

the Court set this matter down for an immediate evidentiary hearing to consider the subject matter of this Motion and give the Government the opportunity to cross-examine Plaintiff's witnesses.

This Motion is brought pursuant to 5 V.I.C. § 80 on the grounds that Plaintiff has established all the pre-conditions for entry of such injunctive relief pursuant to said statute. This Motion is based on the files and pleadings in this action, on the Declarations of Pamela Gaffin and Robert Gloudemans filed concurrently herewith, and on such other and further matters as the Court may consider at the time of hearing on the Motion.

STATEMENT OF RELEVANT FACTS

On May 13, 2003, the District Court entered an Order in *Berne Corp. v. Government of the Virgin Islands*, 262 F.Supp.2d 540 (D.V.I. 2003) (the "Berne Case"). As far as the instant Motion is concerned the Court ordered specific enforcement of the Berne settlement agreement. The District Court entered an injunction, two portions of which are relevant here:

1. The Government was ordered to reassess all real property in the Virgin Islands in accordance with the requirements of 48 U.S.C. § 1401, *et seq.* and the Uniform Standards of Professional Appraisal Practice ("USPAP").¹
2. The Government was enjoined from sending out tax bills until (a) the Special master certifies that the system was in compliance with 48 U.S.C. § 1401 and USPAP, (b) the Board of Tax Review is meeting regularly and dealing with appeals within the statutory time period, and (c) the Department of Finance is making refunds of overpayments within the statutory time period.

¹ On July 29, 2007, Congress repealed 48 U.S.C. § 1401 retroactive to the effective date of the Revised Organic Act of 1954. That repeal has no effect on the instant motion, which is based solely on the Virgin Islands statutes enacted to replace that repealed Act and alleged due process and equal protection constitutional violations by the Government.

On March 10, 2008, the Governor signed Act 6991, a copy of which is attached hereto as Exhibit A. That Act made a significant change to existing law and imposed on the Tax Assessor an additional requirement not covered by the terms of the *Berne* injunction and not included within the scope of the Special Master's duties in the *Berne* consolidated actions. Specifically, Section 7(d) of Act 6991 mandates that all assessments must be done in accordance with the standards of the International Association of Assessing Officers ("IAAO").² It is this newly imposed requirement for assessments and reassessments that is the subject of the instant Motion.

SUMMARY OF ARGUMENT

IAAO standards require that any mass appraisal assessment or reassessment be validated using certain statistical standards, particularly those set out in the IAAO Publication Standard on Ratio Studies, Exhibit B hereto. Filed concurrently herewith is the Declaration of Robert Gloudemans, who is extremely well qualified in the field of mass appraisal, having authored several papers and texts on the subject, and having participated in the drafting of the Standard on Ratio Studies itself.³

² That section of Act 6991 provides:

"In assessing the fair market value of real property, the Tax Assessor shall use the applicable standards promulgated by the International Association of Assessing Officers ("IAAO"), and shall promulgate such rules and regulation (sic) as necessary to implement the IAAO standards for all classifications of property set forth in section 2301(b) of this title."

³

Mr. Gloudemans is a former Senior Research Associate for the IAAO. He is a former Supervisor of Computer Assisted Appraisal and Director of Research and Equalization for the Arizona Department of Revenue. He is the author of *Mass Appraisal of Real Property* (IAAO, 1999), a principal author and a senior technical editor of *Property Appraisal and Assessment Administration*, and a coauthor of *Assessment Practices: Self-Evaluation Guide* and of *Improving Real Property Assessment: A Reference Manual*. He also is the principal author of many IAAO assessment standards, including the Standard on the Application of the Three Approaches to Value in Mass Appraisal, the Standard on Mass Appraisal of Real Property, and the Standard on Ratio Studies (1990). He has taught IAAO and other courses and workshops on assessment administration, mass appraisal, and ratio studies in over thirty-five states and provinces. He has directed or participated in assessment consulting projects for over 100 government agencies, including major

