IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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SAVE CORAL BAY, INC., Plaintiff, v. ALBERT BRYAN, JR. IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE VIRGIN ISLANDS AND SUMMERS END GROUP, LLC, Defendants.	CASE NO. ST-20-CV-298 ACTION FOR INJUNCTIVE AND DECLARATORY RELIEF

ORDER

THIS MATTER is before the Court on Defendants' second joint "Motion to Dismiss for Mootness and Failure to State a Claim" filed on January 7, 2021. Plaintiff Save Coral Bay, Inc. filed an "Opposition to Second Motion to Dismiss" on February 10, 2021, and Defendants filed their Reply on February 24, 2021. A hearing was held on March 18, 2021. For the reasons set forth below, Defendants' motion will be granted.

Factual and Procedural Background

This case is about a proposal to build a large-scale commercial marina with restaurants, office spaces, retail spaces, and other shore facilities in the harbor of Coral Bay, St. John, Virgin Islands. On or about April 4, 2014, the project's proponent, Summers End Group, LLC (SEG) sought approval from various territorial and federal agencies for construction of the marina. SEG was successful in obtaining both land and water permits. Save Coral Bay, Inc. (Save Coral Bay) is a citizens' group that opposes the project for several reasons, but primarily for environmental concerns of construction and operation having a negative impact on the Coral Bay harbor.

Specifically, Save Coral Bay posits that Governor Albert Bryan Jr.'s Modification of Consolidated Major Coastal Zone Management Permit dated December 18, 2019, is improper because it was done prior to the Virgin Islands Legislature's ratification without the review of the Commission for a proper environmental assessment.

Defendant SEG applied for a Major Coastal Zone Management permit CZM-003-14(L) for the redevelopment of seven (7) adjacent parcels in Estate Carolina consisting of 10-17, 10-18, 10-19, 10-41 REM, 13A, 13B, and 13 REM. Simultaneously, SEG filed a separate application CZM-004-14(W) – for the development of the seaward area consisting of approximately 27.5 acres of submerged lands to build a 145-slip marina and other facilities.

On June 18, 2014, Coastal Zone Management (CZM) issued a Letter of Completeness to SEG. Thereafter, SEG availed themselves to the public for comments between June and August 2014. On August 20, 2014, the St. John Committee of the CZM Commission conducted a public hearing regarding the permits. In 2014, the Virgin Islands Conservation Society[1] (VICS) and the Moravian Church Conference of the Virgin Islands (Moravian Church) filed appeals with the Board of Land Use Appeals (BLUA), which BLUA affirmed the approval of the CZM committee. VICS and the Moravian Church subsequently filed for writs of review in the Superior Court challenging BLUA's Decision and Order of June 6, 2016. Almost three years later, on March 27, 2019, the committee chairman re-signed CZM-004-14(W) and forwarded the Consolidated Permit to Governor Bryan for his approval in accordance with 12 V. I. C. § 911(e). In 2019, Governor Bryan approved the permit and forwarded it to the Legislature for ratification. On December 10, 2019, the

[1] The Virgin Islands Conservation Society is the petitioner in another pending action (writ of review) before the Superior Court. *Virgin Islands Conservation Society, Inc. v. Virgin Islands Board of Land Use Appeals*, Case No. ST-16-CV-395. Similar issues have been raised in that case as stated herein. Defendants have referred to Petitioner as the alter ego of the named Plaintiff herein, Save Coral Bay, Inc. Moravian Church Conference of the Virgin Islands has also joined in that suit.

president of the Legislature disapproved the permit and returned it to the Governor. On December 16, 2019, the CZM Commission St. John Committee chairman signed the consolidated permits CZJ-003-14(L) and CZJ-004-14(W) consistent with the Board of Land Use Appeals 2016 Decision and Order, thereby administratively re-affirming the consolidation of the land and water permits.

On December 18, 2019, Governor Bryan approved and modified the Consolidated Permit by, *inter alia*, 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. The Consolidated Permit and Modification of December 18, 2019, delineating all the changes and the environmental impacts were re-submitted to the Legislature for approval. In January 2020, VICS filed a second appeal to BLUA. On July 7, 2020, the Legislature conducted an extensive hearing allowing testimony from several interested parties including opponents of the project.[2] On December 21, 2020, the Legislature ratified the Consolidated Permit and the Governor's Modification.

