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IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

VIRGIN ISLANDS CONSERVATION SOCIETY, Petitioner, vs. VIRGIN ISLANDS BOARD OF LAND USE APPEALS, Respondent.	CASE No. ST-16-CV-395 ACTION FOR: WRIT OF REVIEW
MORAVIAN CHURCH CONFERENCE OF THE VIRGIN ISLANDS, Petitioner, vs. ST. JOHN COASTAL ZONE MANAGEMENT COMMITTEE and VIRGIN ISLANDS BOARD OF LAND USE APPEALS, Respondents.	CASE No. ST-16-CV-428 ACTION FOR: WRIT OF REVIEW

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SUPERIOR COURT

PETITIONER'S REPLY TO BRIEFS OF RESPONDENTS

AND SUMMER'S END GROUP, LLC

COMES NOW Petitioner Moravian Church Conference of the Virgin Islands ("Petitioner" or "Moravian Church"), who files the instant reply to the briefs of Respondents and Summer's End Group, LLC ("SEG" or "Intervenor")[1]. In support, Petitioner states as follows:

[1] Summer's End Group, LLC has a motion to intervene pending. The Court ordered that any responses should be filed by November 23, 2016. The Moravian Church has no objection and thus filed no response. For purposes of the instant brief, the Moravian Church will refer to Summer's End Group, LLC as "SEG" or "Intervenor".

Surety Bond

It is unclear what Intervenor is arguing with respect to Super. Ct. R. 15. Presumably, Intervenor is not arguing that the Moravian Church's petition for writ of review should be denied based upon the absence of a bond in this matter. As Super. Ct. R. 15(b) states that the bond amount is to be fixed by the Court, this is clearly a procedure that begins with the discretion of the Court rather than a jurisdictional bar to the petition for writ of review in the first instance for failing to post a bond for which the amount has never been set.

If, however, Intervenor is arguing that the Court should now, after the Court has already granted the Writ of Review via Order dated August 4, 2016, require the Moravian Church to post a surety bond, the Moravian Church would contend that the Court clearly exercised its discretion in this matter by choosing to waive the requirement for a bond. In the alternative, the Court clearly exercised its discretion in setting the amount of the surety bond as nil. Prior to issuing the Writ of Review, no response from the respondent is required under Super. Ct. R. 15. Consequently it is fair to conclude that the discretionary amount of the surety bond is, in essence, a reflection of the judge's own judgment, prior to any briefing, about the relative worthiness, willingness, and ability of a petitioner to obey the judgments in the case. In this case, Petitioner is a resident of the United States Virgin Islands and, indeed, is both an integral part of the community life of the territory and a major landholder. There exists no ambiguity about Petitioner's willingness to obey the judgment.

Indeed, the wording of the rule itself makes clear that it is not designed to apply to cases like Petitioner's. The rule states that the bond is to ensure "the petitioner will obey the determination on or decision sought to be reviewed and *perform his obligations thereunder*." Super. Ct. R. 15(b) (emphasis added). The plain meaning here implies that the bond is meant to

compel obedience in situations in which the petitioner possessed some form of obligation pursuant to the decision sought to be reviewed. In this case, the Moravian Church owes no duties under the permits issued to Intervenor. The Moravian Church has merely exercised its statutory rights to contest and appeal erroneous decisions on *Intervenor*'s permit applications – from testifying at public CZM Committee hearings to appealing the committee's decision to the BLUA to filing the instant petition for writ of review. Not even Intervenor contends that the Moravian Church would somehow utilize extra legal means to challenge or contest Intervenor's permit applications. Thus, the Court was more than justified in exercising its discretion by declining to require the issuance of a surety bond or, in the alternative, setting the amount of that surety bond as nil.

Failure to Address the Moravian Church's Arguments

This reply will be brief as both Respondents and Intervenor failed to address (other than via some conclusory statements) any of the arguments raised by the Moravian Church. The vast majority of both Respondents' brief and Intervenor's brief, both of which were filed as joint or consolidated responses to the memoranda of both petitioners, are apparently dedicated to addressing arguments raised by or evidence cited exclusively by the Virgin Islands Conservation Society ("VICS").[2] However, in the course of doing so, Respondents and Intervenor left unopposed the vast majority of the Moravian Church's specific arguments.

