SUPREME COURT OF THE VIRGIN ISLANDS

NO. SCT-CIV-2021-0017

SAVE CORAL BAY, INC.,
APPELLANT/PLAINTIFF

V.

ALBERT BRYAN, JR., IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE VIRGIN ISLANDS AND SUMMER'S END GROUP

APPELLEES/DEFENDANTS

ON APPEAL FROM THE SUPERIOR COURT OF THE VIRGIN ISLANDS DIVISION OF ST. THOMAS & ST. JOHN ST-2020-CV-0298

APPELLEE'S BRIEF

DENISE N. GEORGE, Esq.
Attorney General

PAMELA R. TEPPER, Esq.
Solicitor General

By: IAN S.A. CLEMENT, Esq.
Assistant Attorney General
Department of Justice
34-38 Kronprindsens Gade
GERS Complex, 2nd Floor
St. Thomas, VI 00802
(340) 774-5666– ext. 10112
340-774-9710 (f)
Ian.clement@doj.vi.gov

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this case pursuant to 4 V.I.C. § 32(a). Title 4, Section 32, Subsection (a) gives this Court "jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." *Hodge v. McGovan*, 50 V.I. 296 (V.I. 2008).

STATEMENT OF THE ISSUES

1. Whether the Superior Court's finding that the Legislature's ratification of the Governor's modification of the permit under 12 V.I.C. § 911(e),(g) rendered the underlying case moot and non-justiciable was erroneous.
2. Whether the Governor properly exercised his authority to modify the permit under 12 V.I.C. § 911(g).

STATEMENT OF RELATED CASES OR PROCEEDINGS

The underlying permit that is the subject of this Appeal has also been challenged in two writs of review proceedings consolidated and pending in the Superior Court, *Virgin Islands Conservation Society, Inc v. Virgin Islands Board of Land Use Appeals*, Case No. ST-2016-CV-00395, and *Moravian Church Conference of the Virgin Islands v. The Virgin Islands Board of Land*

Use Appeals, Case No. ST-2016-CV-00428. In those consolidated cases, Summers End Group, LLC ("SEG"), has filed a motion to dismiss, arguing that the Governor's modification of the permit and the Legislature's ratification denies the petitioners the statutory right to appeal. The petitioners[1] in those cases have opposed the motion based upon the same arguments made by Appellant in the present case. Thus, the Court's holding in the instant case should resolve the pending writs of review.

STATEMENT OF THE CASE

On or about April 4, 2014, SEG applied for Major Coastal Zone Permit No. CZJ-03-14(L) for the redevelopment of seven adjacent properties in Estate Carolina, Coral Bay, St. John (in two phases) to construct various supporting facilities for the Coral Bay Marina. The project is located on Parcel Nos. 10-17, 10-18, 10-19, 10-41 Rem., 13A, 13B and 13 Rem. Estate Carolina, St. John, U.S. Virgin Islands, ("Land Permit"). (JA 41). Simultaneously, SEG filed another application for Major Coastal Zone Permit No. CZJ-04-14(W) for constructing a 145-slip marina, a designated mooring field of up to 75 moorings, a pump-out station, and a fuel station at and seaward of Plot Nos. 10-17, 10-18, 10-19, 10-41 Rem., 13A, 13B and 13 Rem. Estate Carolina, St. John, U.S. Virgin Islands. (*Id.*) The permit also

[1] The alter ego of the Appellant in the instant case.

allows the use and occupancy of the structures described in Section 2 (a) of the permit, including 27.5 acres of submerged land areas surrounding the structures described in Section 2, (a) ("Water Permit," collectively with the "Land Permit" as "the Permit"). (*Id.*)

On June 18, 2014, CZM issued a Letter of Completeness to SEG regarding the Permits. (JA2, JA41) From June 2014 through August 2014, SEG reviewed and responded to public comments and comments from other related agencies. (*Id.*) On August 20, 2014, CZM issued Preliminary Staff Findings regarding the Permits. On August 20, 2014, the St. John Committee of the VI CZM Commission ("Committee") conducted a Public Hearing regarding the Permits. (*Id.*)

