In the Supreme Court of the Virgin Islan

No. 2021-0017

Save Coral Bay, Inc.

Appellant/Plaintiff,

v.

Albert Bryan, Jr., in his official capacity as Governor of the Virgin Islands and Summers End Group, LLC

Appellees/Defendants

On Appeal from the Superior Court of the Virgin Islands, Division of St. Croix, Case No. SX-20-CV-298

Reply Brief of Appellant
Save Coral Bay, Inc.

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ERRONEOUS STATEMENTS MADE BY APPELLEES

Both appellees refer in their briefs to the Virgin Islands Conservation Society, Inc. as an "alter ego" of Save Coral Bay, Inc. There is no basis, in the record or otherwise, for this claim. The two organizations are legally distinct. The members of the respective boards of directors of the two organizations are different and the membership of the two organizations is different. The only things in common between the two organizations is that they share an interest in protecting the environment of Coral Bay and they have retained the same attorney to represent them in litigation relating to Coral Bay.

Governor Bryan asserts on page nine of his brief that the Legislature ratified the Governor's modification on December 21, 2019, "only three days" after the modification, "easily satisfying the thirty-day deadline of Sections 911(e),(g)." In actuality, the Governor's modification was submitted to the Legislature on December 18, 2019, APPX–68, and the Legislature did not ratify the modification for a year-and-three-days: On December 21, 20*20*. APPX–71.

ARGUMENT

SUMMARY OF REPLY ARGUMENT

There are two basic issues in this appeal: one of statutory interpretation and the other of the power of the judiciary as the ultimate arbiter of Virgin Islands law.

Appellees claim that their statutory interpretation argument is based upon a straight-forward reading of 12 V.I.C. § 911. But their interpretation is only "straight-forward" if one (a) disregards the role of subsection 911(g) in the overall context of section 911; (b) ignores one part of subsection 911(g); (c) rewrites a second part; and (d) misconstrues a third part.

Appellees' argument with respect to the separation of powers argument is misplaced because Save Coral Bay is not asking the judiciary to exercise executive or legislative powers. To the contrary, Save Coral Bay is asking the judiciary to interpret the law—a task uniquely within the judiciary's powers. Save Coral Bay asks this Court to hold that the Governor's actions were *ultra vires*. The determination of that issue is a fundamental responsibility of the judiciary. There is no separation of powers issue when it comes to making that determination. And once it is determined that the action was *ultra vires*, the Legislature's ratification is moot because an

ultra vires act is void *ab initio* and cannot be ratified. It is also a fundamental duty and power of the judiciary to announce the legal effect of an attempt to ratify an act that is void *ab initio*.

I. THE INTERPRETATION—AND MISINTERPRETATION—OF 12 V.I.C. § 911.

Appellee's textual argument is wrong on both the macro and micro levels.

A. THE MACRO LEVEL: SECTION 911 IS AN ADDITIONAL PROTECTION WOVEN INTO THE CZM ACT BECAUSE OF THE VIRGIN ISLANDS GOVERNMENT'S ROLE AS TRUST PROTECTOR FOR THE TRUST LANDS OF THE VIRGIN ISLANDS.

On the macro level, the CZM Act itself, as well as the layout of 12 V.I.C. § 911, are logically and chronologically arranged, proceeding from permit application to permit approval to enforcement of issues that arise during construction. Thus, the CZM Act sets forth goals and general provisions (12 V.I.C. §§ 903 and 905); moves on to specific policies for the first tier of the coastal zone (12 V.I.C. § 906); then segues to general permitting (12 V.I.C. § 910); adds additional protections and permitting requirements for Virgin Islands trust lands (12 V.I.C. § 911); transitions to enforcement (12 V.I.C. § 913) and concludes with appeals (12 V.I.C. § 914).

Section 911, which adds "[a]dditional requirements for development or occupancy of trust lands or other submerged or filled lands," follows this same logical order with respect to lands held in trust for the people of the Virgin Islands.[1] Subsection 911(a) establishes the requirements for a permit on trust lands, followed by subsection 911(b), which defines the procedures for applying for a permit on trust lands. Subsection 911(c) next mandates that the appropriate the CZM Committee or Commissioner "shall deny" a permit for development of trust lands unless it makes additional findings. One such finding is that "the grant of such permit . . . will not . . . cause significant adverse environmental effects."12 V.I.C. § 911(c)(2). Subsection 911(d) establishes time limits for occupancy of trust lands. Subsection 911(e) then sets forth the procedure for approval and ratification of the permit. Subsection 911(f) creates a procedure for collecting rent for the use of trust lands. And subsection 911(g) then transitions to enforcement (incorporating the enforcement provisions of 12 V.I.C. § 913 but adding unique modification and revocation powers

[1] "Trust lands" are "all submerged and filled land conveyed pursuant to Public Law 93–435, 88 Statutes 1210, by the United States to the Government of the United States Virgin Islands to be administered in trust for the benefit of the people of the United States Virgin Islands." 12 V.I.C. § 902(dd).

applicable only to a "permit approved by this section" if "it is necessary to prevent significant environmental damage to coastal zone resources"). 12 V.I.C. § 911(g).

