IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VIRGIN ISLANDS CONSERVATION SOCIETY,	)	
Petitioner	)	
Vs.	)	Case No.: ST-16-CV-395
VIRGIN ISLANDS BOARD OF LAND USE APPEALS,	)	
Respondent	)	
	)	
MORAVIAN CHURCH CONFERENCE OF THE	)	
VIRGIN ISLANDS,	)	
Petitioner	)	
Vs.	)	Case No.: ST-16-CV-428
Virgin Islands Board of Land Use Appeals,	)	
Respondent	)	
	)	

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SUPERIOR COURT

CONSOLIDATED INITIAL OPPOSITION TO WRITS OF REVIEW

Comes now the Summer's End Group, LLC, by and through its attorneys (Law Offices of John H. Benham, P.C.; John H. Benham and Boyd L Sprehn, Esqs. Of Counsel) to move this Court to grant intervention in these consolidated petitions for writs of review. Summer's End Group, LLC ("Summer's End) is the real party in interest, in that it was the applicant for and recipient of "water" Permit No. CZJ-4-14(W) and "land" Permit No. CZJ-3-14(L).

Summer's End only received the Amended Petition and Memorandum of Law of the Moravian Church on Thursday, November 10, 2016, through the graces of the Solicitor General's offices. Consequently, this response will be brief.

Rather than repeating it here, SEG joins in the Solicitor's Standard of Review and Statement of Facts, contained within its Opposition filed on November 14, 2016. SEG notes that these permit applications were filed in April 2014. Applicant SEG and Coastal Zone Management Committee for St. John then issued all appropriate public notices, held all required public hearings, provided opportunities for comment and submission of information. On approval of its applications, SEG then endured a lengthy process before the Board of Land Use Appeals. With the conclusion of that matter, we have now received petitions for writs of review before this Court. We are now 29 months removed from the application, and the process continues, despite statutory limits intended to avoid this sort of endless process.

PETITIONERS HAVE NOT POSTED A BOND IN ACCORDANCE WITH SUPERIOR COURT RULE 15:

Superior Court Rule of Procedure 15 provides, in relevant part:

> **(a)** A writ of review may be granted by the Court upon the petition of any person aggrieved by the decision or determination of an officer, board, commission, authority or tribunal. Such petition shall be filed within 30 days after the date of the decision or determination complained of and shall recite such decision or determination and set forth the errors alleged to have been committed therein. The petition shall be signed by the petitioner or his attorney, and shall be accompanied by the certificate of the attorney that he has examined the process or proceeding and the decision or determination therein sought to be reviewed, that the same is in his opinion erroneous and that the petition is not filed for delay.
>
> **(b)** *Before granting the writ the Court shall require the petitioner to post a surety bond* subject to its approval and in the amount to be fixed by the Court in order to ensure that the petitioner will obey the determination on or decision sought to be reviewed and perform his obligations thereunder in case it is affirmed by the Court upon review.

No bond has been set of posted in this matter. The on-going costs of these appeals is substantial. The project has now been delayed more than 2 years from approval of the CZM permits.

INCLUSION OF ADDITIONAL MATERIAL IS IMPROPER

We must also note that the both the Moravian Church Conference and the VI Conservation Society ("VICS") seek to include within the record of this proceeding additional information that was not introduced before the Coastal Zone Management Committee. The regulations adopted to implement the Coastal Zone Management Act in Sec. 914-6 provides that the "original papers and exhibits filed in the proceeding below constitute the record."

These efforts are in direct conflict with that regulation, the policies behind the regulation, and standard administrative law practice. Each reference to a document, statement or allegation dated after October 1, 2014 is an attempt to expand the record post hoc. The effect of permitting these items to be considered is to place allegations or documents before this Court that were not provided to the CZM Committee or the Board, and so far as we can tell, did not exist at the time of the proceeding below. Consequently, it is not part of the certified record, and should not be admitted in this proceeding.