On October 1, 2014, CZM issued its Final Staff Reports regarding the permits, and the Committee conducted a Decision Meeting regarding the Permits. (JA42). On October 10, 2014, CZM issued a Decision Letter to SEG regarding the Permits. (*Id.*) On October 24, 2014, the St. John Committee of the Virgin Islands Coastal Zone Management Commission issued to SEG Major Coastal Zone Management Permit Nos. CZJ-03-14(L) and CZJ-04-14(W). (JA42-JA43).

On November 14, 2014, the Virgin Islands Conservation Society ("VICS") and the Moravian Church Conference of the Virgin Islands

("Moravian Church") appealed the issuance of Permit Nos. CZJ-03-14(L) and CZJ-04-14(W) to SEG with the BLUA. (JA5). On June 13, 2016, in an Order dated June 6, 2016, the BLUA affirmed Permit Nos. CZJ-03-14(L) and CZJ-04-14(W)'s issuance by the St. John CZM Committee but ordered that the permits be consolidated into one major permit. (Id.) (JA5, JA43). VICS and Moravian Church subsequently filed writs of review suit in Superior Court.

On March 27, 2019, the St. John CZM Committee Chairman re-signed Permit No. CZJ-04-14(W) forwarded the Consolidated permit to Governor Bryan for approval pursuant to 12 V.I.C. § 911(e). (JA5, JA43). On April 4, 2019, Governor Bryan approved and transmitted Permit No. CZJ-04-14(W) to the Legislature for ratification. (*Id.*) On December 10, 2019, the President of the Legislature disapproved of the permit. (JA5) On December 16, 2019, the Chairman of the St. John CZM Committee consolidated permits CZJ-03-14(L) and CZJ-04-14(W) into CZJ-04-14(W) pursuant to the 2016 Order of the BLUA from VICS's previous appeal. It thereby administratively reaffirmed the consolidation of the Land and Water Permits. (JA6, JA43).

On December 18, 2019, Governor Bryan approved and modified the Consolidated Permit by, among other things, removing Parcels 13A, and 13B, removing a mega-yacht slip, and allowing for the construction of a

community boardwalk that was currently under federal permitting review. (JA6). The Governor subsequently transmitted the modified permit to the Legislature for ratification. (*Id.*)

The Legislature conducted an extensive hearing on July 7, 2020, allowing testimony from several interested and opposing parties. (JA6). In its underlying Opinion and Order, the Superior Court took judicial notice of the Legislature's Committee of the Whole's hearing that lasted about seven (7) hours, and that on October 18, 2019, the Legislature also held a hearing on the matter that lasted about seven hours. (*Id.*). On December 21, 2020, the Legislature passed Act 8407 that ratified the consolidated permit. (JA9).

On January 7, 2021, Defendants filed a second joint Motion to Dismiss for Mootness and Failure to State a Claim. (JA4). On February 10, 2021, Coral Bay filed its opposition. Defendants filed their reply on February 24, 2021, and a hearing was held on March 18, 2021. (*Id.*)

On May 12, 2021, the Superior Court issued an Order granting Defendants motions to dismiss. Coral Bay timely filed a Notice of Appeal.

STANDARD OF REVIEW

Generally, the standard of review in examining the Superior Court's application of the law is plenary, while it reviews the Superior Court's findings of fact only for clear error. *Toussaint v. Stewart*, 67 V.I. 931, 940 (2017), *St. Thomas-St. John Bd. Of Elections v. Daniel*, 49 V.I. 322, 329 (V.I. 2007). A reviewing court applies plenary review to determine whether the lower correctly understood and applied the law. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 899 (3d Cir. 1999); *Hoffer v. Microsoft Corp.*, 405 F.3d 1326, 1328 (Fed. Cir. 2005).