Thus, from a macro perspective, it is evident that subsection 911(g) creates a power (similar, but in addition, to the enforcement powers found in 12 V.I.C. § 913), that is intended to be used when an unanticipated environmental issue arises *during construction* on trust lands. When viewed in the logical order of the statutory scheme, it is evident that the subsection 911(g) power is not intended to be a vehicle for the Governor to modify a permit as part of the application and approval process.

Indeed, the language of 911(g) referring to prevention of "significant environmental damage" essentially mirrors the finding that the CZM Committee must make under 12 V.I.C. § 911(c)(2) as part of the application and approval process—that the development will not cause "significant adverse environmental effects." After the CZM Committee has found that the development will not have "significant adverse effects" under subsection 911(c), it goes to the Governor for approval under subsection 911(e). The Governor, as a steward and trustee of the Virgin Islands trust lands, should not approve a permit at that stage if he

disagrees with the CZM Committee and believes that the permit will have "significant adverse effects." Assuming that the CZM Committee is properly performing its function—and the statutory scheme presumes that to be the case— it is only *after* construction is proceeding that an issue *could* arise requiring the invocation of the modification and revocation provisions of subsection 911(g).

B. THE MICRO LEVEL: APPELLEES' ATTEMPT TO CHERRY PICK SPECIFIC PARTS OF SECTION 911 DOES NOT WITHSTAND SCRUTINY.

A key difference in the respective positions of the parties lies in the interpretation of 12 V.I.C. § 911(g), which provides:

> *In addition to any other powers of enforcement set forth in section 913 of this chapter*, the Governor may modify or revoke any coastal zone permit that includes development or occupancy of trust lands or submerged or filled lands *approved pursuant to this section* upon a written determination that such action is in the public interest and that it is necessary to prevent significant environmental damage to coastal zone resources and to protect the public health, safety and general welfare. Such written determination shall be delivered both to the permittee and to the Legislature, together with a statement of the reasons therefor. It shall state the effective date of such modification or revocation, *and shall provide a reasonable time in which the permittee or lessee either may correct the deficiencies stated in such written determination or may establish, to the Governor's satisfaction, that any or all of the deficiencies or reasons stated therein are incorrect.* If the permittee shall fail to

> correct or establish the inaccuracy of such deficiencies or reasons within the time provided in such written determination, the modification or revocation of such occupancy permit shall be effective as of the date stated therein; provided, however, that the Legislature, shall ratify the Governor's action within thirty days after said effective date. The failure of the Legislature, either to ratify or rescind the Governor's action within said thirty-day period shall constitute a ratification of the Governor's action.

(Emphasis added.)

In the emphasized passages above, Appellees ignore the first passage, rewrite the third passage, and misconstrue the second.

1. THE [IGNORED] PLAIN MEANING OF "IN ADDITION TO THE ENFORCEMENT POWERS . . ."

Save Coral Bay argued in its opening brief that the first emphasized portion of subsection 911(g) evidenced an intention to apply 911(g) only to permits that have proceeded to the point where construction has commenced. Appellees opted to ignore the argument. Appellees insist this Court should apply the plain meaning of subsection 911(g) but ignore the introductory phrase that helps to give it meaning: like the enforcement powers of 12 V.I.C. § 913, there is no need for a revocation or modification power before the construction work that causes the unanticipated significant environmental damage commences.

That the power to modify or revoke is intended to be used only after construction commences is also reflected in the notice-and-opportunity-to-cure mechanism the statute imposes upon the Governor. He must give notice to the permittee and the Legislature and give the permittee an opportunity to either cure the deficiency or prove that the deficiency does not exist. 12 V.I.C. § 911(g). That procedure, which is mandated by the statute, would not be necessary prior to commencement of construction. Indeed, there would be no reason to notify the Legislature if the modification/revocation process was intended to be invoked prior to the Legislature having ratified the actual permit under subsection 911(e).

2. APPELLEES REWRITE 12 V.I.C. § 911(g) IN ORDER TO ESCAPE ITS PLAIN MEANING

At page 13 of its brief, SEG asserts, "Since the Modification Letter did not state conditions that SEG needed to correct or a date for compliance for any such conditions, the modification was effective as of the date the Governor executed the letter. 12 V.I.C. § 911(g)." Governor Bryan makes the exact same statement at page nine of his brief.