As detailed in Mr. Gloudeman's Declaration, applicable IAAO standards for assessing property were not complied with a number of substantive respects:

1. There is no substantiation or documentation for the conclusions expressed by Mr. Hunt.
2. There are no reports at all from BearingPoint and the reports provided by Mr. Hunt fail to conform to IAAO standards.
3. There appears to have been no effort to address known problems regarding the inaccuracy of property data.
4. Inadequate - if any - time appears to have been spent on review and analysis.
5. Sales data for 2006 was never used to verify the accuracy of the 2002-2005 values. This was a critical study that should have been conducted.
6. There was a failure to comply with IAAO standards regarding methods of adjusting cost rates to the market, something critical to accurate assessment of commercial properties.
7. Concerns about known problems affecting the validity of the reassessment (i.e., inability to use GIS information, lack of information regarding data reviews, failure to document CAMA system training, known property address errors) were never resolved, something required under IAAO standards.

All of the foregoing leads Mr. Gloudemans to conclude that "there is a complete absence of evidence indicating that the revaluation was completed in accordance with IAAO or USPAP standards.

Mr. Gloudemans was also able to obtain the actual sales data used by BearingPoint for its validation study for St. John. Mr. Gloudemans conducted a statistical analysis of this data using the procedures recommended in the IAAO Standard on Ratio Studies he authored. The results indicate three things:

revaluation projects in Alberta, Arizona, Colorado, Florida, Manitoba, Ontario, and Tennessee. He specializes in mass appraisal model building, mass valuation training, and ratio studies.

1. High-end properties on St. John are systematically under-assessed in the new mass appraisal.
2. Low-end properties on St. John are systematically over-assessed in the new mass appraisal.
3. The ratio numbers themselves fall far outside of IAAO standards.

JURISDICTION

The Complaint alleges violations of Plaintiff's members rights to substantive and procedural due process. Paragraph 15 of the Complaint alleges that the Government has failed to comply with the requirements of Bill No. 21-01765 (now Act 6991), in a number of specific ways, including those discussed in the Gloudemans' Declaration. Paragraph 17 of the Complaint alleges that "the methods used in assessing the value of real property in the Virgin Islands are so flawed and fundamentally erroneous as to constitute a violation of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, made applicable to the Virgin Islands by virtue of the Revised Organic Act of 1954.."

Paragraph 18 further alleges that "The methodology used to generate assessed values for real property in the Virgin Islands was unfair, unreasonable, and discriminatory and, therefore, constitutes a violation of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States, made applicable to the Virgin Islands by virtue of the Revised Organic Act of 1954."

Additionally, Plaintiff has invoked this Court's supplemental jurisdiction with respect to 5 V.I.C. § 80 seeking to enjoin illegal actions on the part of the Government.

In his opinion affirming Judge Moore's findings and conclusions in the *Berne* case, *Bluebeard's Castle, Inc. v. Government of the Virgin Islands*, 321 F.3d 394 (3d Cir. 2003) the Third

Circuit recognized that taxpayer disagreement with valuation of his or her individual property does not state a federal claim. However, when the violation is generalized and systemic, a federal court does have jurisdiction if such violation rises to the level of a constitutional denial of due process.

Id.

In the instant case Plaintiff has alleged that the methodology used to generate property values is unfair, unreasonable, discriminatory, and arbitrary and capricious, thereby violating its members constitutional right to due process. Thus, this Court has subject matter jurisdiction to entertain these claims. Pursuant to 5 V.I.C. § 80, this claim may be asserted on behalf of all Virgin Islands taxpayers.