SUMMARY OF THE ARGUMENT

Appellant has failed to meet its burden of showing that the Superior Court did not understand 12 V.I.C. § 911, the concept of legislative ratification, and the separation of powers doctrine or did not apply the law correctly. The Governor properly modified the Consolidated Permit pursuant to 12 V.I.C. § 911(g), and the Legislature's ratification of the Consolidated rendered the Appellant's claims moot under the separation of powers doctrine. Title Twelve of the Virgin Islands Code, Section 911 is unambiguous. However, Appellant's tortured interpretation of Section 911 would lead to an absurd result. The Superior Court properly applied the facts of this case to the law. Therefore, this Court must affirm the Order of the

Superior Court that dismissed the Complaint for lack of subject matter jurisdiction and dismiss the appeal. This Court's affirmance of the Superior Court in this matter would set a precedent and hasten the disposition of the related writs of review cases that have lingered for years.

ARGUMENT

POINT I

THE SUPERIOR COURT PROPERLY FOUND THAT THE GOVERNOR' MODIFICATION AND THE LEGISLATURE'S RATIFICATION OF THE CONSOLIDATED PERMIT WAS LAWFUL, AND THE LEGISLATURE'S RATIFICATION OF THE CONSOLIDATED PERMIT RENDERED PLAINTIFF'S ACTION MOOT AND NON-JUSTICIABLE; THEREFORE, THE COURT'S GRANT OF DEFENDANTS' MOTION TO DISMISS WAS PROPER.

The Superior Court properly found that the Governor modified the Consolidated Permit in accordance with 12 V.I.C. § 911(g). Title 12 of the Virgin Islands Code, section 911, subsection (g) states:

> **(g)** ***Modification and revocation.*** 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.

12 V.I.C. § 911

In his December 18, 2019, letter to the President of Legislature, the Governor expressly stated that he modified the Permit pursuant to his authority under 12 V.I.C. § 911(g).

The Governor's December 18, 2019, letter ("modification letter") accompanying the modified consolidated permit satisfied Section 911(g) requirement of 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." (JA65-JA66). The Governor's letter quotes the aforementioned requirement of Section 911(g) and notes that the modification would: (1)

eliminate the current practice of noncompliant boaters dumping untreated wastewater into Coral Bay; (2) provides funding of a grant by the marina for the employment of a full time DPNR officer for St. John to ensure boater compliance; (3) provide coordination through the Federal Emergency Management Administration ("FEMA") for the receipt of emergency assistance during natural disasters, and, in accordance with 12 V.I.C. § 903(1)-(5),(7)-(10); (4) reduce the total impacts of construction through the consolidation of the permits; (5) reduce the need for water supply and parking through the removal of Parcels 13A and 13B ; (6) reduce the number of buildings, impermeable surfaces, and runoff; and (7) reduce the long-term effects from shading, the total amount of space that the marina occupies, the amount of sea floor that is disturbed, and preserve the historical resources of the area by removing the mega-yacht slip. (*Id.*)

The Governor delivered the Modification Letter to SEG, and the Legislature as required by Section 911(g). (*Id.*) 12 V.I.C. § 911(g) 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. (*Id.*) 12 V.I.C. § 911(g). Only three days later, on December 21, 2019, the Legislature ratified the modification, easily satisfying the thirty-day deadline of Sections 911(e),(g).

(JA9). The Governor's modification of the consolidated permit satisfied every requirement of Section 911(g).