Through this language, both Appellees attempt to rewrite subsection 911(g). Consistent with the fact that subsection 911(g) is only intended to

be used once construction has commenced, subsection 911(g) does not allow the Governor to make changes to a permit without requiring a response from the permittee. To the contrary, the law specifies that the Governor "shall" deliver a written determination to the permittee and "shall provide a reasonable time in which the permittee or lessee either may correct the deficiencies stated in such written determination or may establish, to the Governor's satisfaction, that any or all of the deficiencies or reasons stated therein are incorrect." *Id.* There is no option for the Governor to waive the requirement of notice and opportunity to cure as suggested by both Appellees.

The reason for Appellees' rewrite of the statute is obvious. Governor Bryan's modification letter did not comply with the requirement in subsection 911(g) of notice and an opportunity to cure because the Governor's modification was not the type of modification *ever* envisioned for a CZM permit. The environmental issues identified by the Governor as necessitating a modification were not conditions that unexpectedly arose during construction—they were pre-existing issues that reflected fatal flaws in SEG's initial permit application. The Governor illegally modified the permits to "cure" these flaws on SEG's behalf and—at least according

to SEG—deprive the Superior Court of its power to adjudicate direct appeals related to those flaws.[2] If there is any separation of powers issue with respect to this development, it relates to the Governor's illegal modification, which SEG argues deprives the Superior Court of the power to adjudicate the *pending* writ of review proceedings authorized by statute.

3. APPELLEES MISCONSTRUE THE DIFFERENCE BETWEEN "SECTION" AND "SUBSECTION"

As Save Coral Bay explained it its opening brief, the additional enforcement provision of subsection 911(g) logically does not apply before a permit is issued and acted upon by the permittee; because, until the permit is fully approved and able to be acted upon, the "significant environmental damage" that triggers the right for the Governor to invoke subsection 911(g) could not possibly occur. If the Governor believes that a CZM permit awaiting his approval will cause "significant environmental damage" (despite the required finding by the CZM Committee that the proposed development will not "cause significant adverse environmental effects," then the solution is to deny approval and send the permittee back

[2] It is those fatal flaws that are the subject of the writ of review proceedings brought by the Virgin Islands Conservation Society and the Moravian Church Conference of the Virgin Islands.

to the CZM Committee.

Appellees insist that subsection 911(g) allows a modification of a permit before it has ever been ratified by the Legislature. Appellees pounce on the language in subsection 911(g) that states that the "Governor may modify or revoke any coastal zone permit that includes development or occupancy of trust lands or submerged or filled lands *approved pursuant to this section*" (emphasis added) and argue that it must refer back to subsection 911(e).

Appellees fail to note that the language they rely upon refers to "section" not "*sub*section." And, when the Legislature wishes to refer back to a specific *sub*section it does so by specifically referencing the *sub*section rather than referring to the entire section and leaving the statute ambiguous. For example, there are 121 cross-references to "subsection (e)" in the Virgin Islands Code, including one such reference in the CZM Act. *See, e.g.*, 12 V.I.C. § 910(c)(1). Had the Legislature intended in subsection 911(g) to refer to subsection 911(e), it would have done so by specific reference to "subsection (e)."[3]

[3] There are approximately 954 references to "subsection (a)" alone throughout the text of Virgin Islands Code. *See, e.g.*, 12 V.I.C. § 910(d)(6) (the immediate preceding section of the CZM Act, referencing "subsection

When the Legislature intends to refer to an entire section (as it did in the wording used in section 911(g)), it refers to "this section." *See, e.g.*, 12 V.I.C. § 906 (referring to the "policies set forth in this section") and 12 V.I.C. § 910(b)(2) (allowing a wavier under certain circumstances of the requirement of "obtaining a permit under this section").

The Legislature limited the Governor's modification/revocation power to permits "approved pursuant to this section" to make it clear that it only applies to permits involving submerged lands—it does not apply to "land permits," which are approved under the previous section in the CZM Act, 12 V.I.C. § 910. This is a far more logical explanation for the interpretation of "approved pursuant to this section" as used in section 911(g) than the misinterpretation urged by Appellees.[4]

(a), paragraph (2) of this section." *See also* 12 V.I.C. § 1122(c) (referring back to "subsection (a)"); 12 V.I.C. § 31(b) (multiple references to "subsection (a)." There are 543 references to "subsection (b)" including one in the CZM Act at 12 V.I.C. § 910(a).

[4] The use of "approved pursuant to this section" following the phrase "any coastal zone permit that includes development or occupancy of trust lands or submerged or filled lands" is redundant. (This is true whether or not it refers to all of section 911 or just subsection 911(g).) But the canon of statutory construction that strives to avoid surplusage is not sacrosanct. "Sometimes drafters do repeat themselves and do include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt -and-suspenders approach."

