

**THE UNITED STATES VIRGIN ISLANDS
BOARD OF LAND USE APPEALS**

Virgin Islands Conservation Society, Inc.,	)	
Appellant	)	
	)	Permit No. CZJ-03-14 (W)
v.	)	Permit No. CZJ-03-14 (L)
	)	
St. John Committee of the Virgin Islands	)	BLUA Appeal No. 002/2020
Coastal Zone Management Commission	)	
Appellee	)	
	)	

The Summer's End Group, LLC's Motion to Dismiss

Comes now The Summer's End Group, LLC, by and through its counsel, the Law Office of John H. Benham, P.C., and moves the Board of Land Use Appeals ("BLUA") to dismiss the Notice of Appeal filed by the Virgin Islands Conservation Society ("VICS") for lack of subject matter jurisdiction. The Summer's End Group, LLC ("SEG" or "Summer's End") is an indispensable and real party in interest in this matter as it is the project applicant and the recipient and current holder of CZM Permit No. CZJ-03-14 (W) and CZJ-03-14 (L).

VICS has alleged that it is challenging a decision of the St. John Coastal Zone Management Committee purportedly made on December 16, 2019; no such Committee decision or action was taken or required. Instead, what the VICS (with the direct participation of St. John CZM Committee Members David Silverman and Rafe Boulon) are really challenging are the June 6, 2016 Decision and Order of this Board of Land Use Appeals, and the actions of Governor Albert Bryan, Jr. taken pursuant to the Coastal Zone Management Act (Title 12, Chapter 21 of the Virgin Islands Code; "CZM Act").

The June 6, 2016 Decision and Order of the BLUA cannot be further challenged by another administrative appeal to the BLUA more than three years after the order was rendered and published.

The Virgin Islands Legislature has the authority and the responsibility to determine the subject matter jurisdiction of the courts and administrative bodies of the Virgin Islands. [cites to be inserted.] The Legislature, through Section 914 of the CZM Act, has limited the jurisdiction of the Board of Land Use Appeals.

The CZM Act provides for the review of actions by the Board of Land Use Appeals in Section 914. That section, provides, in relevant part:

(a) *Administrative appeals or coastal zone permit applications.* Notwithstanding any provision of law to the contrary, any aggrieved person may file an appeal of **an action by the Commission, its Committees, or the Commissioner** taken pursuant to section 910 or 911 of this chapter within forty-five days thereof with the Board of Land Use Appeals, and such appeal shall be governed solely by the provisions of this section.

[Italics added.]

As clearly stated, the Board has no jurisdiction to hear challenges to the actions of the Governor, as he is neither “the Commission^[1], its Committees^[2] or the Commissioner^[3].”

Major Coastal Zone Permits No. CZJ-04-14-(W) and CZM-03-14(L) have remained valid and in good standing, with the following actions:

- **2014 approval by the St. John CZM Committee,**
- 2014 approval by Governor John P. DeJongh, Jr.,

¹ CZM Act, Section 902, Definitions, provides in part:

(j) Commission means the Coastal Zone Management Commission as created by section 904 of this chapter.

² CZM Act, Section 904 provides in part:

(b) There are created within the Coastal Zone Management Commission three Commission Committees: one of such Committees shall consist of the members who reside on St. Croix, one of such Committees shall consist of the members who reside on St. Thomas and one of such Committees shall consist of members who reside on St. John. Each Committee shall exercise the full authority of the Commission over the issuance of Coastal Zone Permits within the jurisdiction of the Commission pertaining solely to the respective resident island of the Committee. Each Committee shall elect a Chairman from its members. A quorum of each Coastal Zone Management Committee shall consist of three of its members. A majority of those present shall decide on all matters before a Commission Committee.

³ CZM Act, Section 902, Definitions, provides in part:

(k) Commissioner means the Commissioner of Conservation and Cultural Affairs.

The annotations in the Virgin Islands Code state “The reference to the Commissioner of Conservation and Cultural Affairs in subsection (k) is deemed to refer and apply to the Commissioner of Planning and Natural Resources pursuant to Act June 24, 1987, No. 5265, 301, Sess. L. 1987, p. 29. See section 407 of Title 3.”

- 2016 affirmation, Decision and Order by the Board of Land Use Appeals, and
- 2019 approval by Governor Albert Bryan Jr and issuance of the consolidated permit in the fulfillment of the Board of Land Use Decision and Order.

These still valid permits were consolidated by order from this Board of Land Use Appeals in your June 6, 2016 Decision and Order and requires no further vote or approvals by St. John CZM Committee. As clearly stated in your 2016 Decision and Order, these permits successfully followed the CZM Act. requirements for approval by the St. John CZM Committee, there is no requirement or option for additional consideration within the VI Code or the CZM Act. The 2014 permits were correctly joined as an administrative function in Consolidated Major Coastal Zone Management Permit CZJ-04-14(W) & CZJ-03-14(L) on December 16, 2019 by Governor Albert Bryan Jr., fulfilling the Decision and Order by the Board of Land Use Appeals. The administrative consolidation of the permits into a single permit was finalized with the signatures of Governor Albert Bryan Jr., the St. John CZM Committee Chairman Andrew Penn, and the applicant The Summer's End Group. The Consolidated Major Coastal Zone Management Permit CZJ-04-14(W) & CZJ-03-14(L) has finalized approvals by the St. John CZM Committee in 2014, two Governors of the Virgin Islands, has been affirmed and consolidated unanimously by the Board of Land Use Appeals and is currently before the Virgin Islands Legislature as is required by the CZM Act and pending final approval of the submerged lands lease and ratification. As discussed in detail below, the action of the Board of Land Use Appeals in consolidating those permits did not and does not require starting the permitting process anew, or even a remand to the St. John Committee.

