

FILED

November 02, 2020

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 LACK SUBJECT MATTER JURISDICTION**

COMES NOW Defendant, Albert Bryan, Jr. in his official capacity as Governor of the United States Territory of the Virgin Islands by and through counsel, Assistant Attorney General, Christopher M. Timmons, 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). For the reasons more 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 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. 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 N. 002/2020. Plaintiff however has not even attempted to exhaust its administrative remedies in this regard. Instead, Plaintiff's present suit impermissibly attempts to challenge the validity of the Permit No. CZJ-03-14(L)(W) as an original action under the guise of the authority found in §913(b) while the same issues are still before the court on judicial review, AND are still pending before the Board on administrative appeal at the hand of a third-party believed to be Plaintiff's alter ego.

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 Plaintiff has not exhausted statutorily imposed administrative remedies. 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 Legislature vested the Board of Land Use Appeals (the "Board") with the exclusive original authority to make determinations on matters related to the grant or denial of Coastal Zoning Permits following action by the Coastal Zoning Management Commission. *See 12 V.I.C. § 913 (d)*. On writ of review, this Court properly serves as an appellate tribunal, and its consideration of the issues is limited to the administrative agency record.

Plaintiff seeks to skip the administrative process and have this matter considered in an original proceeding, in which the Court will be forced to determine the issues raised relating to the issuance of Consolidated Permit No. CZJ-03-14(L)(W) in the first instance, without the benefit of an agency determination or an administrative record. This Court has no original jurisdiction to determine these administrative agency matters in the first instance. Plaintiff

must first exhaust its administrative remedies pursuant to V.I.C. § 913(d) and then seek judicial review of any decision of the Board.

2. Plaintiff's Failure to Exhaust Administrative Remedies, as Required By Law, Deprives this Court of Subject Matter Jurisdiction.

The exhaustion doctrine provides “that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Woodford v. Ngo*, 548 U.S. 81, 88-89, 126 S. Ct. 2378, 2384-86 (2006) (noting public policy bases for enforcing the rule are to protect the authority of administrative agencies and promote judicial economy) (citations omitted); *V.I. Conservation Soc’y v. Golden Resorts, LLLP*, 55 V.I. 613, 620 (2011) (Explaining that the ‘exhaustion’ doctrine “applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.”)(citations omitted). Where, as here, a statute expressly requires exhaustion of administrative remedies prior to seeking judicial relief, the court does not have subject-matter to hear an action in which the litigant has simply bypassed the mandated administrative processes. *See V.I. Tel. Corp. v. Mills*, No. ST-17-CV-279, 2018 V.I. LEXIS 65, at *7-8 (Super. Ct. June 22, 2018) (noting the distinction between mandatory versus permissive or silent exhaustion in a statute) (citing *Bangura v. Hansen*, 434 F.3d 487, 493 (6th Cir. 2006) (noting that where a statute requires exhaustion, “federal courts do not have subject matter jurisdiction to review the plaintiff’s claim until [she] has exhausted [her] administrative remedies.”); *Heywood v. Cruzan Motors, Inc.*, 792 F.2d 367, 370 (3d Cir. 1986) (“Where exhaustion is required by statute ... courts have no choice but to apply the doctrine.”); *see also, Bonelli v. Gov’t of the V.I.*, 67 V.I. 714, 723 (2017) (holding that the failure of a litigant to first complain about alleged unfair labor practices to the commissioner of Labor, using the procedures outlined in Title 24 of the V.I. Code, prior to bringing a civil action warranted dismissal) (citing *Cornwall*, 58 V.I. 431, 441 (V.I. 2013)). Our courts recognize the

following exceptions to the exhaustion doctrine: 1) clear and unambiguous violation of statutory or constitutional rights; 2) when reliance on administrative procedures is clearly and demonstrably inadequate to prevent irreparable injury, and 3) when exhaustion is futile. *La Vallee Northside Civic Asso. v. V.I. Coastal Zone Mgmt. Com.*, 866 F.2d 616, 620-21 (3d Cir. 1989) (citations omitted).

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. Parties seeking to develop land and/or submerged lands within the governed areas must obtain a major siting permit and their development activities are constrained by the conditions of any permit granted 12 §V.I.C. §910. Application does not guarantee issuance, and the conditions upon which a permit is granted must be determined by the administrative agency, based on its multi-tiered administrative assessments under the statute. Those assessments involve factual determinations, surrounding a myriad of issues, to include, whether or not the development is consistent with the basic goals, policies and standards provided in sections 903 and 906; and whether the development incorporates feasible mitigation measures to substantially lessen or eliminate environmental impacts of the development. 12 V.I.C. § 910 Agency determinations in that regard are subject to the express administrative remedies provided by statute, which require aggrieved persons to appeal agency determinations regarding the issuance or denial of a permit to the Board of Land Use Appeals within 45 days thereof. 12 V.I.C. §914. The administrative decision-making process, and the factual considerations required in arriving at a benefits determination illustrate the need and purpose underlying the administrative appeals remedy.

Plaintiff has not adhered to the administrative remedies mandated by statute, nor has it shown that it comes within any of the exceptions to the exhaustion doctrine. Rather, Plaintiff attempts to put before this Court issues that must be determined by the administrative agency in the first instance, and indeed were pending before the Board of Land Use Appeals on the day this matter was filed and continue to be pending before the Board today. Moreover, Plaintiff challenges the validity of the permits in this original action, when the validity of the permits is already at issue before the Superior Court on Writ of Review creating a risk of multiple inconsistent decisions governing the same permit.