The Superior Court correctly found that 12 V.I.C. § 911(e) gives the Legislature the inherent power to ratify the Governor's modification. Section 911(e) states:

> **(e) Approval by Governor and ratification by Legislature of coastal zone permits that include development or occupancy of trust lands or other submerged or filled lands**. Any coastal zone permit which the appropriate Committee of the Commission or the Commissioner recommends for approval pursuant to this section, together with the recommended terms and conditions thereof, shall be forwarded by the Committee or Commissioner to the Governor for the Governor's approval or disapproval within thirty days following the Committee's or Commissioner's final action on the application for the coastal zone permit or the Board's decision on appeal to grant such a permit. The Governor's approval of any such permit or lease must be ratified by the Legislature of the United States Virgin Islands. Upon approval and ratification of such permit, occupancy and any development proposed in connection therewith shall not commence until the permittee has complied with the requirements of the United States Army Corps of Engineers pursuant to Title 33 of the United States Code.

12 V.I.C. § 911.

Finding that the Governor and the Legislature acted in accordance with Section 911, the Superior Court properly found that the separation of powers doctrine prevented it from granting Appellant its requested relief. (JA10)

The Revised Organic Act "divides the power to govern the territory between a legislative branch, an executive branch, and a judicial branch," reflecting that "Congress 'implicitly incorporated the principle of separation of powers into the law of the territory.'" *Bryan v. Fawkes*, 61 V.I. 201, 212 (V.I. 2014) (quoting *Kendall v. Russell*, 572 F.3d 126, 135, 52 V.I. 1021 (3d Cir. 2009) (quoting *Smith v. Magras*, 124 F.3d 457, 465, 37 V.I. 464 (3d Cir. 1997)) (citations omitted). Therefore, "unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; [and] the judiciary cannot exercise either executive or legislative power." *Id.* (*quoting Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 201-02, 48 S.Ct. 480, 72 L.Ed. 845 (1928); *see also*, *In re Joseph*, 65 V.I. 217, 225 (V.I. 2016).

Appellant asked the Superior Court to render invalid the Consolidated Permit modified and ratified according to an unambiguous statute. Since the separation of powers doctrine prevents the Superior Court from granting Appellant its requested relief, the Appellant's Complaint was moot. "The

mootness doctrine requires that 'an actual controversy [is] extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n.10, (1974). If "changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief," we dismiss the [complaint] as moot. *Pierre v. Bureau of Immigration & Customs Enf't*, 267 F. App'x 163, 166 (3d Cir. 2008)(quoting *Rendell v. Rumsfeld*, 484 F.3d 236, 240 (3d Cir. 2007)).

Since Appellant's claims have been rendered moot by the Legislature's ratifying the Consolidated Permit, the Superior Court lacked subject matter jurisdiction, and the Court properly granted SEG's Rule 12(b)(1) motion. *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 188 (V.I. 2009); and see *Stanley v. V.I. Bureau of Corr.*, 72 V.I. 657, 665 (Super. Ct. 2020)(explaining the mootness doctrine under Virgin Islands law); *Eddy v. Treasure Bay V.I., Corp.*, No. SX-15-CV-049, 2020 V.I. LEXIS 86, at *1 (Super. Ct. Aug. 19, 2020)(granting defendants' Rule 12(b)(1) motion where the court found that plaintiff's claim was rendered moot)

In its Order, the Superior Court demonstrated that it understood the plain meaning of Section 911. The Court properly analyzed the effect of the Legislature's ratification of the Consolidated Permit on Appellant's request for relief. The Superior Court's finding that it no longer possessed subject

matter jurisdiction was in accordance with Virgin Islands law. Therefore, its granting of SEG's motion to dismiss was proper. Consequently, this Court must affirm the Superior Court's Order granting SEG's motion to dismiss.

In its Opening Brief, Appellant presents its assessment of the effects of the modification of the Consolidated Permit. Yet, Appellant asserts no authority that would permit the Superior Court or this Court to override the ratification of the Consolidated Permit by the Legislature and interpose Appellant's judgment for that of the Legislature and Governor.

Thus, this Court must reject Appellant's contrived reading of Section 911(g) because it violates the basic precepts of statutory construction. Instead, this Court must affirm the Superior Court's grant of SEG's motion to dismiss for want of subject matter jurisdiction.