APPLICABLE STANDARDS FOR INJUNCTIVE RELIEF

A. Applicable Standard Under 5 V.I.C. § 80

Issues regarding the applicable standards for preliminary injunctive relief in a taxpayer suit challenging the Virgin Islands property tax system were resolved in *Berne Corp. v. Virgin Islands*, 120 F.Supp.2d 528 (D.V.I. 2000). In that case Judge Moore initially noted the traditional factors generally considered in deciding whether preliminary injunctive relief is merited:

“Ordinarily, four factors govern this Court’s exercise of its discretion to issue a preliminary injunction: whether movant can establish (1) a reasonable probability of success on the merits, (2) irreparable harm if the relief is denied, and (3) no greater harm to the nonmoving party plus (4) service to the public interest if the relief is granted. See *Joseph v. Henry*, 36 V.I. 115, 121-22, 958 F. Supp. 238, 243 (D.V.I. App. Div. 1997).”

Judge Moore then noted that irreparable harm was not a requirement for injunctive relief under 5 V.I.C. § 80 (“Plaintiffs are not required to show irreparable harm under 5 V.I.C. § 80 . . .”).

This is also the general rule where - as here - the governmental wrongdoing is alleged to have

resulted in a constitutional violation. In the context of a motion for preliminary injunction, when an alleged constitutional right is involved additional showing of irreparable injury is necessary, and such injury is presumed. *McClendon v City of Albuquerque*, 272 F Supp 2d 1250 (D.C. N.M. 2003). Moreover, irreparable harm is generally viewed as established when a plaintiff's claim for preliminary injunction is based upon a violation of plaintiff's constitutional rights; and a defendant cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations. *Haynes v Office of the Attorney General*, 298 F Supp 2d 1154 (D.C. Kan. 2003).

As discussed in detail below, consideration of the remaining factors mandates the grant of preliminary injunction relief in this case.

1. There is more than a reasonable probability of success on the merits

There is no question that it is more than likely that Plaintiffs will succeed on the merits of their claim. As pointed out above, the Legislature has mandated that all assessments of property in the Virgin Islands must be conducted in accordance with IAAO standards. This is a new requirement that was not included in the now-repealed 48 U.S.C. § 1401, nor was it included as a requirement of the *Berne* settlement agreement (requiring compliance with 48 U.S.C. § 1401 and USPAP).

During the recent hearing on the Order to Show Cause re Contempt in the *Berne* action the Tax Assessor, Mr. Roy Martin, testified that he did not authorize the use of the 2006 reassessment figures until *after* the Legislature passed Act 6991 and the Governor had signed it into law. Mr. Martin also asserted, as did the Government's counsel, that Act 6991 became immediately upon signing by the Governor on March 10, 2008. Thus, there can be no question that the requirements of Act 6991 apply to the use of the 2006 values, which were not implemented until after the Act's

effective date.⁴

It is also clear that the Government's proposed assessment system fails to comply with IAAO standards. For example, the IAAO Standard on Property Tax Policy (Approved August 2004) (Attached as Exhibit D hereto), provides as follows:

4.3.2 Ratio Studies

Ratio studies are effective components of a quality assurance system and should be conducted at least annually. Ratio studies should be used to emphasize horizontal and vertical equity of assessments as well as overall level in comparison to statutory requirements. When used by a local assessing jurisdiction, ratio studies can be designed to measure the quality of assessments in neighborhoods or for specific types of property, as well as to provide overall quality indications. State agencies typically use ratio studies as part of technical assistance, oversight, or equalization roles. (See Standard on Ratio Studies [IAAO 1999].)

State agencies responsible for conducting ratio studies for local jurisdictions should publish the results of such studies. Published reports should be readily available to all interested parties and include narrative discussions of the method used as well as statistics that measure level and vertical and horizontal equity. Published ratio studies should clearly define their purpose to maximize their usefulness to prospective users.

During the recent hearing regarding the report of the Special Master in the *Berne* matter the Government actually objected to producing any ratio studies that might have been conducted as a part of the reassessment project. Additionally, despite the Special Master's requirement that a ratio study using the proposed 2006 assessed values be conducted to check the validity of the 2002-2005 figures used in the reassessment project, there is no evidence that such a ratio study was conducted.⁵

⁴ The May 12, 2003 injunction entered into in the *Berne* case requires Court approval of the new system of assessment. That approval has not yet occurred. In light of the new requirement of Act 6991 that the new assessments comply with IAAO standards, Plaintiff respectfully suggests that compliance with those standards should be considered by the Court before certifying the new system.

