Court is left authorizing a project that will not be completed, resulting in an uncertainty as to the impact of that uncompleted project. Moreover, DeBordieu has been renourished on a regular schedule in 1990, 1998, 2006, and 2015. Following that schedule of renourishment every 8-9 years, the next needed renourishment would be in 2021. Since the hearing in this case will be in February 2020, the benefit of decreasing the frequency and intensity of future renourishments is offset by the danger of allowing an uncertain project to proceed.

Public Interest

"[T]he petitioner must prove . . . continuing the stay serves the public interest." This issue must be considered in the context of the purpose of the statutes or regulations governing the conduct. In this case, the policy of South Carolina is to "preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens . . . ." S.C. Code Ann. § 48-39-260(6) (2008). In furtherance of that goal, the General Assembly established a policy of preserving beaches in this State. S.C. Code Ann. § 48-39-280(A) (Supp. 2018) ("A policy of beach preservation is established."). One of the tools in carrying out that policy is renourishment projects, which may include groin construction and maintenance where necessary "to extend the life of such projects." S.C. Code Ann. § 48-39-20(3) (2008).

Here, in support of their contention that continuing the stay serves the public interest, SCCCL presented evidence relating to the effect of the project upon SCCCL's members and presumably implying similar effects upon the public at large. This evidence included:

1. The sand previously used in 2015 was not compatible with the sand on DeBordieu beach and looked and felt horrible;
2. The debris and sediment that came from prior renourishment made it harder to enjoy the beach
3. The construction of groins would significantly interfere with some of the SCCCL's members or their family's personal use of the beach

4. The groins will make swimming, fishing, boating, surfing and walking on the beach harder because you will have to avoid and work around the structures;
5. The groins could cause harm to people of all ages; and
6. The construction of groins would expose DeBordieu to potential liability.

These assertions do not establish that continuing the stay serves the public interest. Generally, the effects that SCCCL identifies are common to the installation of any groin, and the Legislature has determined that groins are permissible in high erosion areas where development is threatened. More specifically, the first two allegations only relate to the previous project and offer no comparative evidence regarding the permitted project. The third and fourth allegations related to the personal use of SCCCL's members. Although SCCCL members are also members of the general public, I do not find that the harm that was asserted establishes that continuing the stay serves the public interest. The fifth allegation was speculative, and the last allegation was simply irrelevant.

On the other hand, although there is no dispute that absent renourishment of the beach DeBordieu will continue to suffer erosion which will eventually threaten existing development, that impact has not been quantified so that the Court can access the imminence of the threat. Furthermore, in this case, the Court's consideration of what serves the public interest must be made in the context of established public policy. *See* S.C. Code Ann. § 48-39-30 (2008); § 48-39-290(A)(8). Therefore, the Court must weigh the public policy of preserving the beach against the public policy of allowing the public's use the beach. Here, until the evidence establishes the groins should be constructed to protect the beach, the protection of the public's access to and use of the beach weighs in favor of continuing the stay.[3] Moreover, since the hearing in this case will be in February 2020 and the current condition of this public beach on DeBordieu does not reflect an immediate need for renourishment, I find that continuing the stay serves the public interest.

Conclusion

I find Respondent DeBordieu should be allowed to proceed with obtaining a permit from the Corps. Respondent DeBordieu may also begin developing and implementing the initial aspects of the groin construction including the process of beach renourishment in anticipation of

[3] It is notable that DeBordieu asserts the footprint of these groins is narrow and designed to match the natural beach profile. However, the Court was unable to determine the implications of that description from the evidence before it.

constructing the groins. However, this Court does not lift the stay to allow construction of the groins at this time. Nevertheless, at the conclusion of the merits hearing, and after the record is more fully developed regarding the nature and impact of the groins, the court may revisit this issue to determine if the stay should be lifted pending the court's decision in this matter.

IT IS THEREFORE ORDERED that Respondent's Motion to Lift Automatic Stay is GRANTED IN PART to allow Respondent DeBordieu to obtain a permit from the Corps of Engineers for the project and to begin developing and implementing the initial aspects of the project limited to the process of beach renourishment.

IT IS FURTHER ORDERED that the Motion to Lift Automatic Stay to construct or install the groins is DENIED until further review by this Court.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

August 28, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

August 28, 2019
Columbia, South Carolina