POINT II

THE SUPERIOR COURT PROPERLY FOUND THAT THE GOVERNOR'S MODIFICATION OF THE CONSOLIDATED PERMIT WAS LAWFUL.

Appellant posits a tortured reading of Section 911(g) and argues that Governor may only modify a permit after the Legislature has ratified it. (Appellant's Brief, p. 10). Contrary to Appellant's reading of Section 911(g), the term "approved" in that section refers to approval by the Governor after submission by the Committee of the Commission or the Commissioner, or

the Board of Land Use Appeals. Section 911(e) describes the process by which a permit is transmitted to the Governor for his approval:

> Any coastal zone permit which **the appropriate Committee of the Commission or the Commissioner recommends for approval** pursuant to this section, together with the recommended terms and conditions thereof, shall be forwarded by the Committee or Commissioner to the Governor for the Governor's approval or disapproval within thirty days **following the Committee's or Commissioner's final action on the application for the coastal zone permit or the Board's decision on appeal to grant such a permit**.

The statute then unambiguously states that it is the Governor who approves the permit under this Section:

> **The Governor's approval of any such permit or lease** must be ratified by the Legislature of the United States Virgin Islands. Upon approval and ratification of such permit, occupancy and any development proposed in connection therewith shall not commence until the permittee has complied with the requirements of the United States Army Corps of Engineers pursuant to Title 33 of the United States Code.

12 V.I.C. § 911(e)(emphasis added).

Reading Section 911 as a whole, the plain meaning of the word "approved" in Section 911(g) must mean approval as stated in Section 911(e), by the Governor of the permits submitted by the appropriate Committee of the Commission, the Commissioner, or the Board of Land Use

Appeals. *See, In re Infant Sherman*, 49 V.I. 452, 463 (2008) ("the statute should be interpreted to give consistent, harmonious and sensible effect to all its parts")(quoting *Sutherland on Statutes and Statutory Construction* § 69:4 (rev. 6th ed. 2003 and 2007 update), *and see*, *People of the V.I. v. Baxter*, 49 V.I. 384, 393 (2008); *and*, *In re Joseph*, 65 V.I. 217, 230 (2016)("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). The normal rule of statutory construction assumes that "'identical words used in different parts of the same act are intended to have the same meaning.'" *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860, 106 S. Ct. 1600, 1606 (1986)(citing *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). Therefore, the word "approved" in Section 911(g) has the same meaning as it does in Section 911(e).

Consequently, in the context of Section 911(g), the term "approved" is not synonymous with the word "ratify," as argued by Appellant. If the Legislature intended to grant the power to modify a permit only after the Legislature ratified it, it would have used the word "ratify" in the opening sentence of Section 911(g) rather than "approved." The fact that the Legislature uses the word "ratify" in the last two sentences of Section 911(g) to describe its role in the process is a clear indication that the approval of the

permit and the ratification of the permit are distinct and separate acts performed by distinct and separate actors as specified in the statute. Further, the fact that the words "ratify" and "approve(d)" appears in Section 911(e) where Section 911(e) refers to the Governor's approval shows that the Legislature meant the Governor's approval of the permit in Section 911(g)

Furthermore, as a matter of constitutional practice, Appellants reading of the statute is circular. Legislatures ratify acts by chief executives, not visa-versa. Governors cannot modify acts ratified by legislatures, which, in this context, only ratifies acts of Governors. Based on Appellant's reading of Sections 911(e),(g), the Legislature would have to ratify the Consolidated Permit and then ratify the permit a second time after the Governor's modification. Such a reading flies in the face of the statute's unambiguous language and cannot be what the Legislature intended. A canon of statutory construction is to avoid interpreting statutes in a way that produces absurd results. "An 'absurd result,' in the statutory construction context, refers to an interpretation of a statute that would be 'clearly inconsistent with the Legislature 's intent' and finding that an interpretation of a statute that would 'undermin[e] the entire regulatory regime established in' a chapter of a title of the Virgin Islands Code would produce an absurd result." *One St.*

Peter, LLC v. Bd. of Land Use Appeals, 67 V.I. 920, 928 (V.I. 2017) (citing *Gilbert v. People*, 52 V.I. 350, 365 (V.I. 2009)).