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[2] Despite SEG's claim that the Moravian Church "seek[s] to include within the record of this proceeding additional information that was not introduced before [CZM]," the Moravian Church does not rely upon outside information for its arguments and SEG identifies no such "additional information". However, if SEG is referring to footnote 3 of the Moravian Church's brief, which quotes one of the CZM Committee members who stated to the Virgin Islands Daily News immediately after the vote approving SEG's permit applications that he "was keeping his fingers crossed and hoping it works out for the best." The Court should feel free to disregard that quote, which was clearly not the *basis* for any of the Moravian Church's arguments.

This failure to address the Moravian Church's arguments is not surprising as the Board of Land Use Appeals ("BLUA") likewise failed to substantively address those arguments in its decision upholding the actions of the St. John Coastal Zone Management Committee ("CZM Committee").[3] Instead, BLUA simply adopted by reference the findings of the CZM Committee.[4] However, the CZM Committee had likewise failed to address those arguments. Instead, the CZM Committee had merely adopted by reference the findings of the Final Staff Reports of the Department of Planning and Natural Resources ("DPNR").[5] However, the Final Staff Reports likewise also failed to address those arguments. Instead, with respect to the land permit application, the Director merely stated in a dismissive manner that "most" of the objections were directed to the water permit application rather than the land permit application.[6] With respect to the water permit application, the Director stated in a conclusory manner that SEG

[3] "[T]he BLUA is unpersuaded by Appellant's arguments as to how the findings are inconsistent with the goals and policies articulated in 12 V.I.C. § 903, or the procedures of 12 V.I.C. §§ 910(a)(2) and 911(c)." BLUA June 6, 2016 Decision, Conclusions of Law, ¶ 12.

[4] "The BLUA concurs with CZM that findings were made by CZM in a legally sufficient manner. The Final Staff Recommendations by CZM were issued for each permit – land and water – on October 4, 2014, containing the legally sufficient findings." BLUA June 6, 2016 Decision, Conclusions of Law, ¶ 11.

[5] After presenting, in a conclusory manner, the language of the relevant statutes themselves as "findings", CZM "adopt[ed]" the Department of Planning and Natural Resources Staff Reports for the land and water permit applications "to support the Committee's findings." Transcript of October 1, 2014 CZM Decision Meeting, Pages 9 and 22.

[6] With respect to the land permit application, the Director testified that: "There were many who testified against the development. However, it appears that most of the concerns and reasons for denial by testifiers were directed to the marina and that of the upland portion." Transcript of October 1, 2014 CZM Decision Meeting, Page 5. DPNR offered no other response to the objections and arguments in opposition to the land permit application.

had adequately addressed "most, if not all" objections.[7] In short, BLUA, CZM, and DPNR all adopted by reference the "findings" of the applicant itself. However, SEG itself had not addressed the Moravian Church's arguments other than in a conclusory and perfunctory manner.

Staff Findings Are Not Automatically CZM Committee Findings

Respondents state that "[h]ere CZM issues both Preliminary Staff Findings (Appx 147, 165) and Final Staff Findings (Appx 586, 605) for both the SEG land and water permits along with a detailed Decision Letter." Respondents' Brief, Page 9. In reality, however, the CZM Committee did not issue the Preliminary Staff Findings or the Final Staff Findings, and the Decision Letter was short and conclusory, including no findings whatsoever. Instead, the Decision Letter merely listed conditions on the permits that were being issued. The Preliminary Staff Findings were apparently never adopted by the CZM Committee as part of its final decision and are thus irrelevant in terms of analyzing the findings of the CZM Committee. As noted *supra*, the Final Staff Findings were merely verbally adopted by reference by the CZM Committee during the October 1, 2014 Decision Meeting. For purposes of appellate review (whether before the BLUA or the Superior Court on a writ of review), that is the closest the CZM Committee comes to making its own findings upon which any decision by the CZM Committee in this matter could be based.