Plaintiff contends, *inter alia*, the modification applies only to submerged lands permits; applies only to issues that arise necessitating preventative measures to protect the environment after the permit has been issued, and the Governor failed to fully disclose the environmental impacts of the modifications before the Legislature. They further argue the subject Modification was done during the permitting/approval process to purposely circumvent the requirements of § 911(g), which allows for modification only if it "is in the public interest and necessary to prevent significant environmental damage to coastal zone resources and to protect the public health, safety and general welfare." By modifying the plans after the project has been approved, but prior to construction, and

[2] The Court takes judicial notice pursuant to V.I.R E. 201 (b)(2) of the V. I. Legislature's Committee of the Whole's hearing where the proponents, opponents, and respective counsel appeared and testified. Notably, the hearing lasted about seven (7) hours. Prior to the July 2020 hearing, the Legislature held another hearing on October 18, 2019, also lasting approximately seven (7) hours.

without engaging in the coastal zone management committee review process, Save Coral Bay contends the modification escapes without a proper environmental assessment. Consequently, because an updated environmental assessment report was not done, the Legislature was not fully informed of any adverse impact that may occur, hence, the Governor's Modification is not in compliance with the law. To ferret out these concerns, Save Coral Bay argues discovery should be allowed and, at the appropriate time, summary judgment should be considered as Defendants have raised issues beyond the scope of the pleading.

Defendants, on the contrary, assert the Complaint should be dismissed because the extensive permitting process has been fully vetted; the Modification was not for the mere appeasement of the permittee or the Legislature, but it was done in accordance with the statutes. The Modification is in the public interest, it mitigates negative environmental impact, and helps to boost economic opportunities and growth. More importantly, Defendants claim the Legislature's ratification of the Consolidated Permit and the Modification has rendered all issues moot and leaves no justiciable issue.

Discussion

Virgin Islands Rule of Civil Procedure 12(b)(1) provides a defendant may challenge the court's ability to hear a case by asserting lack of subject matter jurisdiction as a defense. The Virgin Islands Supreme Court reiterated in *Martinez v. Columbian Emeralds, Inc.* 51 V.I. 174, 188 (2009) the framework established by the Third Circuit in *Mortenson v. First Fed. Sav. & Loan Ass'n,* 549 F. 2d 884 (1977). Rule 12(b)(1) motions attacking the court's subject-matter jurisdiction may either be treated as facial or factual. In a facial challenge, the defendant attacks the complaint on its face, specifically "arguing that the complaint on its face does not allege sufficient grounds to establish subject matter jurisdiction." *Racz v. Cheetam*, 2019 V.I. SUPER 99U, 8, 2019 V.I. LEXIS

101, *3, 2019 WL 4855532. In addressing a facial challenge, the court accepts the allegations in the complaint as true viewing the allegations in the light most favorable to the non-moving party. *Id.* Alternatively, in addressing a factual challenge, the court does not presume the plaintiff's allegations as true; because it is based in fact and separate from the pleadings, the court must weigh the evidence to determine its own jurisdiction. *Id.* The factual attack disputes the existence of jurisdictional facts as sufficient to confer subject matter jurisdiction. *See Joseph v. Legislature of the V. I.*, 2017 V.I. Lexis 175, *citing James - St. Jules v. Thompson*, 2015 V.I. Lexis 74.

V. I. R. Civ. P. 12(b)(6) allows a party to move for a dismissal for "failure to state a claim upon which relief can be granted." The sufficiency of a complaint is governed by the rule of pleading in V.I. R. Civ. P. 8(a)(2) which provides this is "a notice pleading jurisdiction and requires that a complaint present a short plain statement of the cause of action and basis for the claims for relief." The Virgin Islands Supreme Court in *Mills-Williams v. Mapp*, 67 V.I. 574, 585-86 (V.I. 2017) stated the plaintiff must "adequately allege facts that put an accused party on notice of claims brought against it." The proper standard for evaluating motions to dismiss for failure to state a claim requires the plaintiff to provide a basic legal and factual basis for the claim alleged, describe the essence of the claim, and provide facts sufficient to show that the plaintiff is entitled to relief.[3]

In the present case, Defendants claim the Legislature's ratification has rendered all issues moot; the Court lacks subject matter jurisdiction and there is no remaining relief to be granted. Although the Virgin Islands' notice pleading standard is now more lenient than the former *Twombly*[4] plausibility standard, Plaintiff must still allege some factual and legal basis for each count of the complaint. Here, the Plaintiff's claims for declaratory judgment and injunctive relief have

[3] *Greaux v. Frett*, 2019 V.I. Super. 77U, at *4 (V.I. Super. 2019); *Racz v. Cheetam*, 2019 V.I. Super. 99U at* 11 (V.I. Super. 2019).
[4] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

dissipated with the passage of Act No. 8407. The claims do not surpass legislative ratification therefore the Complaint does not survive the scrutiny of Rule 8(a). Title 12 V. I. C. § 911(e) provides the Virgin Islands Legislature with the inherent power to confirm the Governor's approval and modification. The Legislature's authority to ratify all prior actions is equivalent to the presence of the original authority. Section 911 (e) provides:

> "Any coastal zone permit which the appropriate Committee of the Commission or the Commissioner recommends for approval pursuant to this section, ... 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 Sates Code."