Moreover, the constitutional purpose of legislative ratification of executive action is to check executive power or confirm the chief executive's power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 686, 72 S. Ct. 863, 938 (1952)(noting the historical purpose of legislative ratification, and recounting that sponsors of a bill recognizing and confirming President Lincoln's power to seize the railroads and telegraphs during the Civil War declared that the bill's purpose was only to confirm the power which the President already possessed). Here, under Section 911(e), if the Legislature failed to act on the modified permit within thirty days of the governor's transmittal, the permit would have been deemed ratified. Consideration by the Legislature is always the last step in the process. In contrast, it is true that in the present case, the Governor presented Permit No. CZJ-04-14(W) twice to the Legislature, the first time the Legislature rejected the permit. The Legislature ratified the Governor's modification only after the Governor resubmitted the modified approved Consolidated Permit to the Legislature.

Appellant admits that Governor Bryan at least facially complied with Section 911(g) by stating that the modification is necessary because the permit would cause significant environmental damage. (Appellant Brief, p.

23). But Appellant claims that the Governor's statement is unsupportable. However, Appellant presents no authority that would permit this Court to hurdle the Separation of Powers doctrine and challenge the Governor's statement, which, on its face, complies with the law. In short, Appellant wants this Court to overturn the Superior Court's Order and "unratify" the Legislature's ratification of the Consolidated permit because it does not agree with the Governor.

Appellant cites *Douglas v. Transp. Servs. of St. John, Inc.*, 2020 V.I. LEXIS 10, at *33 (Super. Ct. Feb. 4, 2020) to support the proposition that the Legislature's ratification of the Governor's modification of the Consolidated Permits is void because the Governor's action was *ultra vires*. (Appellant Brief, p. 21). However, in *Douglas*, *supra*, the Superior Court found that the alleged *ultra vires* act was not committed and granted defendants' motion for summary judgment. *Id.*

Appellant further cites *Barnhart v. City of Fayetteville*, 900 S.W.2d 539, 545 (Ark. 1995) for the proposition that when a government entity takes action outside of its statutory authority, the action is *ultra vires* and void *ab initio* and not "subject to ratification." *Id.* But the Supreme Court of Arkansas in *Barnhart* distinguished between an *ultra vires* contract in the general sense and a contract that is *ultra vires* in the limited sense. *Id.* (citations

omitted). A contract that is ultra vires in the general sense is not subject to ratification because it is wholly outside the municipality's authority to take such a contract under any circumstances. *Id.* A contract that is ultra vires in the limited sense may be ratified because the power to contract was merely exercised irregularly. *Id.*

Here, Appellant claims that the Governor exercised his power to modify the Consolidated Permits incorrectly. Even assuming *arguendo* that Appellant is correct, under the *Barnhart* example, the Governor's modification of the permit would fall under the class of actions that were *ultra vires* in the limited sense and subject to ratification. *Barnhart*, 900 S.W.2d at 545, *and see, Monsanto v. V.I. Hous. Auth.*, 18 V.I. 113, 118 (1982) (See Appellant's Brief, p. 29 "It is well-settled that when a corporation or government exercises power it properly possesses, e.g., *intra vires* power, but there is a procedural defect in the exercise of that power, the otherwise invalid act can be cured through ratification.")

Since the Legislature has ratified the Governor's modification, the separation of powers doctrine prevents this Court from taking any action against the permit. *Bryan*, 61 V.I. at 212*; and see*, *Fay v. Merrill*, 2021 Conn. LEXIS 32, at *28 (Feb. 11, 2021)(a challenge to the Governor's executive

order is rendered moot by legislative ratification of the challenged executive order).

