SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS & ST. JOHN

VIRGIN ISLANDS CONSERVATION SOCIETY, INC., PETITIONER, V. VIRGIN ISLANDS BOARD OF LAND USE APPEALS, RESPONDENT	**CASE NO. ST-16-CV-395**
MORAVIAN CHURCH CONFERENCE OF THE VIRGIN ISLANDS, PETITIONER, V. ST. JOHN COASTAL ZONE MANAGEMENT COMMITTEE AND BOARD OF LAND USE APPEALS, RESPONDENTS	**CASE NO. ST-16-CV-428**

VIRGIN ISLANDS CONSERVATION SOCIETY'S REPLY TO OPPOSITIONS BY SUMMERS END GROUP AND V.I. BOARD OF LAND USE APPEALS TO BRIEFS IN SUPPORT OF WRITS OF REVIEW

The Virgin Islands Conservation Society ("VICS") submits this single reply to the opposition briefs filed by Summers End Group ("SEG") and the Virgin Islands Board of Land Use Appeals ("VIBLUA")/St. John Coastal Zone Management Committee ("CZM"). The opposition briefs are particularly noteworthy for two methods that they

employ to avoid the issues raised by VICS. First, they speak in broad platitudes and do not address specific issues (nor cite to record evidence in support); second, they simply ignore a host of issues raised by VICS. Because SEG covered more issues in its opposition brief than did VIBLUA/CZM (and SEG includes all issues raised by VIBLUA/CZM), VICS will respond in the order of issues addressed by SEG.

NO BOND IS NECESSARY IN THIS CASE

SEG argues that the Court must require VICS to post surety bond. However, the surety bond requirement set forth in Superior Court Rule 15(b) is "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." Here, the case has two possible outcomes: (1) the Court could reverse or vacate the decision of the Coastal Zone Management Commission or the Virgin Islands Board of Land Use Appeals; or, (2) it could affirm the proceedings below. In either instance, there would be no obligations imposed upon VICS for it to perform.

Rule 15(b) is evidently intended for the situation where a petitioner is challenging an administrative order directing the petitioner to act or refrain from acting (*e.g.* an Order from DPNR to cease and desist land clearing without an appropriate permit). Rule 15(b) simply has no applicability in a situation where an aggrieved party is challenging the issuance of a CZM permit. Therefore, no bond is necessary and no bond should be required.

THE COURT MAY TAKE APPELLATE JUDICIAL NOTICE OF THE ASSIGNMENT OF THE CERTIFICATE OF SALE FOR PARCEL 13A

SEG takes issue with VICS asking this Court to take judicial notice of events that have occurred since the closure of the public record at the CZM stage of the proceeding. As a general principle, SEG is correct that the Court's review is based upon the evidence that is of record at the conclusion of the CZM hearing process. This principle is also true in the normal appellate process; yet, the Virgin Islands Supreme Court takes judicial notice on appeal. *See, e.g., Haynes v. Ottley*, 61 V.I. 547, 558 (2014) (taking judicial notice on appeal of a fact); *Mapp v. Fawkes*, 61 V.I. 521, 535 n.13 (2014) (taking judicial notice on appeal of facts). And, at least one court in the Virgin Islands has taken judicial notice in a writ of review proceeding in the past. *See McCarthy v. Monte*, 1991 U.S. Dis. LEXIS 10029 (D.V.I. App. Div. June 17, 1991) (taking judicial notice in writ of review proceeding).

The *Haynes* decision is particularly instructive because the Supreme Court of the Virgin Islands in *Haynes* took judicial notice of a fact on appeal in order to determine whether the case was moot. Here, this Court is not required to act in a vacuum and it has a duty to determine whether or not the proceeding is moot due to subsequent events. VICS has offered evidence from the Recorder of Deeds office (a source "whose accuracy cannot be questioned reasonably" (*Rodriguez v. Rodriguez-Ramos*, 64 V.I. 447, 457 (2014))), that establishes unequivocally that key property (Parcel 13A) required for SEG's proposal is no longer controlled by SEG because it was sold in a Marshal's sale. Surely this Court is entitled to take judicial notice of that fact and

therefore determine that it need not resolve all of the issues raised by VICS or the Moravian Church Conference since the sale of a key piece of property essential to the SEG development has been sold and thus can no longer be developed by SEG. In other words, this single assignment of property makes it impossible for SEG to develop the property in accordance with the permits.

Moreover, the Court can also take judicial notice of the sale of Parcel 13A because it is not being offered as evidence to be reviewed as part of the Court's review of the permit application; rather, it is simply confirmatory of what is already in the record: That the powers of attorney relied upon by SEG were (a) not irrevocable and (b) did not allow SEG to develop the property. The Court can readily determine that the powers of attorney are insufficient just from the face of each power of attorney. Taking judicial notice that Parcel 13A was sold does not add to the record; it merely adds support for a conclusion that can be drawn from the powers of attorney themselves.