In the case of the *Environmental Association Of St. Thomas-St. John And The League Of Women Voters vs. The Virgin Islands Board Of Land Use Appeals, The St. Thomas Coastal Zone Management, And The Cove At Smith Bay*, 31 VI 9; 1994 VI LEXIS 19; 885 F.Supp. 792 (1994), the Court discussed both the standard of review and the record before the Board of Land Use Appeals. In that case, the Board had taken action when CZM had failed to act within the statutory timelines. In conducting its review, the Court outlined the differing standards for review at each of the potential levels of review. In discussing the Board, the Court stated:

> The standard of review applied by the Board to CZM committee actions authorizes the Board to review any decision or action of the Committee in which the findings, inference, conclusions or decisions are in any way:
> {31 V.I. 13} "in violation of the United States Constitution, The Revised Organic Act of 1954, or any statutory provisions, or exceeds the statutory authority of the

> Board, or the commission, Committee; or was determined upon unlawful procedure; or is erroneous *in view of the standard of evidence the whole record*; or arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion." V.I.R. & Regs. tit. 12, Section 914-3 [*Italics* added.]

There are sound policy reasons for limiting appellate review to the record before the Committee. Opening the record to new evidence or testimony would discourage interested parties from presenting all information to the responsible body, if it could be held back and utilized at a later date.

COMMISSIONER MORRISETTE ACTED PROPERLY TO PERMIT THE CZM TO PERFORM ITS FUNCTION.

Petitioners argue that Commissioner Brion Morrisette acted improperly in being present for the CZM-STJ hearings and meetings which considered these permits. Nothing could be further from the truth; Commissioner Morrisette's behavior was legal, proper and the continued attacks on him are inappropriate.

Commissioner Morrisette disclosed, at the beginning of the hearing on August 20, 2014, and again at the October 1, 2014 hearing, the existence of a conflict of interest, and recused himself from the discussion and voting on the permits. Commissioner Morrisette remained present however, because the CZM-STJ requires the presence of three commissioners to have a quorum. Although by law there are to be five commissioners for each island, in 2014 there were only three commissioners on St. John – the legal minimum for a quorum. As the CZM-STJ had only three current commissioners, had Commissioner Morrisette left, the CZM-STJ would have had no ability to proceed. Consequently, Commissioner Morrisette remained present and silent, enduring abuse from several speakers, to permit the Commission to do its job.

If, as urged by Petitioners, Commissioner Morrisette had left and broken the quorum, then the permits would have been issued as a matter of law. Title 12, Section 910(d) provides in relevant part:

> **(4)** The appropriate Committee of the Commission shall act upon a major coastal zone permit application within thirty days after the conclusion of the public hearing required by paragraph (2) of this subsection, and the Commissioner shall act upon a minor coastal zone permit application within sixty days after receipt thereof. *Failure of the appropriate Committee of the Commission or the Commissioner to act within any time limit specified in this paragraph shall constitute an action taken and shall be deemed an approval of any such application.* A copy of the decision of the appropriate Committee of the Commission or the Commissioner, whichever is applicable, on an application for a coastal zone permit shall be transmitted in writing to the applicant and to any person who requests a copy thereof.
> [Emphasis added.]

Commissioner Morrisette's mere presence preserved the quorum, allowed the Commission to take action and to impose a variety of conditions on the permits, which would not have occurred if he left.

CUMULATIVE IMPACTS WERE CONSIDERED, BUT DO NOT REQUIRE SPECULATION.

The VICS argument on cumulative impacts is essentially in three parts: (i) the permits should not have been considered separately; (ii) the Commission failed to consider the Moravian Church's project; (iii) that the Commission's adoption of the CZM Staff's recommended findings is inappropriate; and (iv) BLA acted *ultra vires* in consolidating the permits.

First, the permits were considered together at all times. Every hearing was joint. All comments were received an applied together. We must note that a single certified record has been submitted by CZM and BLA on this matter. This argument is a classic example of elevating form over substance. SEG complied with CZM requirements in submitting its

applications, which required significant redundancy, for the land and water permits. And SEG agreed that these two permits constitute a single project – there will be no shoreside development without a marina in the water; there will be no marina if no shoreside support is provided.