In *Wellswood Columbia, LLC v. Town of Hebron*, 992 A.2d 1120, 1134 (Conn. 2010), the Supreme Court of Connecticut held that an *ultra vires* act of a municipality was void *ab initio*. Therefore, it was irrelevant whether the plaintiff could recover damages; a legislature did not ratify the ultra vires act in that case. Furthermore, the alleged *ultra vires* act was committed by a municipality, unlike in *Fay v. Merrill*, *supra*, where plaintiffs challenged the actions of Connecticut's Governor Ned Lamont. In *Fay v. Merrill, supra*, the Plaintiff not only claimed that Governor Lamont's executive order was *ultra vires* but that it violated the separation of powers doctrine by expanding absentee voting. This issue of who may vote is the province of the Connecticut legislature. *Fay*, 2021 Conn. LEXIS 32, at *7. But the Connecticut legislature ratified Governor Lamont's executive order. *Id.* at *28. The Supreme Court of Connecticut agreed with the Defendants. It concluded that the ratification of the Governor's executive order rendered the plaintiff's separation of powers challenge moot and dismissed the appeal. *Id.* at *28-*29, *57. (citing *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301-302, 57 S. Ct. 478, 81 L. Ed. 659 (1937) ("[i]t is well settled that Congress may, by enactment not otherwise inappropriate, ratify . . . acts

which it might have authorized . . . and give the force of law to official action unauthorized when taken" (citation omitted; internal quotation marks omitted); *and Fletcher v. Commonwealth*, 163 S.W.3d 852, 859 (Ky. 2005) (challenge to governor's emergency budget action as violating legislature's appropriations power was rendered moot by legislature's enactment of bill ratifying governor's actions but reaching issue as capable of repetition, yet evading review).

Therefore, the Appellant's citation of *Wellswood Columbia, supra,* for, at best, persuasive authority on this issue is of no moment. As applied to the facts of this case, *Fay v. Merrill, supra*, is far more persuasive (and recent) authority from the Supreme Court of Connecticut. Moreover, as discussed above, Appellant claims that, at worst, the Governor exercised his power improperly. Therefore, unlike the municipality's actions in *Wellswood Columbia, supra*, the Governor's modification of the Consolidate Permit here was subject to ratification by the Legislature. *Barnhart*, 900 S.W.2d at 545.

Appellant also takes issue with the fact that SEG requested that the Governor modify the permit. (Appellant Brief, p. 26). But Section 911(g) does not prevent the Governor from acceding to an applicant's request if the Governor complies with Section 911(g) provisions, which he did. Moreover, the Governor was free to deny SEG's request. And despite the Governor

granting SEG's request, the Governor's modification was not valid until ratified by the Legislature pursuant to Section 911(e). Appellant is right 12 V.I.R. Reg. § 910-4(b), and 12 V.I.R. & Reg. 910-14(a) provide avenues to modify a permit. But another avenue is 12 V.I.C. § 911(e),(g). Appellant suggests that the Governor should not have exercised his statutory power under Section 911(g). But instead, should have referred SEG to the rules and regulations. However, Appellant does not suggest under what circumstances the Governor *could* or *should* exercise his statutory power under Section 911(g), Appellant's unseemly suggestion of cronyism notwithstanding (Appellant's Brief, pp. 28-29), the Revised Organic Act of 1954 as amended vests in the Governor control of the executive branch and executive processes. V.I.C. Rev. Org. Act of 1954 § 11.