Plaintiff's attempt to forego the administrative review process would put this Court in the position of the administrative agency, making an administrative permit validity determination in the first instance. Moreover, it would do so when administrative action on the very issues raised in this matter is currently pending AND when judicial review of the original permit issuance is underway. Importantly, until Virgin Islands' Conservation Society's appeal in BLUA No. 002/2020, the Board has never been presented with the question of whether the governor's modification pursuant to 12 V.I.C. §911 (g) can be made before the submerged lands permit is ratified by the legislature; and the Code is silent as to the interplay between sections 911 (e) (f) and (g). The superior court should have the benefit of agency interpretation before weighing in on this important issue. For these reasons, Plaintiff's claim does not fit within the exemption for clear and unambiguous violation of statutory or constitutional rights. And as to Plaintiff's argument that Consolidated Permit No. CZJ-03-14(L)(W) authorizes development on land that is not within the ownership or control of the permittee, it is without question that a permit cannot confer a right upon Summers End Group to do so, (See 12 V.I.C. § 905) and thus there is no risk of SEG's development on Lot 13 which could give rise to an exception for irreparable injury.

Exhaustion Is Mandatory In Cases Involving Permit Grant Or Denial

Whether the exhaustion rule applies turns on the subject matter being challenged. While 12 V.I.C. §913(b) permits an aggrieved person to bring an action for declaratory and injunctive relief for *general violations* of the [act], “[t]he expansive access to judicial relief for violation of the [CZM Act] must be considered *subject to administrative exhaustion in the specific instances where the grievance is based on the grant or denial of a permit*” pursuant to the more specific requirements of § 913 (d). *La Vallee Northside Civic Asso. v. V.I. Coastal Zone Mgmt. Com.*, 866 F.2d 616, 621 (3d Cir. 1989); *Traxco, Inc. v. Gov't of the V.I.*, 49 V.I. 240, 251 (Super. Ct. 2008) (emphasis added). That is different from the situation where a person can begin an immediate action under section 913(b) to restrain a violation of the Act or to compel the performance of duties the Act specifically imposes. *Id.*

When statutes conflict, general provisions yield to more specific and more recent provisions. *Traxco, Inc. v. Gov't of the V.I.*, 49 V.I. 240, 250 (Super. Ct. 2008). Moreover, the Virgin Islands’ Coastal Zoning Management law is patterned after a California statute which “prohibits suits based on the statute's more general provisions to challenge a decision to grant or deny a permit. . .” Just as under the Virgin Islands statute, a party aggrieved must exhaust administrative remedies before seeking judicial review, under the California statute, the enforcement suits that can be brought by “any person” must “allege either a violation of the act itself—usually initiating or completing development without a permit—or a violation of the terms of a permit issued pursuant to the act,” and are “**entirely distinct from actions by development applicants or opponents challenging the validity of a coastal development permit issued by the commission or a unit of local government.**” Philip J. Hess, Citizen Enforcement Suits Under the California Coastal Act, LOS ANGELES LAWYER, December, 2001, at 17 (internal citations omitted) (emphasis added). *Traxco* at 253.

In *La Vallee* supra., the Third Circuit shared the same understanding, holding that exhaustion is required when challenging issuance or denial of a permit under the CZM Act. *La Vallee* noted that tenets of statutory interpretation direct that a specific provision in an enactment prevails over a seemingly irreconcilable general provision (citing 2A A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.05, at 499 (N. Singer 4th ed. 1984)). See also 82 C.J.S. Statutes, § 354, “where a general statute and a specific statute relating to the same subject matter cannot be reconciled, the special or specific statute ordinarily will control.” The CZM Act conflicts with the general statutes . . . because the CZM Act provides for administrative review and contains an exhaustion requirement before judicial review may be obtained; while the general statutes allow for suits to be brought at any time. 12 V.I.C. § 913(d). Further, “the legislature's intent are found . . . in . . . [c]hapter 97 of the Virgin Islands Code—to which the first phrase of section 913(d) refers—provid[ing] that writs of review are allowed “in all cases where there is no appeal or other plain, speedy, and adequate remedy.”” *La Vallee* at 621 citing V.I. Code Ann. tit. 5, § 1422 (emphasis added). The fact that the legislature thought it necessary to provide for writs of review in permit cases evidences an intent to supply a right to appeal for a class of disputes that might otherwise be unreviewable. *Id.* However, an interpretation allowing a §913b challenger to bring suit taking issue with the grant or denial of a permit without first exhausting its administrative remedies before the Board of Land Use Appeals would expressly violate this intent. Therefore “the expansive access to judicial relief for violation of the Virgin Islands Act must be considered subject to administrative exhaustion in the specific instances where the grievance is based on the grant or denial of a permit.” *Id.*

Just as in *Traxco*, where the Complaint was grounded on alleged violations of the CZM Act relating to the grant or denial of a permit, Save Coral Bay cannot circumvent the Act by

alleging a violation of more general provisions that do not have the same procedural requirements as found in §913(d). And just as the court held that *Traxco* could not rely upon section 913(b) unless exhaustion is excused . . . [under] circumstances, with a permit that is still being litigated. . . exhaustion [could not] be excused,” this court too should dismiss Save Coral Bay’s complaint for lack of subject matter jurisdiction for failure to exhaust its administrative remedies before the Board of Land Use Appeals.

IV. CONCLUSION

For the foregoing reasons, the Plaintiff’s Complaint must be dismissed for lack of subject matter jurisdiction.

Respectfully Submitted,
DENISE N. GEORGE, ESQ.
ATTORNEY GENERAL

DATED: November 2, 2020

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

/s/ Christopher M. Timmons

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2020, 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 and hand-delivery to:

/s/ Ivelisse Torres
Ivelisse Torres, Legal Secretary