BEFORE THE BOARD OF LAND USE APPEALS

VIRGIN ISLANDS CONSERVATION SOCIETY, INC., **APPELLANT** **V.** **ST. JOHN COMMITTEE OF THE VIRGIN ISLANDS COASTAL ZONE MANAGEMENT COMMISSION** **APPELLEE** **SUMMERS END GROUP, LLC** **INTERVENOR**	**LAND USE APPEALS NO. 002 /2020**

BRIEF OF APPELLANT

Summers End Group's opposition brief is notable for what it does not mention: The fact that the "consolidated" permit signed by a single member of the St. John CZM Committee failed to comply with this Board's order on the initial appeal and requires only half of the maximum bond that this Board required. According to SEG, the Board does not have any jurisdiction over a permit issued following an appeal, even if the permit is contrary to the decision of the Board. SEG's argument is absurd on its face and ignores the plain language of the CZM Act, which authorizes appeals from any "action" taken by the CZM Committee.

THE BOARD HAS JURISDICTION

An "aggrieved person may file an appeal of an *action* by the Commission, its Committees, or the Commissioner taken pursuant to section 910 or 911 . . ." 12 V.I.C.

§ 914(a). Neither the CZM Act nor the supporting regulations define "action."[1] But, some guidance can be found in 12 V.I.C. § 902(a), which defines an "aggrieved person" as "any person, including the applicant, who, in connection with a *decision or action* of the Commission on an application for a major coastal zone permit either appeared in person or through representatives at a public hearing of the Commission on said application, . . ." (emphasis added). The V.I. Legislature chose to authorize an appeal of an *action* and distinguished between "action" and "decision" in the same Act. When a legislature includes particular language in one section of a stature but omits it in another section of the same Act, it is generally presumed to have done so intentionally and purposely. *Rodriguez v. United States*, 480 U.S. 522, 525 (1987). This Board has jurisdiction because the issuance of the consolidated permit was an "action" of the Committee.[2]

SEG seems to argue that the issuance of the consolidated permit was not an "action" of the CZM Committee. But SEG apparently does not think through the consequences of this argument. If the issuance of the consolidated permit was not CZM

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[1] A prior version of 12 V.I.R.&R. § 902–2 defined "action" as "[a] vote by a quorum of Committee members or Commission members upon a motion, proposal, resolution or order, whether or not resulting in a collective decision by a majority of those voting members present." *See Virgin Islands Conservation Society, Inc. v. V.I. Board of Land Use Appeals*, Civ. No. 83/2005, 2006 WL 8089324, at *5 (V.I. Super. May 25, 2006) (Super. Ct. May 25, 2006), *aff'd in part, rev'd in part*, 49 V.I. 581, 2007 WL 4800361 (D.V.I. 2007), and *aff'd in part after remand*, 2020 WL 1844785 (Apr. 9, 2020) (Third Circuit appeal pending). That language was removed in the February 2006 revision of the Rules and Regulations and thus no longer limits the definition of actions to something requiring a vote.

[2] Alternatively, the consolidated permit is a nullity because it was not an action of the Committee and was issued ultra vires by a single Commissioner.

Committee action, then it does not have a permit, as an individual Committee Member is not authorized to issue a permit. *See* 12 V.I.C. § 910(c) (stating that a"major coastal zone permit shall be issued by the appropriate Committee of the Commission"). Thus, if the issuance of the "consolidated" permit was not action of the Committee, then SEG still does not have a permit.

SEG tries to avoid the logical consequences of its own argument by asserting that because the Committee had not acted upon this Board's previous order, it has a permit "by default" under 12 V.I.C. § 910(d)(4). That argument, however, is also flawed. First, subsection (4) only applies to the failure to meet deadlines "within this paragraph." There are only two deadlines set forth in subsection (4) and neither is applicable to action following a reversal by this Board. Second, the decision of this Board that SEG relies upon remains subject to a writ of review pending in the Superior Court of the Virgin Islands and the Board's decision has never been remanded to the CZM Committee. Thus, to this day, the CZM Committee to act has yet to regain jurisdiction to act upon this Board's order.

In summary, if the "consolidated" permit issued by a single Committee Member was not an action of the Committee, then SEG has no permit. On the other hand, if it is deemed to have been issued by the entire Committee, then the issuance of the permit is an "action" that is subject to appeal.