Neither Respondent Nor Intervenor Properly Address Littoral Rights

Respondents also claim that SEG adequately satisfied the ownership/interest requirement of 12 V.I.C. § 910(e)(2). *See* Respondents' Brief, Page 9. Presumably, this is intended to address (albeit indirectly) Moravian Church's argument regarding interference with the littoral

[7] With respect to the water permit application, the Director testified that: "The applicant responded to most, if not all, of the concerns and staff believes that the responses adequately addressed those concerns." Transcript of October 1, 2014 CZM Decision Meeting, Pages 16-17.

rights of neighboring property owners. If that was Respondents' intention, their argument fails. Regardless of whether or not SEG presented powers of attorney for several non-littoral property owners within SEG's proposed land permit project, the Moravian Church's argument relates to the impact upon adjacent and neighboring property owners' littoral rights. SEG certainly did not present powers of attorney for all the littoral property owners impacted by this massive marina in Coral Bay Harbor.

Intervenor, presumably recognizing that its powers of attorney do not address that issue, instead argue that the adjacent property owners' "[a]ccess to the waters remains open from the Moravian Church properties – both directly from the shoreline *and to deep waters*." Intervenor's Brief, Page 10 (emphasis added). However, even assuming that were true, and it is not, it would not be relevant to this Court's review as neither CZM nor BLUA made any such finding. Rather, CZM and BLUA made no findings at all on this point. At best, one could say that BLUA adopted by reference CZM's adoption by reference of DPNR's adoption by reference of SEG's own response to the issue. However, even SEG never made a "finding" that the Moravian Church had access to the shoreline and to deep waters, so it is unclear what relevance this could have on appeal. Moreover, even if CZM and BLUA had made that precise finding, which it clearly did not do, it would not address the littoral rights of all the other property owners in the area. The issue was presented to CZM and BLUA not as a violation of only the Moravian Church's littoral rights but also a violation of the littoral rights of virtually all littoral property owners in Coral Bay Harbor. If CZM and BLUA were to dismiss all such concerns by merely finding that a single littoral property owner has access to "the shoreline and to deep waters" while disregarding the question of all other littoral property owners' access, this would clearly be a decision that must be overturned for all the reasons detailed in the underlying brief.

Dismissive and Irrelevant Response to Environmental Issues

BLUA's Brief acknowledges that "Appellants also list other environmental impact concerns." Respondents' Brief, Page 9. BLUA now dismisses any such concerns by stating in conclusory fashion that those concerns: "were discussed at length in the CZM underlying brief" filed in the BLUA appeal. *Id.* However, CZM's underlying brief in the BLUA appeal is not part of CZM's findings, which BLUA was supposed to be reviewing. Though CZM sought to improperly insert what amounted to findings in that almost 30 page brief before BLUA, they are irrelevant for purposes of review as they were not made by the CZM Committee at the time of decision, so BLUA could not consider those pseudo findings to support the decision of the CZM Committee almost eighteen months earlier.

The Trimming of Mangroves was Never Addressed by CZM or BLUA

Respondents do not attempt to address this issue. However, Intervenor dismisses this issue as mere presumption. Commentator Sharon Couldren was conservative in stating that SEG's plans appeared to indicate the mangroves would be trimmed. Intervenor's claim that this was therefore mere presumption is not supported by the evidence. The images submitted as part of Intervenor's plans specifically depicted the proposed mangroves as a low hedge immediately in front of their land based structures and situated between the land based structures and the water based structures so as not to obstruct the view from the land-based structures. SEG may attempt to dismiss this as a hypothetical, but it is based upon SEG's depiction of what that proposed mangrove would look like *after* SEG's development is complete. Whether or not SEG acknowledged in its permit application that making a mangrove look like a low hedge would require the mangrove to be trimmed is immaterial. It was obvious and unmistakable to the CZM Committee and therefore had to be addressed. To claim otherwise would be no different than

arguing that submitting a proposed image of one's intended development that depicts dump trucks pouring refuse in the water requires no explanation as long as the applicant hasn't requested permission to dump refuse in the water as part of the permit application.

