

**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)	
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The Summer’s End Group, LLC’s
Opposition to the Virgin Islands Conservation Society’s Appeal
to the Board Of Land Use Appeals

Comes now Intervenor The Summer’s End Group, LLC, by and through its counsel, the Law Office of John H. Benham, P.C. (Boyd Sprehn, Of Counsel), and opposes the appeal of the Virgin Islands Conservation Society (“VICS” or Appellant). The appeal should be denied for three reasons, which apply to all of the arguments and allegations of VICS:

1. The Coastal Zone Act does not provide jurisdiction for this Board to review actions (or inactions) pursuant to the Coastal Zone Management Act except as to the Commission, its Committees, or the Commissioner.
2. The information relied on by VICS is not within the record on appeal and are inadmissible.
3. The allegations and actions (or inactions) alleged have been subject to prior review and are foreclosed from further appeal to this Board.

In addition, today Summer’s End has reviewed the filing of the Department of Justice and joins in the arguments made therein, except as noted herein. For the sake of brevity, arguments in the prior motions and by the Department of Justice will be referred to and not repeated at length here.¹

For each of the above reasons, this matter should be dismissed forthwith.

SUMMARY OF APPROVALS – THE ST. JOHN MARINA

Summer’s End’s permits in this matter were approved by the St. John CZM Committee in October 2014, and then spent 17 months on appeal before the Board of Land Use Appeals before

¹ Nor, for the same reasons, will the attachments be repeated.

being unanimously affirmed. Despite a Superior Court action brought by the Virgin Islands Conservation Society, which has now been pending for four years, no court or administrative body has ever invalidated those permits.

For your convenience, a short history is provided in bullet point summary:

- 2014 April Application for St. John Marina Permits (L) submitted to CZM.
- 2014 April Application for St. John Marina Permits (W) submitted to CZM (Land and water were concurrent filings, per DPNR requirements).
- 2014 June Applications for St. John Marina permits(L) & (W) deemed complete by DPNR/CZM and public notices sent out.
- 2014 June Through August – Public Comments and comments from other agencies received, reviewed and responded.
- 2014 Aug. DPNR/CZM issues staff reports recommending approval of both (L)&(W) permits.
- 2014 Oct. St. John CZM Committee completes review and approves (L)&(W)permits.
- 2014 Nov. Governor de Jongh completes review and approves permits.
- 2014 Dec. VICS files Notice of Appeal with Board of Land Use Appeals.
- 2104-Present U.S. Army Corps of Engineers Permit process on-going, despite delays caused by the Storms of 2017; USACE process cannot be completed until VI permit process completed.
- 2016 Jun BLUA *unanimously* uphold decision of STJ CZM Comm., orders permits be consolidated into one major permit.
- 2016 Sept. VICS and Moravian Church Conference file a writ of review suit in Superior Court.
- 2017 Jan. All briefings complete in Superior Court writ proceeding.
- 2017-19 All efforts by Summer's End to obtain a hearing in Superior Court ignored by VICS/Silverman.
- 2018 July NOAA evaluates and *upholds* DPNR/CZM &STJ CZM Comm. review and approval process.
- 2018 Aug. U.S. Fish & Wildlife Service completes consultation and determines Marina *not likely to adversely affect sea life*.
- 2019 April Governor Bryan completes *review and approves permit*.
- 2019 April 33rd Leg. Receives permit (W) portion from Gov. Bryan and request for approval of submerged lands lease.

- 2019 Oct. 33rd Leg. COW – requests consolidated (L)&(W) permit, and project modifications resulting from the US Army Corps of Engineers permitting process.
- 2019 Dec. Major CZM Permits (L&W) documents merged/consolidated as ordered by BLUA. These permits (L&W) are the same documents reviewed and approved by the St. John CZM Commission and have completed the CZM review process.
- 2019 Dec. Governor Bryan modifies the consolidated permit as requested by 33rd Legislature, as is authorized to do by VI Code Title 12, §911(g).
- 2019 Dec. 33rd Leg. Receives consolidated permit and modification to the consolidated permit as they requested by Governor Bryan.

LACK OF JURISDICTION

The Summer's End Group, LLC ("SEG" or "Summer's End") filed and served its first Motion for Dismissal for lack of subject matter jurisdiction on February 21, 2020 (copy attached for convenience). No party filed an opposition.

On March 19, 2020, SEG filed its first Motion for Immediate Entry of Dismissal. Appellant Virgin Islands Conservation Society ("VICS") subsequently responded, and asserted that it had no obligation to respond to the Motion to Dismiss as this Board had not granted the permit holder intervenor status, and the subsequent grant of status still did not require a response.

On April 15, 2020, the St. John Committee of the Coastal Zone Commission, acting through the Virgin Islands Department of Justice, filed its Joinder in Summer's End Group's Motion to Dismiss and its own Motion to Stay Briefing. No response was filed to that joinder and motion.

The Motions should be deemed conceded.

On May 1, 2020, Summer's End filed its Renewed Motion to Dismiss.

