

FILED

May 10, 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-2020-CV-00298
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)	
_____)	

DEFENDANT SUMMER’S END GROUP, LLC’S REPLY
RE MOTION TO SUPPLEMENT DEFENDANT’S MOTION TO DISMISS
AND REQUEST TO TAKE JUDICIAL NOTICE

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 Reply to Plaintiff Save Coral Bay, Inc.’s Opposition to the Motion to Supplement the Record 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) and Request to Take Judicial Notice pursuant to Virgin Islands Rules of Evidence Rule 201. For the reasons set forth below, Defendant respectfully requests that this Motion to Supplement be granted and its Motion to Dismiss be granted. We shall be brief.

Request for Judicial Notice.

First, Plaintiff does not oppose the Request to Take Judicial Notice. Plaintiff never addresses its own lack of candor or its deliberately misleading statements, which were the reasons for the Supplemental filing and the Request for Judicial Notice. The Request should be deemed conceded.

Motion to Dismiss.

Plaintiff's first Opposition to the Motion to Dismiss was largely premised on the argument that the Legislature could not ratify the CZM Permit without offending the separation of powers. Plaintiff's second Opposition appears to be premised on the idea that the Court should now directly supervise the Governor's exercise of his duties, and then should determine if the Legislature was sufficient in its diligence in enacting laws. And the only case law cited by Plaintiff references corporate law on shareholders. Plaintiff cites no authority for the application of private corporate law principles to the actions of the Governor and Legislature of the Virgin Islands.

Plaintiff makes no mention of its statements, which were previously itemized, nor does it address the multitude of statements that Summer's End, Plaintiff and others made to the Legislature. Instead, Plaintiff asserts that the Governor concealed information, and the Legislature was misled and therefore this Court should ignore the law.

As we have previously demonstrated, the Coastal Zone Management Act requires the exercise of judgment and discretion. It contains conflicting demands, acknowledges this, and decrees that a balancing of these priorities needs to be made.¹ Plaintiff apparently would have this Court review all of the information placed before the Governor, who must exercise discretion in the execution of his duties pursuant to the CZM Act, and then determine if the Governor reached the correct conclusion. That is not practicable, because differing minds

¹ E.g., 12 V.I.C. § 903(b); § 906(a) [development policies], (b) [environmental policies] and (c) [amenity policies]; § 910 [... if the appropriate Committee of the Commission or the Commissioner, whichever is applicable, finds that (A) the development is consistent with the basic goals, policies and standards provided in sections 903 and 906 of this chapter ...”]

may disagree about the about balancing; it does not mean that one is wrong, they simply disagree. Plaintiff would have this Court substitute its judgment for that of the Governor.

Having completed its supervisory function over the Governor's exercise of his responsibilities and discretion, Plaintiff would then have this Court review all of the information placed before the Legislature. This would necessarily not involve just what the Governor provided to the Legislators, but also what Defendant, Plaintiff, associated parties, third parties and government entities, officials and employees provided to the Legislature. Then, and only then, according to Plaintiff, should the Court accord any respect to the laws enacted by the Legislature. There is no support for this argument, because that is not the role of this Court..

The Plaintiff's argument ignores the record before this Court. The ratification of the Consolidated Coastal Zone Management Permit with the Governor's Modification was before the Legislature from December 2019 until December 2020; it had been before the Legislature before that in 2014 and in 2019. The Legislature devoted two full days to public hearings on this matter – a tremendous commitment of the Legislature's limited time and resources. Now Plaintiff wants this Court to review that process and determine if it was sufficient for the Court to respect the Legislature's action, and instead substitute this Court's judgment for that of the Legislature.

What Plaintiff has raised is the issue of "justiciability."

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.'" *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). Thus, "unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the executive cannot exercise either

Save Coral Bay, Inc. v. Albert Bryan Jr. et. al.
Reply re Motion To Supplement Defendant's Motion To Dismiss
And Request To Take Judicial Notice
Case No. ST-2020-CV-00298

legislative or judicial power; [and] the judiciary cannot exercise either executive or legislative power." *Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 201-02, 48 S. Ct. 480, 72 L. Ed. 845 (1928).

Bryan v. Fawkes (Hansen, Appellee/Intervenor), 61 V.I. 201, 212; 2014 V.I. Supreme LEXIS 42 (2014).

"A political question is present, and therefore a case is non-justiciable, when a concern over the separation of powers between coordinate branches of government is so inextricably intertwined to the case at hand that a judicial forum would be an inappropriate place for resolution of that issue."

Goodwin v. U.S. Federal Election Com'n, 2012 WL 4009903, at *6 (D. Virgin Islands, 2012) citing *See Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss, Motion to Supplement the Record and for Judicial Notice should be granted, and the Plaintiff's Complaint must be dismissed.

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

DATED: May 10, 2021

BY: /s/ Boyd L. Sprehn
Boyd L. Sprehn
Of Counsel
P.O. Box 11720
St. Thomas, VI 00801
O: 340.774.0673
C: 340.643.2660
Fax: 800.948.1947
sprehn@benhamlawvi.com
Attorneys for Defendant
Summer's End Group, LLC

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

/s/ Boyd L. Sprehn

Save Coral Bay, Inc. v. Albert Bryan Jr. et. al.
Reply re Motion To Supplement Defendant's Motion To Dismiss
And Request To Take Judicial Notice
Case No. ST-2020-CV-00298

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of May, 2021, I caused a true and exact copy of the foregoing **Reply to Plaintiff's Opposition to Motion To Supplement Defendant's Motion To Dismiss And Request To Take Judicial Notice** to be served by email to:

Andrew C. Simpson, Esq.
2191 Church St., Ste. 5
Christiansted, VI 00820
Tel: 340-719-3900
asimpson@coralbrief.com
For Save Coral Bay, Inc.
Plaintiff

David J. Cattie, Esq.
The Cattie Law Firm, P.C.
1710 Kongens Gade,
St. Thomas V.I. 00802
tel: 340.775.1200/ fax.: 800.878.5237
david.cattie@cattie-law.com
For Summer's End Group, LLC
Defendant

Denise George, Esq,
Attorney General
Christopher M. Timmons, Esq.
Assistant Attorney General
213 Estate La Reine, RR1 Box 6151
Kingshill, V.I. 00851, (340) 773-0295
christopher.timmons@doj.vi.gov
For Governor Albert Bryan, Jr.
Defendant

/s/ Boyd L. Sprehn
Boyd L Sprehn