As a side note, SEG has made a telling admission in this argument. SEG states that: "[a]t this point, no information is available to indicate that the mangrove planting will be the hoped for success." SEG Brief, Page 9. In as much as "this point" is years after CZM granted the permits, it is revealing that to this day SEG has no information whatsoever that the mangrove planting will be a success. If it is not expected to succeed, if there is not a report from an expert confirming that it should succeed, the fact that SEG obtained its permits based, in part, upon citing this "mitigation effort" shows that neither the CZM Committee nor BLUA satisfied their statutory mandates. If there is no information showing the "mitigation effort" will be successful, there was no basis for the CZM Committee to dismiss environmental concerns based, in part, upon this non-evidence of mitigation.

Bond Requirements Do Not Substitute for Addressing a Glaring Problem with SEG's Authority

Respondents do not address or make any mention of SEG's financial status or its right to proceed based upon the plans generated by Applied Technology & Management, Inc. ("ATM"). However, Intervenor attempts to dismiss this out of hand by noting that the CZM Committee and BLUA have required SEG to post a bond. However, even assuming, per arguendo, that including a bond requirement is actually a logical substitute for making a substantive inquiry into whether or not SEG could financially proceed with development, this does not address the underlying legal issue involving SEG's use of ATM's plans. Neither Respondents nor SEG have addressed this point. ATM sent a letter to CZM expressly stating that SEG no longer had the right to use ATM's plans. ATM was the only expert in SEG's team with any experience

constructing a marina and consumed the vast majority of SEG's package of resumes and qualifications.

The exchange of letters between ATM and SEG were expressly part of the record before the CZM Committee. However, neither the CZM Committee nor BLUA addressed this fundamental threshold issue. If SEG must present proof establishing its right to develop on properties in that area but is unable to present proof of its right to utilize the plans that constitute almost the entirety of its permit application, how can the CZM Committee or BLUA be said to have satisfied their statutory duties if they make no inquiry whatsoever on that point? Instead, they potentially approved permit applications based upon plans that were clearly part of a dispute as to ownership as well as potential litigation given the language utilized in those letters regarding contractual duties. This was obviously grounds for reversal by BLUA and for further inquiry by CZM.[8]

CONCLUSION

All decisions of CZM and BLUA must rest on substantial evidence in the record. *Conservation Society v. Board of Land Use Appeals*, 21 V.I. 516 (1985). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 520 *citing Richardson v. Pearles*, 402 U.S. 389, 401 (1971). An objective review of the record below fails to reveal substantial evidence that the proposed development is consistent with the findings, goals and policies identified by the Coastal Zone Management Act, for all the reasons set forth above and in the original brief. Both CZM and BLUA then misapplied that

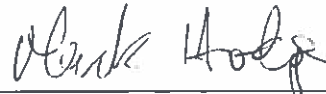
[8] It should be noted that though SEG has noted in other filings certain events following the issuance of the permits (including reference to subsequent action on SEG's federal grant), SEG has never, whether before the CZM Committee, BLUA, or this Court, claimed that this dispute as to ownership of (and the right to use) those plans has ever been resolved.

insufficient evidence to the requirements of the relevant statutes. Finally, CZM and BLUA did so in an arbitrary and capricious manner that represented a clear abuse of discretion. Accordingly, the Court should reverse the decisions below.

WHEREFORE, the Petitioner respectfully requests that the Court enter a Judgment vacating the decision of the BLUA and reversing the Decision of the St. John Coastal Zone Management Committee rendered on October 10, 2014 in the application of the Summer's End Group, LLC (the "applicant") for permit applications CZJ-4-14(W) and CZJ-3-14(L).

Dated: December 16, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this 16th day of December, 2016, a true and exact copy of the foregoing was sent via first class mail, postage pre-paid and via electronic mail to the following counsel of record:

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