COMMISSIONER MORRISETTE'S FAILURE TO FULLY RECUSE HIMSELF

It is interesting – and telling – that the Respondents avoid the express language of 12 V.I.R.&R. 904(6)(d) when arguing that Commissioner Morrisette properly participated in the CZM hearings. 12 V.I.R.&R. § 904-6(d) prohibits a commission member from using his "official position to aid or impede the progress of or approval of a Coastal Zone application in order to further his own pecuniary interest, ..." It is undisputed that Commissioner Morrisette had a pecuniary interest in the application. Thus, the only issue is whether Commissioner Morrisette used his official position to aid or impede the progress of the application.

VIBLUA/CZM admit in their brief that Commissioner Morrisette "appear[ed] for the proceedings in order to ensure a quorum thereby enabling the public hearing and decision meeting *to move forward*." VIBLUA/CZM brief at p.10 (emphasis added). SEG likewise acknowledges that Commissioner Morrisette's presence was essential because otherwise, the review of permit application "had no ability to proceed." SEG brief at p.4. In other words, Commissioner Morrisette used his official position to aid the progress of the application – an application in which he holds a pecuniary interest as the lessor of the land that is the subject of the permit.

SEG further argues that if Commissioner Morrisette had not provided the quorum for the decisional meeting, then the permits would have been issued as a matter of law. SEG brief at p.5. Thus, SEG actually suggests that the Commissioner's participation was a good thing. But, that argument puts the cart before the horse – had Commissioner Morrisette not participated in the initial public hearing, the permit could not have moved forward to the decisional meeting; and, consequently, the CZM Committee would never had been placed in the position of being required to act on the CZM permit at the decisional meeting on pain of an automatic issuance of the permit if it did not reach a decision within the time period established by statute.

An arsonist who starts a fire is not a hero for then putting the fire out. Commissioner Morrisette's improper participation in the public hearing started the fire; he is not a hero for then also participating in the decisional meeting and mitigating some of the consequences of the fire he helped start.

CUMULATIVE IMPACTS WERE NOT CONSIDERED

SEG's protests notwithstanding, consideration of the cumulative impacts of potential development in an area is required by law. Environmental development law has evolved from the days when the first person to develop a pristine site got free rein to do what ever he wanted and then each successive developer was held back and given an ever shrinking piece of the pie due to the established development in the area.

Although the Respondents *claim* that CZM considered the cumulative impacts of the water and land permits together, they do not *show* that it did so. By contrast, VICS gave a specific example (at p.10 of its initial brief) from the land permit application where there is no discussion of the impact on water quality of runoff from land clearing activities. And with no discussion at all, there certainly was no discussion of the combined – cumulative – impact of runoff during construction of the land buildings while water quality is simultaneously being impacted by pile driving or other marine construction.

SEG MAY HAVE HAD AUTHORITY TO SIGN THE APPLICATIONS BUT THAT AUTHORITY WAS NOT IRREVOCABLE AND IT WAS NOT AUTHORITY TO *DEVELOP*

Perhaps the most glaring defect in SEG's application – and it alone is a fatal defect – is SEG's failure to comply with 12 V.I.R.&R. § 910-3(b). Section 910-3(b) requires the applicant to prove that it has the right to *develop* the property. SEG only had authority to *apply* for a CZM permit. The powers of attorney given to SEG did not allow it to develop the property. The Respondents do not even bother attempting to argue that

SEG had the power to develop the property. They can point to no document that gives SEG that authority.

Further, the Respondents do not address the undisputed fact that rather than being irrevocable as required (APPX-75), the powers of attorney were subject to specific expiration dates and were revocable by the principal – whichever came first. Thus they were quite obviously revocable. All of the powers of attorney are now expired based upon the expiration dates in them – if they were not revoked before the expiration date.

**THE EARS MUST COMPLY WITH THE CZMA.
IT DOES NOT MATTER WHAT STAFF, CZM OR BLUA "FOUND" IF
THE EARS ARE LEGALLY INSUFFICIENT.**

The EARs must comply with the requirements set forth in the Coastal Zone Management Act ("CZMA"). *See* 12 V.I.C. § 9021(o). The Respondents place great reliance upon the assertion that CZM staff or the CZM Committee found that the EARs were sufficient. However, only the *facts* found by the CZM Committee are entitled to deference. The legal determination as to whether the permit is sufficient based upon the facts found by the CZM Committee is a legal question and is subject to review by this Court. *See, e.g., Virgin Islands Conservation Society v. V.I. Board of Land Use Appeals*, 2007 U.S. Dist. LEXIS 91458 (D.V.I. Oct. 19, 2007) (addressing challenge to legal sufficiency of an EAR and remanding because the CZM Committee had not issued findings of fact that the court could review as part of its assessment of the legal sufficiency of the EAR).