The Decision And Order of the BLUA is final and cannot be challenged by another administrative appeal to the BLUA past the deadline given for appeal. In relevant part, the June 6, 2016 order provided:

DECISION AND ORDER

...For the following reasons, the BLUA finds that the land and water permits are to be consolidated as one permit, and affirms the decision of the St. John Committee of the Virgins Islands Coastal Zone Management Commission ("CZM")

...

13) In affirming CZM's decision to issue the permits to SEG, the BLUA also concurs with the Moravian Church Conference's argument that the Permits **should be consolidated as one (1) permit application.**

14) As Moravian Church correctly identified, the Environmental Assessment Reports for each application repeatedly state that each Permit is dependent on the other. Because the Land and the Water permit applications are mutually dependent developments, **they must be treated as one permit application.**

...

ORDERED that the Permits at issue here, CZJ-03-14(L) and CZJ-4-14(W), **be consolidated,** and it is further

ORDERED that the St. John Committee of the Virgin Islands Coastal Zone Management Commission approval and issuance of the Permits Nos. CZJ-03-14(L) and CZJ-04-14(W) is affirmed.

The Board of Land Use Appeals had **full power to impose this condition.** Section 914(d) provides, in relevant part:

*...If the Board grants an application for a coastal zone permit, **the Board shall impose such reasonable terms and conditions on such permit as it deems necessary to achieve the objectives and purposes of this chapter.***

That action is now final, and at no time has any party – SEG, the project opponents (VICS⁴; Moravian Church Conference⁵), the Department of Planning and Natural Resources, or the Department of Justice – argued that it was not within the power of the Board of Land Use Appeals to do so. In fact, the law clearly authorized the BLUA to act in the 2014 appeal – BLUA had the power and authority to order the consolidation, which was effective on BLUA's order. **No appeal has been taken challenging that consolidation, and the time to challenge that affirmation and consolidation has long since expired.**

As properly ordered, the consolidated permit is valid, in good standing, in compliance of the rules and regulations of the V.I. Code and CZM Act and presently pending ratification by the

⁴ In its 2014 Notice of Appeal, Exhibit B – Statement of Complaint, at page 27, VICS argued: "The Committee failed to consider the cumulative impacts of the project pursuant to 12 V.I.C. § 903, which requires the Committee to assure the orderly, balanced utilization and conservation of the coastal zone. First, the land and water permits were separated..."

⁵ In its 2014 Petition of Appeal, the Moravian Church Conference identified as its first issue: "Whether CZM erred in failing to consolidate CZM Permit Applications CZJ-4-14L and CZJ-4-14W to reflect the mutually dependent nature of the applicant's proposed development?"

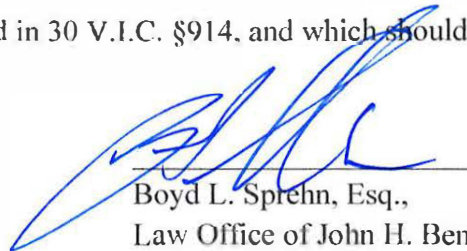
33rd Legislature.

The only evidence that has been submitted by VICS that the permits are not valid and in place is a December 10, 2019 letter from Senate President Francis.⁶ However, nothing in the CZM Act has been cited as providing for the Senate President, acting by letter, to invalidate a permit; that is because no such authority exists. Appellant VICS has not, and cannot, cite any action by the Legislature which invalidates the permit. What VICS, Silverman and Boulon are seeking to accomplish here is to obtain a stay on proceedings to prevent action by the Legislature on the pending permit, a stay which in more than three years they have failed to obtain through the writ of review litigation.

The only actions here in violation of the CZM Act are those of Silverman and VICS, who have been engaged in delaying tactics for more than five years.

For the foregoing reasons cited above, the Board of Land Use Appeals has already completed a ruling, issued a Decision and Order on these permits. The 2020 purported Notice of Appeal clearly lacks subject matter jurisdiction as it is challenging the actions of the Governor of the Virgin Islands and seeking to stop the Legislature from acting, which are beyond the scope of this Board's jurisdiction as granted in 30 V.I.C. §914, and which should be dismissed immediately.

Dated: February 21, 2020



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⁶ 2020 Notice of Appeal, within the "Background" section at paragraphs 6-9.

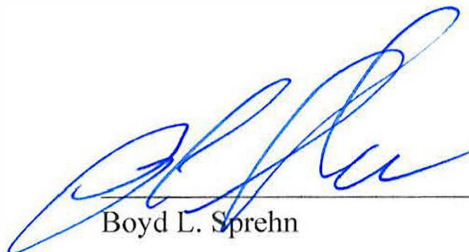
Certificate of Service

It is hereby certified that an exact copy of the foregoing Motion to Dismiss was served on the following via email and US mail at the below addresses on February 21, 2020:

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