Further § 911 (g) provides "[t]he 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 actions." The Governor's approval of the consolidation of major permit CZJ-004-014(W) and permit CZJ-003-14(L); and the Modification Letter to Ms. Chaliese Summers, even without any further action by the Legislature results in ratification. Ratification is the action of signing or giving formal consent to a treaty, contract, or agreement making it officially valid.[5] To ratify means to confirm by expressing consent, approval, or formal sanction.[6] The Legislature explicitly created and reserved this inherent power to ratify the Governor's actions under the CZM Act. The language is unambiguous.

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[5] "Ratify". *Merriam-Webster.com Dictionary*, Merriam -Webster, https://www.merriam- webster.com/dictionary/ratify. Accessed 6 May. 2021.
[6] https://www.dictionary.com

Prior to ratification, § 911(g) confers upon the Governor the authority to modify or revoke any coastal permit. Upon modification, § 911(e) grants the Legislature the absolute right to ratify. The Legislature has proscribed the following under Act No. 8407:

> 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. Chaliese Summers, Managing Member of the Summers 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.

Before the ratification, the Virgin Islands Legislature - Committee of the Whole- conducted an extensive hearing on July 7, 2020, allowing ample opportunity for all concerned parties to raise any, and all issues regarding the environmental, social impacts, or any negative impact SEG's project would have upon Coral Bay. On November 19, 2020, the Board of Land Use Appeals, for the second time, dismissed the VICS's appeal that challenged the Governor's Modification and Consolidated Permit. After two full-blown hearings, the Legislature ratified the Governor's approval of the Consolidated Permit, including subsequent modifications.

Plaintiff seeks a declaratory judgment asking this Court to render invalid a Consolidated Permit and its Modification that has undergone the scrutiny of the appropriate committees, board, and respective federal and territorial agencies. The separation of powers doctrine precludes this Court from interfering in the executive and legislative processes unless there is a clear violation of the law. "Unless expressly provided or incidental to the powers conferred … the judiciary may not exercise either executive or legislative power." *In re Joseph,* 65 V.I. 217 (2016); s*ee also Bryan v. Fawkes*, 61 V.I. 201 (2014). The Court's role is not to create or modify the law, but to interpret and apply the laws as written. "Ordinarily, when the language of a statute is clear, courts apply the statute as written. Courts also should avoid creating ambiguity in statutes where there is none."

Jones v. Lockheed Martin Corporation, 68 V.I. 158 (2017). Here, the Court has concluded from the record that SEG has been vetted at all levels of the permitting process as proscribed in the CZM Act. The BLUA, as the reviewing administrative body, has twice dismissed the appeals of the VICS thereby re-affirming the decision of the Commission. The Legislature's ratification has sanctioned the entire permitting process including the Governor's approval and the Modification.

It is not this Court's responsibility to determine how much testimony before the legislative body is considered "full disclosure". Neither is it the Court's place to substitute its judgment for that of the CZM Commission, the BLUA, the Legislature, or the Governor. Plaintiff's argument that the ratification of the Modification does not necessarily mean that the Modification complied with the law is without merit. In effect, Plaintiff is asking this Court to step into the role of the Legislature and unratify the Governor's actions and declare invalid Act No. 8407 where there is no constitutional violation or other legitimate basis (other than their objection) to do so. Ratification has been addressed by the courts in *Monsanto v. V.I. Housing Authority*, 18 V.I. 113, 118 (1982). "Consequently, the Authority possesses the power to terminate Monsanto's employment so long as the termination was not in violation of any constitutionally protected right, citing *Hodgin v. Noland*, 435 F.2d 859 (4th Cir. 1970)." "Accordingly, the board possessed the power to *ratify* its decision to terminate Monsanto's employment, and whatever defects with rèspect to the by-laws occurred at the July meeting were corrected at the October meeting." *Id.* As stated, this Court is not in the position to determine what constitutes full disclosure to the legislative body, but clearly the Legislature was satisfied with the information provided by all interested parties and ultimately, in accordance with their inherent power, chose to ratify the Consolidated Permit and the Governor's Modification.

Conclusion

The 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. *See Virgin Islands Conservation Society v. Board of Land Use Appeals and Golden Resort, LLP,* D.C. Civ. App. 2006/089 (April 9, 2020), *Cowgirl Bebop, LLP v. Oriol*, 2021 V.I. Lexis 16 (March 5, 2021) speaking to the importance of deadlines. As the only issue before this Court is whether there is a colorable claim of relief that can be granted; this Court cannot find any. There is no justiciable issue for this Court to adjudicate as Act No. 8407 is the law and it is clear. Therefore, Defendants' joint motion for dismissal due to mootness and lack of subject matter jurisdiction will be granted. Accordingly, it is hereby

ORDERED that Defendants' motion is **GRANTED**; and it is further

ORDERED that this matter is **DISMISSED**; and it is further

ORDERED that a copy of this Order be distributed to Andrew C. Simpson, Esquire, Christopher M. Timmons, Esquire, Boyd Sprehn, Esquire, and David J. Cattie, Esquire.

Dated: May 12, 2021

Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Tamara Charles
Clerk of the Court

By: _____
Donna D. Donovan
Court Clerk Supervisor 5/13/2021