Petitioners also argue that the CZM-STJ failed to consider the cumulative impacts of this project with a possible project by the Moravian Church in another portion of Coral Harbor. The first and most significant failure of this argument is no such project was pending. Although the Moravian Church Conference (*not* the local congregants) has discussed for many years a potential project, no such application had been filed or was pending. It is difficult, if not impossible to consider the cumulative impacts of a project which does not exist, has not been applied for, and may never occur. The cumulative impacts of that project will have to be assessed when and if a permit is ever sought; anything prior to that time would be merely speculative. Put another way, there is no reason to deny the Virgin Islands economic development on the mere speculation that other opportunities may occur in the future.

VICS further argues that the Commission's adoption of the findings recommended by CZM Staff in its report is improper. VICS also suggests, but does not directly say, that adoption by Staff of the language utilized in the Environmental Assessment Reports ("EARs") is improper. Neither is accurate. The EARs are required documents in the permitting process, and a required to be submitted by competent scientific personnel. Although both VICS and the Moravian Church make repeated references to comments on those reports, no countervailing reports were submitted – only critiques. In addition, in both of these writ petitions and supporting information, reference is made only to that testimony of the critics; no mention is made of the extensive and detailed response submitted by SEG on September 24, 2014 (Appendix 500 through 584), addressing each and every one of the comments submitted. CZM

Staff then performed their analysis of the evidence submitted before them – the EARs, applications, supporting documents, comments and critiques, and responses to those critiques. CZM Staff and the Commissioners are charged with weighing the evidence before them and making decisions based on substantial evidence. Despite the Petitioners imprecations, there is absolutely no evidence that CZM failed to do its duty, in weighing the evidence, recommending findings and issuing the permit with appropriate conditions.

All parties agreed at the BLA hearing that the permits are inextricably linked, and BLA has imposed the additional condition that the permits must proceed together, which was agreed to by SEG, the project applicant on the record, VICS now argues that BLA acted in excess of its authority. Again, elevating form over substance, it appears that the only action which would satisfy BLA is the revocation of both permits and beginning the entire process over again.

SEG HAD AUTHORITY TO SIGN APPLICATIONS.

VICS next argues that the applications were not signed by the owners of each affected parcel of land. But in each case, it concedes that the applicant had leases and/or powers of attorney for each of the parcels, which specifically granted such power to SEG. VICS also suggests that SEG either no longer has such control, or that it might not have such control, based on this long and drawn out appeals process. Of course, such issues are improper, as it would require the admission of information not before the Commission, BLA or this Court. As discussed *supra*, expansion of the record is improper, and the question is whether adequate evidence was adduced as of October 1, 2014. It was adequate, and demonstrated legal control of the properties; the effect of the delay tactics in the appeal cannot be used to invalidate the legally sufficient proof.

CZM FOUND THE APPLICATIONS, AND THE EARS SUFFICIENT AND FEASIBLE MITIGATION MEASURES ARE INCLUDED.

Although the Petitioners again, for the third time, allege that the EARs were insufficient, CZM Staff (through its Final Report), and the CZM-STJ found the EARs sufficient. BLA found substantial evidence supported the CZM-STJ conclusions. The Certified Record of Proceedings in this matter does not fully show the level of detail submitted by SEG in support of its application (by title, full documents are presented in the Appendix). However, after requesting additional information, on June 18, 2004, CZM stated that the applications were complete, including all the supporting studies.

In just one example, the project includes, at the request of DPNR, a new 75 vessel mooring field. VICS argues that there is no evidence that the proposed mooring field would comply with the Mooring and Anchoring Act, 25 VIC Sec. 401 et seq. However, the record undercuts that argument in two ways. At the time of the hearings, there had been considerable press about the absence of compliance with the Mooring and Anchoring Act by the vessels then present in Coral Harbor. Water quality was severely deteriorated; very few of the more than 100 boats then in Coral Harbor had current mooring permits or even valid VI registrations; numerous sunken boats were located within the bay; no pump out or waste facilities were available in the bay; and seagrasses were severely impacted by the turbidity (opacity) of the water and by the use of poorly constructed moorings. The Commission found that the proposed mooring field would be a mitigation measure and that it would afford a reasonable opportunity to *improve* the health of Coral Harbor.