The findings of fact in this case are nothing more than conclusions of law. The CZM Committee simply reached legal conclusions (APPX-644) and adopted the Staff Report "to support the committee's *findings*." *Id.* (emphasis added). There are no underlying factual findings by the CZM Committee.

THE CZMA REQUIRES THAT IMPACTS BE MITIGATED TO THE MAXIMUM EXTENT POSSIBLE. MERE INCLUSION OF *SOME* FEASIBLE MITIGATION MEASURES IS NOT THE STANDARD.

SEG's brief includes at page 8 a section heading that includes the phrase "feasible mitigation measures are included" [in the EAR]. SEG then discusses one aspect of its proposal that it believes qualifies as a mitigation measure. The CZMA requires far more. A CZM permit "shall be denied" unless the CZM Committee (or Commissioner of DPNR is some circumstances) finds that "the development as finally proposed *incorporates to the maximum extent feasible mitigation measures* to substantially lessen or eliminate any and all adverse environmental impacts of the development." 12 V.I.C. § 910(a)(2)(B). Thus, it is not enough to simply have a few mitigation measures. The applicant must demonstrate, and the Committee must find, that the proposed development incorporates mitigation measures to the maximum extent feasible. For the reasons set forth in VICS's Memorandum of Law in Support of Writ of Review, SEG's EAR fails miserably in that regard.

CZM DID NOT MAKE THE REQUISITE FINDINGS OF FACT

In VICS's Memorandum of Law in Support of Writ of Review, it pointed out that the CZM Committee failed to make any of the conclusions required by 12 V.I.C. §

911(c)(3) through (7). Without these mandatory conclusions, a water permit may not be granted. *See* 12 V.I.C. § 911(c) ("The appropriate Committee of the Commission or the Commissioner *shall deny* an application under section 910 hereof for a coastal zone permit which includes development or occupancy of trust lands or other submerged or filled lands, *unless it or he makes all of the following findings*:" (Emphasis added.)). Findings 3 through 7 were not made. The Respondents do not argue (nor could they) that the findings were made. This omission alone requires that the permits be vacated.

BOTH RESPONDENTS IGNORE NUMEROUS ARGUMENTS RAISED BY VICS

Respondents do not even attempt to address numerous arguments raised by VICS in its Memorandum of Law in Support of Writ of Review. VICS will not re-argue those points, but lists them below so that it is clear exactly what additional issues are unrebutted:

- The EAR does not address the sewage requirements for entire project;
- There is no plan for implementation of and maintenance of sediment and run off control devices;
- There information regarding alternatives to the proposed development is grossly inadequate;
- The EAR does not address particulate matter to be released into the air during construction;
- The water quality information is insufficient (and in particular the baseline information is out-of-date and does not reflect the current water quality in Coral

Bay and the methodology to be used for water quality monitoring is not disclosed);

- The EAR for the water application does not adequately analyze the impact of wave action on the proposed development;
- The EARs do not assess the impact of increased marine traffic caused by the development;
- The EARs do not disclose any hurricane contingency plans or information as to how the development will deal with the environmental and safety risks caused by hurricanes;
- The seagrass mitigation plan is inadequate and there was insufficient information to allow the CZM Committee to determine whether it was feasible;
- The EARs lack sufficient information about the mooring field
- SEG did not properly address the impact upon endangered species in the EAR;
- The EAR does not discuss the potential impact of the development upon nearby significant areas of marine resources;
- SEG failed to comply with CZM's Supplemental EAR Guidelines for Marinas;
- The EAR does not assess the impact of the development upon the fisheries;
- The EAR does not address the impact of the project upon shoreline access for fishermen;
- The EAR fails to provide factual or evidentiary support for claims of economic benefit;
- SEG provided no information that would allow the CZM Committee to assess the

environmental impact of driving 1,333 piles into the submerged lands;

- The water permit is subject to improper conditions;
- VIBLUA lacked the authority to consolidate the two permits.

CONCLUSION

The permits in this case should never have been issued. For all of the reasons stated in this Reply and in VICS's Memorandum in Support of Writ of Review, the Court should reverse the decision of the Board of Land Use Appeals and remand with instructions that the Board of Land Use Appeals remand the permits to CZM-STJ with instructions that the Permits be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing documents were served via U.S. Postal Service first class mail, postage prepaid, on December 16, 2016, upon the following:

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