⁵ Mr. Hunt's Report states: "The VI revaluation was calibrated and tested using property sales that occurred during the years 2002-2005. Because of timing and difficulties inherent in the existing Virgin Islands GIS, 2006 sales were not used in these phases of the revaluation. The 2006 property sales should be processed and used in a sales ratio study as a final check on the new residential values. A sales ratio study, using sales that occurred after the

As indicated above, not only should such studies have been conducted but the results should have been made public.

Beyond that, the Declaration of Robert Gloude-mans filed concurrently herewith establishes numerous violations of IAAO standards and policies and clearly indicates that further discovery is very likely to turn up even more.

In summary, there is more than a reasonable probability of success on the merits.

2. Both the balance of harm and public interest factors favor Plaintiff

In granting a preliminary injunction in *Berne v. Virgin Islands, supra*, Judge Moore noted that “these two factors inherently favor the plaintiffs in a taxpayer suit, since its purpose is ‘to obtain the aid of the district court to restrain any illegal acts of territorial authorities.’” In making this statement Judge Moore cited with approval the Third Circuit’s opinion in *Smith v. Government of the Virgin Islands* 329 F.2d 131 (3d Cir. 1964). *Smith* involved a § 80 taxpayers’ suit seeking to prevent the illegal transfer of a piece of property from the Government of the Virgin Islands to an individual. In that case, the plaintiffs were taxpayers, but had no other interest in the land being transferred. In holding that there was no requirement that Plaintiffs show any special damage suffered by them directly the Court stated:

“It is not necessary that the plaintiff should show actual damage to himself and to all others similarly situated, as is contended by the Assistant Attorney General. * * * The object of the suit is to prevent the violation of the law. The consequences which may result in case the law is disregarded are so obvious that no proof of actual pecuniary damage is necessary. In *Crampton v. Zabriskie* the court (101 U.S.) on page 609 (25 L.Ed. 1070) says: * * * From the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt

reevaluation was conducted, will provide an important final measure of quality for the revaluation and should be conducted as a condition of final approval.” Correspondence from Joe Hunt to the Honorable Curtis Gomez, March 25, 2007.

action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of the corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate power.' The plaintiff comes within the rule, and no further showing as to damages is necessary under the facts in this case.'

The Court then noted:

“The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate, and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases *and is the rule of this Court.* (emphasis added).” (emphasis added; internal quotes omitted).

See also *Crampton v. Zabriskie* 101 U.S. 601 (1897).

In summary, the balance of harm and public interest inquiries virtually always favor the taxpayer in a § 80 action.

CONCLUSION

Plaintiff has clearly shown that it is entitled to preliminary injunctive relief in this matter. The Legislature has recently required that all assessments and reassessments after the effective date of Act 6991, March 10, 2008, must conform to IAAO standards. Mr. Roy Martin has testified that the new assessed values were not implemented until *after* the effective date of Act 6991 and, indeed, were implemented specifically in reliance on the requirements of that Act. The Government has admitted at oral argument in the *Berne* case that it is bound by all of the requirements of that Act, which would include the requirement to comply with IAAO standards. The principal author of those IAAO standards, Robert Gludemans, has offered a Declaration attesting that, based upon his preliminary review of data, the new reassessment does not comply with IAAO standards in a number

of respects. Pursuant to case authority cited above irreparable harm is presumed, and Plaintiff need make no further showing to be entitled to injunctive relief.

For the foregoing reasons, and each of them, Plaintiff respectfully requests that this Court set this matter down for an evidentiary hearing at its earliest convenience for purposes of considering the propriety of granting preliminary injunctive relief enjoining collection of any property taxes based on the new assessments, which fail to conform to law.

DATED: September 11, 2008

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of September, 2008, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

Carol Thomas-Jacobs, Esq.