When subsection 911(g) is interpreted properly—without ignoring inconvenient language, without making non-existent exceptions to the statute, and without misunderstanding the difference between "subsection" and "section"—it is evident that the power to revoke or modify does not apply before a permit is final and the permittee has begun work under the permit. Just as the court stated in *West Indian Co. v. Gov't of Virgin Islands*, 844 F.2d 1007, 1012 (3d Cir. 1988): "A coastal zone permit for public lands may be modified or revoked *during its term*, upon a determination by the Governor that revocation or modification is in the public interest and necessary to prevent significant environmental damage." (Emphasis added.)

The Superior Court erred when it interpreted section 911(g) as giving the Governor the power to modify or revoke a permit [p]rior to ratification." The Governor had no such power and thus his modification of the SEG permit was *ultra vires*.

Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 177 (2012) (emphasis omitted). The surplusage can be overcome by the context of the statute. *Gray v. State*, 850 S.E.2d 36, 40 n.5 (Ga. 2020).

II. THERE IS NO VIOLATION OF THE SEPARATION OF POWERS WHEN A COURT INTERPRETS A STATUTE OR DECLARES THE LEGAL EFFECT OF AN ATTEMPT TO RATIFY AN ACT THAT IS VOID *AB INITIO*.

Appellees do not dispute the distinction between an *ultra vires* act and an *intra vires* act.[5] They simply argue that the separation of powers doctrine precludes the Court from interpreting a statute—determining if the Governor exceeded his authority—if the Legislature has ratified the Governor's act. But Appellees put the cart before the horse. The legislature's ratification decision is meaningless if the Governor's action was *ultra vires* and void *ab initio*. And it is the judiciary's duty to interpret a statute to determine if it has been applied correctly. *Separation* of powers does not require *abdication* of powers.

Here there are two issues that are within the judicial power: First, the Court must determine if the Governor exceeded his authority. Second, the

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[5] Governor Bryan cites *Barnhart v. City of Fayetteville, Ark.*, 900 S.W.2d 539, 545 (Ark. 1995) to suggest that an *ultra vires* act is not void *ab initio*, but in that case, the court distinguishes between two types of *ultra vires* acts: "general *ultra vires* and "limited *ultra vires*." *Barnhart* holds that an act that is *ultra vires* "in the general sense" is "wholly outside the authority" and "void *ab initio*." By contrast, an act that is *ultra vires* "in the limited sense" is a result of power that "was merely exercised irregularly and thus can be ratified." Thus, it is clear from the context of that decision that the "limited" type of *ultra vires* act is the equivalent of what most courts term an *intra vires* act—*e.g.*, a procedurally irregular exercise of power that can be cured.

Court must determine (to the extent it is even contested) the legal effect of an *ultra vires* action.

Save Coral Bay has shown that the Governor's act in modifying the permit was void *ab initio* because he exercised a power he did not possess under 12 V.I.C. § 911(g). The determination of the scope of the Governor's power under subsection 911(g) is a matter of statutory interpretation. "When the Legislature established this Court in 2004, it reposed in this Court 'the supreme judicial power of the Territory.' 4 V.I.C. § 21. This includes the power to both *interpret local law* and modify the common law." *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 978 (2011) (emphasis added). In reaching this conclusion in *Banks*, this Court quoted with approval the following passage from *Ford v. Norris*, 364 F.3d 916, 919 (8th Cir. 2004): "The Arkansas Supreme Court is the final authority on the interpretation of Arkansas law. As the supreme judicial authority of the state, it decides what state law is . . . ." In the Virgin Islands, this Court, "and - to the extent not bound by precedent, the Superior Court," *Banks*, 55 V.I. at 979, decides what territorial law is. The Superior Court erred when it held that the separation of powers doctrine precluded it from determining whether or not Governor Bryan had exceeded the limited and

circumscribed authority granted to him under 12 V.I.C. § 911(g).

Similarly, in the absence of legislation that addresses the issue, it is incumbent upon the judiciary to determine the legal effect of an *ultra vires* act. The Superior Court erred when it concluded that the separation of powers doctrine precluded it from addressing that issue.

CONCLUSION

Save Coral Bay's amended complaint alleged that the Governor had exceeded his power when he modified SEG's permit. The Superior Court erred when it held that the question was non-justiciable under the separation of powers doctrine. For the foregoing reasons, this Court should reverse the decision of the Superior Court dismissing Save Coral Bay's complaint on preliminary grounds and remand with instructions to allow the case to progress to the merits.

Respectfully submitted,
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CERTIFICATIONS

BAR MEMBERSHIP

I am a member in good standing of the bar of this Court.

WORD COUNT AND TYPE FACE

This brief complies with the type-volume limitation of V.I.R.App.P. 22(f). It consists of 3,435 words, exclusive of the cover, the table of contents and table of authorities, and the certifications.

SERVICE OF BRIEF

I certify that this brief and the accompanying joint appendix were served upon the parties listed below using the Court's Electronic Filing System.

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