

**FILED**

January 07, 2021

ST-2020-CV-00298

TAMARA CHARLES

CLERK OF THE COURT

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS  
DIVISION ST. THOMAS & ST. JOHN

SAVE CORAL BAY, INC.	)	
	)	CASE NO. ST-20-CV-298
Plaintiff,	)	
	)	ACTION FOR
v.	)	PRELIMINARY INJUNCTION and
	)	DECLARATORY RELIEF
ALBERT BRYAN, JR. in his official	)	
Capacity as Governor of the Virgin Islands	)	
and SUMMERS END GROUP, LLC,	)	
	)	
Defendants	)	
_____	)	

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS’ MOTION  
TO DISMISS FOR MOOTNESS AND FAILURE TO STATE A CLAIM**

Comes now the Summer’s End Group, LLC, by and through its attorneys (Law Offices of John H. Benham, P.C.; John H. Benham and Boyd L Sprehn, Esqs. Of Counsel; and Law Office of David Cattie, David Cattie, Esq.), and files this Memorandum of Law in Support of Defendant’s Motion to Dismiss the Complaint for lack of subject matter jurisdiction pursuant to V.I.R. Civ. P. 12 (b)(1) and 12(b)(6). For the reasons set forth below, Defendant respectfully requests that its Motion to Dismiss be granted.

**I. BRIEF SUMMARY OF THE CASE**

On or about October 1, 2014 the St. John Committee of the Coastal Zoning Management Commission approved Permit Nos. CZJ-03-14(L) and CZJ-03-014W authorizing Summers End Group to develop a marina at Coral Bay on St. John. Virgin Islands Conservation Society (who upon information and belief is Plaintiff’s alter ego) appealed the Committee’s decision to the Board of Land Use Appeals, which in turn affirmed the grant of permit and consolidated the two permits (land and submerged land) into one. Virgin Islands Conservation Society challenged the board’s decision by of judicial review pursuant to 12 V.I.C. §913 (d). Judicial review of the grant of consolidated permit No. CZJ-03-14(L)(W) is presently pending in the

Superior Court at the hand of VICS, who upon information and belief, is an alter ego of Save Coral Bay, Inc.

Following the Board's consolidation of the permits in 2016, and following the election of Governor Albert Bryan, Jr., Chairman Penn of the St. John Committee executed the paper permit previously consolidated by the Board and transmitted the same to Governor Bryan pursuant to 12 V.I.C. §911(e). Upon review of the permit conditions and in consultation with the permittee Governor Bryan modified the terms of the permit pursuant to his authority in 12 V.I.C. §911(g). He then transmitted the consolidated and modified permit to the Senate for ratification.

At the same time, the Virgin Islands Conservation Society lodged an appeal with the Board of Land Use Appeals challenging the actions of Penn and the Governor in BLUA Appeal No. 002/2020. That appeal was heard on November 19, 2020 and was dismissed on the unanimous vote of the Board of Land Use Appeals. (Copy of the Order and Decision is attached as Exhibit A.) The Board restated that it had affirmed the issuance of the permits, that the consolidation of the permits was within its power and effective on the Board's order, and that the subsequent execution of the Consolidated Permit was merely administrative.

On July 7, 2020 the Virgin Islands Legislature met in Committee of the Whole to consider the Consolidated Permit and the Governor's Modification of the same. Following that hearing before the Legislature, Plaintiff filed this suit in a desperate attempt to prevent the Legislature from acting to ratify those actions. That effort to intimidate or frustrate the passage of an act of ratification has failed. The Legislature passed Bill No. 33-0428 on December 11, 2020. That bill provides:

Pursuant to 12 V.I.C. § 911 (e), the Legislature of the Virgin Islands ratifies the Governor's approval of the Consolidation of Major Coastal Zone Permit No. CZJ-04-14 (W) and the Letter to Ms. Chaliene Summers, Managing Member of the Summer's End Group, LLC titled Modification of Consolidated Major

Coastal Zone Management Permit CZJ-04-14 (W) and CZJ-03-14 (L), for the operation of a marina in Coral Bay, St. John.

Copy attached as Exhibit B.

Multiple news reports have now reported that Governor Bryan has signed Bill No. 33-0428, which he had requested. [See Virgin Islands Consortium, January 6, 2021 (page 5 of attached copy; <https://viconsortium.com/vi-government/virgin-islands-bryan-signs-nearly-two-dozen-bills-into-law-vetoes-6-including-measure-giving-psc-more-oversight-power-over-wapa> ; Exhibit C); Daily News, January 7, 2021, Page 4 (Exhibit D).] As soon as the codified Act becomes available, we will deliver a copy to this Court.

When faced with the Government's Motion to Dismiss in this matter, Plaintiff instead filed an Amended Complaint deleting its original Count I and the request for preliminary injunction. Plaintiff's present suit now asserts two counts – Count II seeks a declaratory judgment that that the Governor's modification of the permit is invalid; and Count III again seeks a preliminary injunction barring Summer's End from proceeding with the project.

Assuming *arguendo* that Plaintiff had any claim when this suit was filed, the Legislature has acted and there is no longer any colorable claim.