Appellate jurisdiction is a critical question. Every decision of the Virgin Islands Supreme Court begins by addressing the question of jurisdiction (e.g., *World Fresh Markets, LLC v. Henry*, 2019 VI 30; 2019 V.I. Supreme LEXIS 43 (2019)²; *Malek v. Romano*, 70 V.I. 1033;

² This Court, being an appellate court, is a court of limited jurisdiction, and must be satisfied of its own appellate subject matter jurisdiction before it considers the merits of an appeal. *People v. Rios*, S. Ct. Crim. No. 2007-0112, 2008 V.I. Supreme LEXIS 44, 2008 WL 5605714, at *1 (V.I. Nov. 14, 2008) (unpublished) (citing *V.I. Gov't Hosp. & Health Facilities Corp. v. Gov't of the V.I.*, 50 V.I. 276 (V.I. 2008); *Gov't of the V.I. ex rel. Larsen v. Ruiz*, 145 F. Supp. 2d 681, 689 (D.V.I. App. Div. 2000); see *V.I. Gov't Hosp. & Health Facilities Corp.*, 50 V.I. at 279. The Revised Organic Act of 1954, as amended ("ROA"), is the *de facto* constitution of the Territory, and the grant of jurisdiction to the courts of the

2019 VI 16; 2019 V.I. Supreme LEXIS 27). The Legislature, through Section 914 of the Coastal Zone Management Act ("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:

(914) *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.]

The subject matter listed in Board's Regulations at CVIR 12-021-914 (DOJ Brief at Page 2) cannot expand the jurisdiction granted by the CZM Act. Only an action by "the Commission, its Committees or the Commissioner" is subject to appeal to this Board. No such action occurred or is alleged. The only action alleged to have occurred following the 2014-2016 proceeding before this Board is the preparation of a "Consolidated Permit" by the Governor's Office, in compliance with the prior order of the Board of Land Use Appeals, and subsequent modification by the Governor in his submission to the Legislature. As clearly stated, the Board has no jurisdiction to hear challenges to the actions of the Governor, as he is neither "the

Virgin Islands contained in the ROA controls over statutes enacted by the Virgin Islands Legislature. *Hodge v. Bluebeard's Castle, Inc.*, 62 V.I. 672, 682 (V.I. 2015); *Gov't of the V.I. v. Crooke*, 54 V.I. 237, 247 (V.I. 2010).

...Within the ROA framework, "[t]he Virgin Islands Legislature unquestionably possesses the authority to determine the jurisdiction of Virgin Islands courts. The Legislature has exercised that power by adopting the [Final Judgment Rule 3] and [establishing] a set of permissible interlocutory appeals as of right."....

Commission[³], its Committees[⁴] or the Commissioner[⁵].” That is now supported by the Certified Record on appeal, filed by the Department of Natural Resources and Planning. With the addition of the Consolidated Permit ordered by this Board, the Record contains nothing new; all of it was before this Board in 2014-2016.

RELIANCE ON MATTERS OUTSIDE THE RECORD

VICS not only relies, but effectively builds its entire case on a letter from the office of Senator Novelle E. Francis, Jr., dated December 10, 2019. That letter is ineffective in supporting VICS's claims for two reasons.

First, that letter is nowhere to be found in the record on appeal. Board regulations (12 V.I. R. & Regs. § 914-6) provide:

914-6. The Record.

The original papers and exhibits filed in the proceeding-below and the transcript in the proceeding-below constitute the record.

The December 10, 2019 letter is not part of the Record.

Second, and more critically, the letter does not reflect an action by the Legislature. The Legislature does not deny leases, invalidate permits or take any action whatsoever by letter. The Legislature takes actions by a vote of the members, which is reflected in a bill, resolution, or act; no such event occurred herein. Rather, it is a letter from a single Senator. It carries no more weight than that; in this instance, it carries no weight at all, as it is not part of the Record on

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

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

⁴ CZM Act, Section 904 provides in part:

(b) There are created within the Coastal Zone Management Commission three Commission Committees: ... 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.

⁵ 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.”

appeal. All references to that December 10, 2019 letter should be struck and no weight afforded in your decision.

THE ALLEGATIONS AND ACTIONS (OR INACTIONS) ALLEGED HAVE BEEN SUBJECT TO PRIOR REVIEW AND ARE FORECLOSED FROM FURTHER APPEAL TO THIS BOARD.

As noted above in the Summary, the permit that VICS challenges herein were approved by the St. John CZM Committee in 2014, appealed to this Board, and this Board affirmed the permit, and at the request of VICS and with the acceptance on the record of Summer's End, consolidated the permits in June 2016.

On June 6, 2016, the Board of Land Use Appeals ordered the two permits "consolidated" as one single permit. In its Decision and Order of June 6, 2016, BLUA found and ordered:

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-4-14(L) and CZJ-4-14(W), be consolidated.

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 – Summer's End, the project opponents (VI Conservation Society⁶; Moravian Church Conference⁷), 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 is clearly to the contrary – 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.

The simple reason for this Order was that this is a single project and has been treated as one from the beginning. Each of the now consolidated permits was addressed simultaneously, in the submission of applications, in the issuance of staff reports, in the conduct of public hearings, and in the issuance of the permits.

VICS now appears to be taking the position that despite the Board's Order of June 2016 clearly *affirming the permits and ordering consolidation*, the Board should now interpret its order that the permits “be consolidated” as overturning the very same order affirming the permits, and instead effectively ordering a remand. The argument is nonsense.

We further join in the brief of the Department of Justice that if the St. John CZM Committee was required to take further action, that such time has lapsed and the permit is issued by operation of law.

CONCLUSION

Major Coastal Zone Permits No. CZJ-04-14-(W) and CZM-03-14(L) were:

- approved by the St. John CZM Committee,
- approved by Governor John P. de Jongh, Jr.,
- affirmed and consolidated by the 2016 Order of this Board, and
- the 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.

⁶ In its 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...”

⁷ In its 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?”

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 pending ratification by the 33rd Legislature.

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.

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 33rd Legislature.

Dated: May 7, 2020

/s/ Boyd L. Sprehn

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Certificate of Service

It is hereby certified that an exact copy of the foregoing Opposition to Appeal was served on the following via email only at the below addresses on May 7, 2020:

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