THE BOARD HAS JURISDICTION OVER THE PERMIT AS IT EXISTED AT THE TIME THE APPEAL WAS FILED

This appeal arises under a unique set of circumstances. Normally, a permit would be issued, perhaps appealed, and then construction would commence. After

construction commenced, an issue might arise involving significant environmental damage to coastal zone resources or requiring protection of the public health, safety and general welfare. In such an instance, the Governor has the power to unilaterally modify a permit that authorizes development or occupancy of submerged lands. 12 V.I.C. § 911(g). The statute does not envision that the Governor will modify a permit immediately upon issuance on the grounds that the work will cause significant environmental damage—because by definition a permit would never issue if it was known at the time of issuance that the work would cause significant environmental damage.

In this case, SEG finally acknowledged what VICS had said from Day One—that it did not have the right to develop the land it proposed to develop. But, rather than following the modification process set forth in 12 V.I.R.&R. § 910-14, SEG opted for its shortcut: Get a "consolidated" permit issued by a single member of the CZM Committee and immediately request that the Governor modify the permit under 12 V.I.C. § 911(g). Because the Governor's modification occurred within the 45 days for an appeal from the issuance of the permit and VICS's appeal was filed after the Governor's modification, it is that permit that is before the Board. Indeed, it is the only that permit that the Board can review because it is the only one that exists.

THE RECORD ON APPEAL

SEG argues that the Board is limited by the record in the proceeding-below by virtue of 12 V.I.R.&R. § 914-6. The Board follows the decisional law of the Virgin Islands and the Third Circuit Court of Appeals. 12 V.I.R.&R. § 914-13. With respect

to procedural questions, the Board follows the Federal Rules of Evidence and Federal Rules of Appellate Procedure. 12 V.I.R.&R. § 914-12. Rule 201(b)(2) of the Federal Rules of Evidence allows a court to "judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." "Judicial notice may be taken at any stage of the proceeding, including on appeal, as long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority." *In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 205–06 (3d Cir. 1995) Judicial notice may be even be taken of events that occur after an appeal is filed. *Samuel v. Univ. of Pittsburgh*, 506 F.2d 355, 360 n.12 (3d Cir. 1974).

In this case, the documents in question cannot reasonably be questioned. The December 10, 2019 letter from the Legislature to the Governor stating that "the consensus of the Legislature" is that the project must be "submitted for CZM review" is attached as Exhibit 4 to the notice of appeal. It bears the signature of the Senate President and the stamp of the Governor's Office confirming receipt. The December 3, 2019 letter from SEG to the Governor and the December 18, 2019 letter from the Governor to SEG are published on the Legislature's web site (at the links indicated). These documents, accepted as valid by the Legislature, cannot be reasonably questioned—and SEG, the author of one letter and recipient of the response in no way suggests that there is a basis to question either letter.

Thus the Board can, and should, take judicial notice of the documents. VICS formally requests that the Board do so.

THIS BOARD HAS NOT REVIEWED THE NEW CHANGES TO THE PERMIT

It is pure fantasy for SEG to suggest that this Board has reviewed the "consolidated" permit. SEG engages in this charade by ignoring the material changes that have been made to the original permits and the "consolidated" permit. SEG insists—despite overwhelming and irrefutable evidence—that the original permits and the consolidated permits are identical with the sole exception that now they are consolidated as one permit rather than separate permits.

Even before the Governor modified the "consolidated" permit, it still was not a mere merger of the previous, separate, land and water permits. Some of the differences are pointed at page 4 of the notice of appeal and discussed in greater detail starting at page 10 of VICS's principal brief. There is no need to discuss them a second time because SEG *does not contest the fact that there material differences*. It simply ignores the arguments that it cannot refute.

CONCLUSION

The Board has jurisdiction and should review the permit. It should then vacate the consolidated permit and remand it with directions to submit a new permit application in accordance with 12 V.I.R.&R. § 910-14.

Respectfully submitted,

May 21, 2020

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CERTIFICATE OF COUNSEL

I, Andrew C. Simpson, certify that: this Appeal is based upon a true belief that

- the decision appealed from was in error;
- there exist meritorious grounds to reverse the decision; and
- this Appeal is not filed for the purposes of delay or harassment; and it is not frivolous.

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Andrew C. Simpson

CERTIFICATE OF SERVICE

I certify that a copy of this appeal was served upon Jean Pierre Oriol, Commissioner of the Department of Planning and Natural Resources, No. 45 Estate Mars Hill, Frederiksted, VI 00840 as well as upon Summer's End Group at the address shown in the body of this Notice, on May 21, 2020, by U.S. Mail, postage prepaid.

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Andrew C. Simpson