Appellant admits that the related writs of review in *Virgin Islands Conservation Society, Inc v. Virgin Islands Board of Land Use Appeals*, Case No. ST-2016-CV-00395, and *Moravian Church Conference of the Virgin Islands v. The Virgin Islands Board of Land Use Appeals*, Case No. ST-2016-CV-00428, concern a challenge to the Consolidated Permit in the case herein. (Appellant's Brief, pp. 6,8, 10, 23). Appellant further refers to some facts adduced in the writs of review rather than the proceedings below in support of this Appeal. *Id.* Appellant's counsel is also counsel for the Appellant's alter

ego Virgin Islands Conservation Society, Petitioner in the writs of review cases. (Appellant's Brief, p. 6, n. 2) Appellant and the Superior Court note VICS has raised similar issues in the writs of review, as the Appellant has raised here. (JA5). Further, Appellant suggests that this Court stay this appeal pending a decision by the Superior Court and subsequent appeal, to this very Court, in the writs of review cases. (Appellant's Brief, p. 6, n. 3).

But this Court need not delay this matter any further. As noted by the Superior Court in its Order: "[t]he CZM act is designed for the permit process for review and appeal to be conducted within less than one (1) year. This process commencing seven years ago and having been approved has far surpassed the statutory deadlines." (JA12). If this Court affirms the ruling of the Superior Court, as it should, and finds that the Legislature's ratification of the Governor's modification of the Consolidated Permit rendered the Appellant's case below moot and non-justiciable, it will set a precedent for the writs of review cases and hasten the resolution of those cases in the Superior Court as well.[2]

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[2] Interestingly the doctrine of *res judicata* does not apply here because a dismissal based upon lack of jurisdiction (even based upon the separation of powers doctrine) is not a decision on the merits and does not meet the test for *res judicata* under *Stewart v. V.I. Bd. of Land Use Appeals*, 66 V.I. 522, 531-32 (V.I. 2017). The writs of review cases also do not meet the test for the "law of the case" doctrine since they are separate cases although they involve the same parties, same issues and challenge the same permit. *V.I. Taxi Ass'n*

In sum, the Governor's modification of the Consolidated Permit followed the plain and unambiguous language of 12 V.I.C. § 911(g) and was ratified by the Legislature. By Appellant's admission, legislative ratification of the Governor's proper action renders the challenged action moot and non-justiciable. The Superior Court understood 12 V.I.C. § 911 and correctly applied the law to the facts of this case. Consequently, this Court must affirm the ruling of the Superior Court and dismiss the appeal herein.

CONCLUSION

For all the foregoing reasons, this Court must affirm the Superior Court's Order to dismiss the Complaint and dismiss this Appeal.

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v. V.I. Port Auth., 67 V.I. 643, 669 (V.I. 2017). Nonetheless, Appellant's suggestion that this court stay this appeal in lieu of the resolution of the writs of review cases after seven years is another in a long line of delay tactics that this Court should not countenance.

Respectfully Submitted,

DENISE N. GEORGE, ESQ.
Attorney General

PAMELA TEPPER, ESQ.
Solicitor General

Dated: August 24, 2021

By: */s/ Ian S.A. Clement*
IAN S.A. CLEMENT, ESQ.
Assistant Attorney General
Attorney ID No. R-2089
Virgin Islands Department of Justice
34-38 Kronprindsens Gade
GERS Complex, 2nd Floor
St. Thomas, USVI 00802
(340) 774-5666 ext. 10112
ian.clement@doj.vi.gov

CERTIFICATE OF BAR MEMBERSHIP

IAN S.A. CLEMENT, Counsel for the Appellants, certifies that he is a member in good standing of the bar of the Supreme Court of the Virgin Islands.

*/s/ Ian S.A. Clement*_____

CERTIFICATE OF FILING AND SERVICE PURSUANT TO V.I. R. App. P. 15(d)

I certify that on August 24, 2021, the undersigned caused a true, correct copy of the foregoing Appellees' Brief to be efiled according to the Rules of the Virgin Islands Supreme Court via the VIJECMS on Andrew C. Simpson, Esq.

*/s/ Ian S.A. Clement*_____

CERTIFICATE OF WORD COUNT PURSUANT TO V.I. R. App. P. 22(f)

I certify that according to V.I.R. App. P. 22(f), the total word count of the foregoing brief is 5,214 words.

*/s/ Ian S.A. Clement*_____