## II. STANDARD OF REVIEW

A motion to dismiss based on lack of subject matter jurisdiction challenges the court's authority to hear the case presented. See *Joseph v. Legislature of the V.I.*, No. ST-11-CV-419, 2017 V.I. LEXIS 175, at \*4 (Super. Ct. Apr. 12, 2017); V.I.R. Civ. P. 12(b)(1). The motion may present a facial attack, based on the sufficiency of the information in the complaint, or a factual challenge if based on additional facts gleaned through discovery. See *Gardiner v. V.I. Hosps. & Health Facilities Corp.*, No. SX-14-CV-112, 2016 V.I. LEXIS 157, at \*5-6 (Super. Ct. Oct. 4, 2016). On a motion under V.I.R. CIV. P. 12 (b)(1), the court is "free to weigh the

evidence and satisfy itself as to the existence of its power to hear the case.” *Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174, 188 (2009). When a Rule 12(b)(1) motion to dismiss is premised on the face of plaintiff’s complaint, the Court must take all material allegations as true. *See Taliaferro v. Darby Twp. Zoning Bd.*, 458 F.3d 181, 188 (3d Cir. 2006). “The person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation.” *Packard v. Provident Nat’l Bank*, 994 F.2d 1039, 1045 (3d Cir. 1993). Lack of subject-matter jurisdiction requires dismissal of the action. *See V.I.R. Civ. P. 12(h)(3)*.

### III. DISCUSSION

This Court lacks jurisdiction to consider Plaintiff’s claims, where the Plaintiff’s claims are moot and where the Court cannot grant any relief upon the claims. Accordingly, the Complaint must be dismissed.

#### A. PLAINTIFF’S CLAIMS MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

##### 1. This Court Lacks Subject Matter Jurisdiction to Review the Administrative Agency Decision in An Original Action at Law or Equity.

The Virgin Islands Rules of Civil Procedure Rule 12 provides in relevant part:

**(b) How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) ...
- (6) failure to state a claim upon which relief can be granted; and
- (7) ....

A motion asserting any of these defenses except lack of subject matter jurisdiction and as provided in subparts (g) and (h) of this rule must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by

joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Plaintiff has asserted that the Governor has no authority to modify the permit and that the Governor's action was contrary to the law (Count II). Plaintiff has further asserted that the Governor was without legal authority, that the modifications were not authorized, and that Summer's End Group was authorized "to occupy submerged lands without any negotiation of rent for the same". Each of these allegations is false, but more importantly for this motion, the Plaintiff has failed to file a claim that can withstand the action of the Legislature to ratify both the permit and the Governor's modification.

The Virgin Islands Legislature established the Coastal Zoning Management Act as the comprehensive framework to govern development within designated coastal zones including the land and submerged land at issue in this case. 12 V.I.C. §903. The process within the Coastal Zone Management Act is that the local committee, with the participation of Department of Planning and Natural Resources ("DPNR") staff, reviews and *issues* permits. That was done. The Board of Land Use Appeals hears all appeals of the permits, and it *affirmed* the permits. The Governor *approves* permits and has the power to modify permits. The Legislature *ratifies* all permits concerning submerged lands. Since this permit was consolidated (land and water permits) at the request of appellants before the Board of Land Use Appeals, for this project the entire permit was ratified by the Legislature in Bill No. 33-0428. That is now the law.

In advising the Legislature the Legislative Counsel stated:

... the Legislature has inherent power to ratify the unauthorized actions of the executive branch. The doctrine Legislative ratification of unauthorized government action is well established in the law. The Legislature by subsequent ratification can make that legal that was initially without legal sanction. *Anderson v. Township of Santa Anna*, 116 U.S. 356, 364, (1886). Consequently, the Legislature may grant the Governor authority retroactively to modify the consolidated permit.

Consequently, it is now a moot point whether Plaintiff's interpretation of the Governor's authority under §911(g) was arguable; the Legislature has now very specifically authorized and ratified that action.

In *Bell v. Government of the United States*, 2020 U.S. Dist. Lexis 15534 (Jan. 30, 2020), the Court stated:

Subject matter jurisdiction refers to the Court's power to hear a case. *Cty. of Morris v. Nationalist Movement*, 273 F.3d 527, 533 (3d Cir. 2001). Such jurisdiction is a threshold matter and thus any challenge thereto must be resolved before any further proceedings. *Id.*

Article III of the Constitution provides that federal judicial power extends to cases and controversies. *See* U.S. Const. art III, 2, cl.1. The mootness doctrine precludes federal courts from issuing advisory opinions by requiring that an actual controversy exists between adverse litigants. *See, e.g., Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 698-99 (3d Cir. 1996) ("If developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot.").

A justiciable case or controversy requires that a party have a continuing, personal interest in the outcome of the litigation. *See, e.g., Freedom from Religion Found. Inc v. New Kensington Arnold Sch. Dist.*, 832 F.3d 469, 476 (3d Cir. 2016) ("[M]ootness ensures that this [requisite personal] interest 'continues throughout' the duration of the case." (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997))). In addition, when events subsequent to the filing of a case mean that the decision of the federal court will not have any effect in the matter before it, the case must be dismissed as moot. *See Church of Scientology of California v. United States*, 506 U.S. 9, 11, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) ("[I]f an event{ 2020 U.S. Dist. LEXIS 9 } occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatsoever' to a prevailing party, the appeal must be dismissed." (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 40 L. Ed. 293 (1895))).

This Court cannot issue a declaratory judgment contradicting the express statement of the Legislature, nor can it enjoin the Governor or Summer's End Group when the Legislature has expressly authorized these actions. Consequently, whether the complaint is characterized as a lack of subject matter jurisdiction (mootness) or failing to state a claim on which relief can

be granted, this complaint fails to meet the requirements of pleading in the Virgin Islands Rules of Civil Procedure.

#### IV. CONCLUSION

For the foregoing reasons, the Plaintiff's Complaint must be dismissed.

Respectfully Submitted,  
Law office of John H. Benham, P.C.

DATED: January 7, 2021

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This document complies with the page or word limitation set forth in Rule 6-1 (e)

/s/ Boyd L. Sprehn

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 7th day of January, 2021, I caused a true and exact copy of the foregoing Defendants' Motion to Dismiss and accompanying Memorandum of Law in support thereof, to be served by email to:

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