A second example, argued extensively by the Moravian Church, is that failure to address the potential trimming of newly planted mangroves in the future is an error as a matter of law. The argument is both specious and speculative.

First, although historically the shoreline in the project area likely contained mangroves, there have not been any present for many years, with a roadway and riprap lining the shoreline. SEG proposed planting mangroves along that shoreline, to restore habitat for sealife, and to assist in water quality improvement. Commentator Sharon Couldren *interpreted* the application as "appear[ing] to indicate" that the planted mangroves will be trimmed. (Moravian Church at pg. 9.) The permits, as issued, state the "permit does not allow the removal of mangroves, if trimming of mangroves are required the permittee must obtain a permit from [DPNR]." (Moravian Church at pg. 9.)

No request for trimming of mangroves is included in the application. CZM's permit language is a recitation of the actual requirements of the law; in effect, CZM could have simply said "Permittee shall comply with the law." CZM did not permit the trimming of currently non-existent mangroves, nor has SEG requested such permission. At this point, no information is available to indicate that the mangrove planting will be the hoped for success, that any subsequent trimming will be sought, if so how much trimming will be required, and that any trimming will occur within the term of these permits. The staggering number of hypotheticals reaches levels that are difficult to count. Laws must be interpreted in a manner which does not lead to absurd results.

The Moravian Church has also challenged the financial viability of the project, and accused CZM-STJ of ignoring this issue. That is simply not true. The permits require that bonds

be posted to cover either the costs of completion or removal of the project, if it is not completed by SEG. Those are examples of the specific requirements that are included to address valid public concerns.

An additional issue raised by the Moravian Church is an alleged violation of the Church's littoral rights. As first alleged "riparian rights," SEG first responded to that issue with a letter from Benham & Chan (Appendix at 139 through 141). The project does not violate any such rights. Access to the waters remains open from the Moravian Churches properties – both directly from the shoreline and to deep waters. The Moravian Church does not have a right to the use of the submerged lands held in trust by the Government of the Virgin Islands, which remains at the discretion of the appropriate government bodies – in this case, CZM, the Governor and the Legislature.

CONCLUSION

Petitioners have not demonstrated that the St. John Committee of the Coastal Zone Management or the Board of Land Use Appeals have failed to perform their responsibilities. Petitioners have repeated here the same issues and arguments that have been presented in writing to CZM, in the public hearings, and before the Board of Land Use Appeals. Those issues and arguments have either been addressed by the CZM-STJ, CZM Staff, SEG, or BLA, or have been rejected.

The standard here is not whether project opponents have raised issues or made allegations, but whether the decisions of the CZM-STJ and BLA have complied with the law, and if those decisions are supported by substantial evidence. Again, it is not the job of this court to reweigh the evidence and determine if the court would have reached the same conclusions, but rather if those agencies applied the law correctly and had substantial evidence in the record.

Although neither petitioner cited any countervailing evidence in the record, the Appendix contains hundreds of pages of supporting and substantial evidence, along with substantial testimony before CZM-STJ, in support of the issuance of these permits.

This matter is now two and half years old. Summer's End Group has been subject to long delays in the BLA process. The petitioners have not posted any bonds or security to address the additional costs that are being incurred by continuing delays.

The petitioners have failed to provide evidence that the Coastal Zone Committee of St. John or the Board of Land Use Appeals have failed to perfom their functions. Instead, petitioners have cite concerns that were addressed. While petitioners are entitled to disagree with the conclusions reached, they are not entitled to further delay a project that is supported by substantial evidence in the record, and findings which comply with the specifics and the goals of the Coastal Zone Management Act.

Dated: November 16, 2016

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Certificate of Service

It is hereby certified that an exact copy of the foregoing Brief of Intervenor Summer's End Group, LLC Brief in Opposition to Petitions for Writ of Review was served on the following via by email at the below addresses on November 16, 2016:

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